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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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T. D. CRAWFORD
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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

EDGAR A. McCULLOCH, - - - - - Chief Justice
CARROLL D. WOOD, - - - - - - Associate Justice
JESSE C. HART, - - - - - - - Associate Justice
FRANK G. SMITH, - - - - - - Associate Justice
THOMAS H. HUMPHREYS, - - - Associate Justice
JOHN D. ARBUCKLE, - - - - - Attorney General
WILLIAM P. SADLER, - - - - - - - - - Clerk
T. D. CRAWFORD, - - - - - - - - - Reporter

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

MILTON *v.* STATE.

Opinion delivered May 10, 1920.

FISH—SEINING IN "WATERS OF THE STATE."—Acts 1915, page 464, § 18, making it unlawful to fish with a seine, net, trap or other device of that character "in any of the waters of this State," does not apply to a lake situated wholly on land privately owned and having no connection with "waters of this State."

Appeal from Cross Circuit Court; *R. E. L. Johnson,* Judge; reversed.

Killough, Limes & Killough, for appellant.

1. The court erred in holding the lake in question to be included in the term "waters of this State." This was a private lake or pond, and the State had no right or title to the fish in a private lake or pond and no right to regulate the taking of fish in such. Especially is this so where the lake is in no way connected with any other body of water. The fish were a product of the lands owned by the appellant's lessors and belonged to them absolutely as their individual property, and appellants were not guilty of unlawful fishing under Acts 1915, p. 464. 140 U. S. 414; 190 *Id.* 452; 71 Ark. 390; 76 *Id.* 44; 35 N. Y. 454; 19 Cyc. 999; 43 Ill. 477; 92 Am. Dec. 146; 11 R. C. L. 1044; 11 R. C. L. 1017 and notes; 60 L. R. A. 512; 59 N. H. 256; 47 Am. Rep. 199; 19 Cyc. 1014; 31 N. E. 115.

2. Any attempt by the State to control appellant's right to the fish in this privately owned lake is a violation of the Constitution of the United States and the State. 113 U. S. 27; 73 Ark. 236; 75 *Id.* 542.

John D. Arbuckle, Attorney General, and *J. B. Webster,* Assistant Attorney General, for appellee.

Appellants were convicted under Acts 1915, No. 124, § 18. The State has general title to and is the owner of, at least for the purpose of regulation and control, all fish within its borders wherever situated. 73 Ark. 236; 161 U. S. 519; 56 Ark. 270; 110 *Id.* 206; 117 *Id.* 193; 88 *Id.* 571.

McCULLOCH, C. J. Appellant is charged with the offense of unlawful fishing, in violation of the statute which makes it unlawful to fish with a seine, net, trap or other device of that character "in any of the waters of this State." Acts 1915, p. 464.

The case was tried before the court sitting as a jury on an agreed statement of facts, in which it was shown that appellant put out nets in a certain inland lake for the purpose of catching fish. The description of the body of water in which the fishing was done and the circumstances and method thereof is set forth in the agreed statement of facts, as follows:

"It is further agreed that said lake is a body of water about one mile and a half or two miles long and of an average of about one hundred yards in width. That said lake is not a meandered body of water, and that same has been duly surveyed and is wholly the property of Press Cogbill and Wess Porter.

"It is further agreed that said lake is entirely surrounded by cleared and cultivated land and is all under fence.

"It is further agreed that said lake is in no way connected with any navigable stream, or any other stream and that no water from a navigable stream or any other stream runs into said lake except when a break in the levee occurs, and that no water has been in such lake from navigable stream since the year 1913, caused by a break in the levee.

"It is further agreed that defendants for the years 1918 and 1919 and for many years prior thereto, have

rented said lake and paid annual rental therefor to said Wess Porter and Press Cogbill, and that the rent notes for the year 1918 are exhibited to the court.

"It is further agreed that said Press Cogbill and Wess Porter have for more than seven years last past paid taxes, State and levee, upon the land occupied by said lake."

The question presented is whether or not the body of water described is such as falls within the designation of the statute, "the waters of this State." We interpret the language of the agreed statement of facts to be, that Cogbill and Porter are the owners as tenants in common of the lands surrounding the lake, and are not separate owners. In other words, we find that the lake in question is an inland body of water wholly within the boundaries of certain owners, who hold title as tenants in common, and that it has no outlet or connection with any other body of water. In view of these facts, we are of the opinion that it does not fall within the terms, "in any of the waters of this State."

The purpose of the statute was to protect and preserve fish in the public waters or such privately owned waters as were connected with other streams or bodies of water, and not to a private pond or lake wholly on the premises of an owner or common owners, which is not connected in any way with another stream or body of water. The former statute of this State regulating the taking of fish (Kirby's Digest, section 3600), contained an express provision exempting from the application of the statute waters "wholly on the premises belonging to such person or persons using such device or devices." This provision was omitted from the statute now in force, but, as before stated, we think that the term, "in any of the waters of this State," when considered in the light of the obvious design of the statute, excludes privately owned waters having no connection with other streams.

There is an instructive opinion rendered by the Supreme Court of New Hampshire, in the case of *State* v.

Roberts, 59 N. H. 256, 47 Am. Rep. 199, a case involving the interpretation of a statute against fishing in public waters, where the court said:

"But while the Legislature has power to regulate and limit the time and manner of taking fish in waters which are public breeding places or passageways for fish, it has not assumed to interfere with the privileges of owners of private ponds having no communication through which fish are accustomed to pass to other waters. Such ponds, whether natural or artificial, are regarded as private property, and the owners may take fish therefrom whenever they choose, without restraint from any legislative enactment, since the exercise of this right in no way interferes with the rights of others."

It is unnecessary in the present case to pass on the question as to whether or not the Legislature has the power to regulate fishing in private ponds wholly on the premises of an owner, and we content ourselves merely by deciding the question as to whether or not such an attempt has been made in this statute.

In the case of *People* v. *Bridges,* 31 N. E. 115, 142 Ill. 30, 16 L. R. A. 684, the Supreme Court of Illinois dealt with a statute of that State prohibiting the use of seines for catching fish "upon any of the rivers, creeks, streams, ponds, lakes, sloughs, bayous and other water courses," in its application to a small inland lake near the Sangamon River, it being shown that there was a low place between the river and lake, by which, in times of high water frequently occurring, a passageway for fish was afforded. The court upheld the validity of that statute, but did so on the distinct ground that the statute expressly applied to privately owned bodies of water of that character and that there was a passageway for fish, at frequent intervals between the inland lake and the Sangamon River. In disposing of the matter, the court said:

"It being clear, as we think, that the statute is broad enough to include the pond or lake in question, and that

bodies of water of that character are within the legislative intent, the inquiry involving the greatest difficulty is whether, as applied to such bodies of water, the statute is obnoxious to any constitutional objection. The only objection of that character which seems to be suggested is that it is an undue and unwarranted interference with the property rights of the owner of the land upon which said pond or lake is situate. Fish, in streams or bodies of water, have always been classed by the common law as *ferae naturae,* in which the riparian proprietor or the owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in such waters, has at best but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters. We are unable to see that there is anything in the situation or character of the pond or lake in question that takes it out of the rule. While said body of water has no continuous connection with the river situated but a few yards away, such connection is established during all periods of high water, and continues for a sufficient length of time to allow fish to pass into it, or the fish in the lake to escape therefrom. During such periods of high water, which occur once or twice, if not oftener, every year, and continue sometimes for several weeks, said lake, so far as the passage of fish to and from it is concerned, becomes, for all practical purposes, a part of the river. During these periods, as we may presume, migratory fish, passing up the river in search of proper places for depositing their spawn, are liable, for such purposes, to pass into this as into other bayous where the waters are quiet, but with this difference: that while, in case of ordinary bayous, which maintain their connection with the stream, the fish, after accomplishing their purpose, are at liberty to leave and go elsewhere, here, by the receding of the water, their exit is for the time being cut off, and they, as well as their progeny, are compelled to remain. As soon, however, as

another flood occurs—a thing which may happen at any season of the year—the fish thus impounded are at liberty to escape, and if they do so any qualified property the owner of the lake may have in them is at once divested.

"We are unable to see how the mere fact that said lake, instead of having a continual connection with the river, has such connection only during periods of high water, can have any essential bearing upon the rights which the owner of the soil has in the fish that happen for the time being to be in the lake. It undoubtedly greatly increases his opportunities for obtaining an absolute title by catching and reducing them to possession, but until he does so he has only the same and no better title to them than he would have if the lake were merely a bayou having uninterrupted connection with the river. It is impossible, therefore, to distinguish the present case from those arising in relation to other waters in the State to which the statute is applicable."

The distinction between the Illinois case and the case now before us is well marked. In this case the lake is not only wholly on the premises of the persons named, but it is also shown in the agreed statement of facts that it is in no way connected with any other stream and that there can be no contact with the waters of other streams, except in case of a break in the levee. The precise location of the lake in question is not described in the agreed statement of facts, but we may assume from the language used that the lake lies in that portion of Cross County which is within the boundaries of the St. Francis Levee District—an area which is protected from the waters of the Mississippi River by a levee extending along the bank of the river. We may take knowledge of the fact that the maintenance of the levee along the Mississippi River front in what is termed the St. Francis basin is a permanent enterprise, and is intended to afford immunity from the overflow of waters from the Mississippi River, and that it does afford such immunity, except at

rare intervals when the levee breaks, as is shown by the agreed statement of facts. This being true, it takes the case out of the application of the doctrine announced by the Illinois court in the case cited.

According to the facts of the case, as drawn from the agreement, this lake is entirely protected from the influx of other waters and no opportunity is afforded for the escape of fish into other waters. In this respect it is the same as if it were an artificial pond within a man's own premises. Fish within the waters of the lake are therefore in the exclusive possession of the owners of the land, and no one has a right to fish there without the consent of the owner, and there is no way for the fish to escape from the owner's possession.

The Attorney General contends that the decision of this court in the case of *State* v. *Mallory*, 73 Ark. 236, has controlling force of the present case, but we do not think so. In that case we were dealing with the question of a property owner's right to fish and hunt on his own premises, and we said it was a qualified right held subject to the State's regulatory power. It is true that in that case the agreed statement of facts showed that the fishing was done in a private pond, but the case involved the rights of the property owner with respect to hunting wild game, as well as fishing, and the opinion declared the general principles with respect to the right of the State to regulate hunting and fishing even on one's own premises. We did not undertake to define the extent to which the Legislature had gone in regulating fishing. The statutes at that time contained, as before stated, an express provision exempting the waters wholly on the premises of an owner from the operation of the statute.

Our conclusion therefore is that the circuit court erred in its decision that the facts of the case constituted a violation of the law. Judgment is reversed and the cause remanded for further proceedings.

SCHMIDT v. GRIFFITH.

Opinion delivered May 10, 1920.

CONTRACTS — AGREEMENT TO PAY ANOTHER'S DEBT — ENFORCEMENT.— Where defendants, who were officers of a corporation and owners of most of its stock, sold the property of the corporation, and agreed to protect the purchasers of the property against all claims against the corporation, a creditor of the corporation can not recover on such promise; there being no privity between plaintiff and such purchasers.

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

Robert J. White, for appellants.

If the option and lease contracts have any probative force it is to explain the intention of the parties of the list of debts assumed and what they want in that list contract between appellants and the Alix Coal Company. These, taken with the evidence of Coffer and R. A. Schmidt, show that appellants never intended to pay or assume appellee's debt, but the only agreement entered into, or intended, was to protect the property against liens or claims which might become liens by suit or otherwise. The Alix Coal Company did not owe Griffith anything and there was no reason for them to exact such promise, as they could not, and did not, recover any benefit from such a promise, and there was no consideration directly moving appellants to make such promise to Alix Coal Company for appellant's benefit, under Kirby's Digest, §§ 5999-6002. See 65 Ark. 27; 86 *Id.* 212-218; 9 L. R. A. (N. S.) 889.

There being no sufficient testimony to prove an agreement made by appellants with Alix Coal Company to pay appellee's debt, a new trial should have been granted and the cause dismissed. 73 Cal. 522; 76 Fed. 130.

If this action would lie at all on a promise made by appellants to Alix Coal Company for the benefit of appellee, it would be in assumpsit for the full amount of the debt beyond the jurisdiction of the justice of the peace. 169 S. W. 959.

Partain & Carter, for appellee.

The agreement with the Alix Coal Company to pay all the debts of the Schmidt-Blakely Coal Company except the one excepted was an unconditional promise to pay appellee's debt, and they are bound by it.

Where a promise is made for the benefit of a third person, the beneficiary may sue for a breach thereof. 46 Ark. 132; 31 *Id.* 144; *Ib.* 411; 90 Ark. 351; 25 *Id.* 196; 93 *Id.* 346; 107 *Id.* 118; 112 *Id.* 260.

McCULLOCH, C. J. The facts of the case are these: appellee is a creditor of the Schmidt-Blakely Coal Company, a domestic corporation engaged in coal mining, the debt being evidenced by certain promissory notes executed to cover a pre-existing debt. Appellants were president and secretary, respectively, and the owners of practically all of the stock of said corporation, and in January, 1919, they entered into a written contract whereby they sold and delivered all of the property of the Schmidt-Blakely Coal Company to certain individuals, who organized another corporation, called the Alix Coal Company, for the purpose of operating the mines. In the contract of sale the new corporation, the Alix Coal Company, assumed payment of certain specified debts of the Schmidt-Blakely Coal Company, which were mentioned in a list attached to the contract. This list does not contain the debt to appellee, but in another clause of the contract appellants undertook and agreed with Alix Coal Company to "protect it against any other claims against the Schmidt-Blakely Coal Company and Superior Coal Company, arising prior to January 15, 1919, either paying same or allowing same to be deducted from moneys due us, after settling through suit or legal adjustment."

There was a preliminary contract between the parties giving the purchasers an option, which was afterward accepted, and the contract from which the above quotation is taken was the writing which evidenced the consummation of the sale. The option contract contained a stipulation that "if this option is exercised, the said R. A.

Schmidt and Charles Schmidt are to deliver the property herein mentioned free and clear of all liens, charges and obligations of every character and description, and that they are to pay and satisfy all demands, debts and obligations of every character and description, due from and by the Schmidt-Blakely Coal Company and the Superior Coal Company."

Appellee sued appellants on the obligation of the contract with the original purchasers, the Alix Coal Company, claiming the right to maintain the suit on the theory that the contract was made for appellee's benefit as a creditor of the Schmidt-Blakely Coal Company. There are many decisions of this court announcing the familiar rule that where a promise is made to one party upon a sufficient consideration for the benefit of another, the beneficiary may sue the promisor on his promise. *Hecht* v. *Caughron,* 46 Ark. 132; *Thomas Mfg. Co.* v. *Prather,* 65 Ark. 27; *Spear Mining Co.* v. *Shinn,* 93 Ark. 346; *Dickinson* v. *McCoppin,* 121 Ark. 414. It is not sufficient, however, under the law declared in those decisions, merely to show that there is a benefit to result to a party, but in order to sue there must be privity between the parties seeking to maintain the action of the promisee in the contract. In other words, there must be an obligation existing at that time on the part of the promisee which constituted privity between the parties in order to entitle a third party to maintain the action on the promise. *Dickinson* v. *McCoppin, supra.* The cases in which the doctrine has been applied are those where the promisor entered into an engagement with the debtor of a third party to pay the debt, and it was held that the third party, as a creditor of the promisee in the contract, had the right to maintain the action. In the present case, however, there is no privity existing between appellee and the purchaser under the contract, who were the promisees in the contract sued on. Neither the Alix Coal Company nor the original purchasers were resting under any obligation to pay the debts of the Schmidt-

Blakely Coal Company to appellee except those expressly mentioned. The promise was made entirely for their benefit; and while appellee would have been the beneficiary on the performance of the contract, there was no such privity as to entitle him to claim those benefits.

This is not an attack on the validity of the sale, and there is no fraud charged, and the purchasers of the property of the Schmidt-Blakely Coal Company did not by that purchase bind themselves to pay this debt or any other debt of the Schmidt-Blakely Coal Company, except those expressly mentioned in the contract. We are therefore unable to find any theory upon which appellee's action against appellants can be sustained. They have made no contract with appellee for the payment of his debt, nor have they made any contract for his benefit with one who was in privity with appellee.

The judgment is reversed, and as the facts fully developed show there is no right of action, the cause will be dismissed. So ordered.

HINES v. MASON.

Opinion delivered May 10, 1920.

1. CARRIERS—DUTY TO FURNISH CARS FOR LIVE STOCK.—A railroad company, when engaged in the business of transporting live stock, is bound to furnish suitable cars therefor upon reasonable notice, whenever it is within its power to do so without jeopardizing its other business.
2. CARRIERS—LIABILITY FOR FAILURE TO FURNISH CARS PROMPTLY.—If a carrier fails to furnish cars within a reasonable time after demand by a prospective shipper, it is liable for the resulting damages.
3. CARRIERS—REASONABLE NOTICE TO FURNISH CARS.—To be reasonable, a notice by a shipper of live stock to furnish cars for shipment must be sufficient to enable the carrier, with reasonable diligence, under the circumstances then existing, to furnish the cars without jeopardizing its business on other portions of its road.
4. CARRIERS—TO NOTIFY SHIPPER OF INABILITY TO FURNISH CARS.—Where a shipper applies to the proper agency of a railroad com-

pany for cars to ship live stock to be furnished at a time and station named, it becomes the duty of the company to inform the shipper within a reasonable time, if practicable, whether it is able so to furnish; and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present at the time and place named, and finds no cars, the company should respond in damages.

5. CARRIERS—UNPRECEDENTED DEMAND FOR CARS—QUESTION FOR JURY. —Whether there was an unprecedented demand for cars, which the carrier was unable to supply at the time plaintiff applied for cars for shipment of live stock, *held* a question for the jury.

6. CARRIERS—UNPRECEDENTED DEMAND FOR CARS—BURDEN OF PROOF. Where a carrier, sued for failure to furnish live-stock cars, defends on the ground that there was an unprecedented demand for cars, which it was unable to supply, it has the burden of proving such unprecedented demand.

7. CARRIERS — DELAY IN FURNISHING CARS — NOTICE OF DAMAGES.— Damages to cattle suffered by reason of the carrier's delay in furnishing cars for shipment are not covered by a stipulation in the bill of lading that as a condition precedent to recovery of damages under the contract the shipper will give notice to the company before the stock is removed.

8. CARRIERS—NOTICE OF CLAIM.—A letter written for a shipper by his attorney, notifying the carrier of the failure to promptly furnish cars to such shipper, advising the carrier of the damages sustained and giving an itemized statement of the same, was a sufficient compliance with a stipulation in the bill of lading requiring written notice of damages and a verified itemized statement.

9. CARRIERS—NOTICE OF CLAIM—WAIVER.—A provision in a bill of lading for an interstate shipment requiring notice of a claim for damages to live stock shipped can not be waived by the carrier.

10. COURTS—INTERSTATE COMMERCE—FEDERAL DECISIONS CONTROLLING.—Decisions of the United States Supreme Court are controlling on the question whether provisions in a bill of lading for an interstate shipment of stock can be waived.

11. CARRIERS — DAMAGES FOR DELAY IN FURNISHING STOCK CARS.— Where a carrier negligently delayed furnishing cars for live stock, the shipper is entitled to damages which will fairly and reasonably compensate him for the loss, if any, sustained by the negligence, and, in determining such loss, the jury should consider the excess shrinkage and the decline in market from the day the stock should have reached the market without delay up to the time they were put on the market and extra expense, if

any, which the shipper sustained for feed occasioned by the delay.

12. CARRIERS—DELAY IN SHIPMENT OF CATTLE—MEASURE OF DAMAGES. —The damages caused by delay after cattle are in transit is the same, whether the cause of action sounds in tort for an alleged negligent failure to furnish cars, or is an action *ex contractu* for failure to ship promptly.

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

Troy Pace and *Ponder & Gibson,* for appellant.

1. Appellee ordered the car October 9, 1918. It was placed for him at Bradford on that date. This was a compliance with the order and he can not recover. In the absence of an agreement to provide cars at a particular time a carrier is obligated to exercise only due diligence to furnish freight cars within a reasonable time. The duty to furnish cars does not include the duty to carry them by special train. 10 C. J. 72-3; 164 Ill. 310; 74 Atl. 227; 8 L. R. A. (N. S.) 115. Where a railroad is not required by the order for cars to furnish them at any particular hour, a delivery at any hour of that day is sufficient. 19 S. W. 53. The Arkansas statute requiring carriers to furnish transportation facilities for the carriage of freight is not intended to make the duty an absolute one, but is simply declaratory of the common law and does not require the carrier to provide in advance for any unexpected rush of business. 77 Ark. 357; 95 S. W. 170; 99 *Id.* 375; 10 C. J. 74; 85 Ark. 293; 105 *Id.* 415; 113 *Id.* 215; 91 *Id.* 198.

If appellant furnished a car within a "reasonable time" it complied with the law. 4 R. C. L., § 426; 241 U. S. 55; 242 *Id.* 120; 44 L. R. A. (N. S.) 643; 141 Pac. 442; 202 Fed. 745.

The court erred in its instructions. The proof was that there was an unprecedented demand for cars which could not have been foreseen or expected. 79 Ark. 62; 10 C. J. 74; 237 U. S. 121; 85 Ark. 293; 77 *Id.* 357.

2. Under the third provision in the bill of lading the cattle were not to be transported within any special

time, nor delivered at destination at any particular hour, and in any suit for loss, damage or delay, negligence shall not be presumed nor inferred from mere delay. Instruction No. 2 for appellant should have been given. The clause in the contract was based on a valuable consideration and was a valid defense. 113 Ark. 688; 114 *Id.* 676; 138 *Id.* 322; 172 *Id.* 353; 128 *Id.* 662.

3. Appellee can not recover on account of failure to comply with the seventh provision of the bill of lading as to notice. 243 U. S. 592; 241 *Id.* 190; *Ib.* 87; 127 Ark. 261; 90 *Id.* 308; 127 *Id.* 261. See, also, 10 C. J. 381-340; Meckie on Carriers, § 2085; 167 N. W. 546.

The burden was on plaintiff to show negligence. 240 U. S. 632; 243 Fed. 91; 22 L. R. A. (N. S.) 975, note; 211 S. W. 103.

4. The court erred in its instruction as to the measure of damages. 10 C. J., p. 77; 4 R. C. L. 389; 96 Ark. 384; 92 *Id.* 573; 126 *Id.* 103; 69 *Id.* 150; 92 *Id.* 574; 127 S. W. 568.

5. The notice required could not be waived. 10 C. J. 340; 241 U. S. 190; 206 S. W. 638; 250 Fed. 272; 201 S. W. 865.

Boyce & Mack, for appellee.

1. The jury were properly instructed and the verdict on the ground of negligence is amply supported by the evidence. 131 Ark. 237; 113 *Id.* 215; 132 *Id.* 446; 213 S. W. 777.

2. The stipulation as to notice of damages may be waived. 89 Ark. 154; 66 Cyc. 509.

3. The instruction as to the measure of damages was correct. 48 Ark. 502; 73 *Id.* 112; 92 *Id.* 573; 4 R. C. L., § 389; 113 Ark. 215.

4. The notice was sufficient under the contract and the question of waiver cuts no figure. 241 U. S. 190.

WOOD, J. This suit was instituted by the appellee against the appellant to recover damages alleged to have accrued by reason of appellant's failure to furnish a car for the shipment of cattle.

The appellee alleged, in substance, that he made a demand in writing of the appellant to furnish a car, suitable for shipping cattle, to be placed at Bradford on the 9th of October, 1918; that on the 8th of October he placed his cattle, consisting of 38 head, in the stock pens of Bradford to be loaded in such car for the purpose of shipment by appellant's regular stock train, which passed Bradford station at 2 a. m. every Wednesday morning; that appellant carelessly and negligently failed to furnish the car as demanded by the appellee in time for the regular stock train on the morning of October 9th; that by reason of such failure the appellee was unable to ship his cattle until 5 p. m. of that day; that in consequence thereof appellee's cattle did not reach their destination until 4 p. m. October 11th and were not placed on the market until October 14th, whereas, if the car had been furnished as ordered the cattle would have reached their destination in time for the market of October 10th and 11th; that appellee, by reason of the delay, was compelled to purchase extra feed for the cattle in the sum of $48.19; that there was a shrinkage of at least forty pounds on each head of cattle, which amounted to the sum of $106.40 and a decline in the market value during the delay in the sum of $159.75. Appellee prayed judgment in the sum of $314.34.

The appellant denied all the material allegations of the complaint and set up that at the time the car was ordered appellant did all in its power to furnish the car without discrimination as to other customers or places. It alleged that at the time the car was ordered there was an unprecedented press of business, such that appellant could not by ordinary prudence and the usual course of traffic contemplate. Appellant also set up that there was a provision in the contract of shipment to the effect that the cattle were not to be transported at any specified time or delivered at any particular hour nor in season for any particular market; that in any suit for loss, damage, or delay, negligence should not be presumed

or inferred from mere proof of delay. That the contract also contained the following provision:

"That the second party will notify in writing the nearest station agent or general officer of one of the carriers concerned regarding any loss or injury from delay or otherwise to the live stock covered by this contract in time to enable said agent or officer to examine said stock before it is removed from the unloading pens or mingled with other stock; that if claim should be presented for said loss or injury that written notice to that effect will be filed with the agent at point of origin or destination within ninety days, and verified itemized claim within 125 days after the loss or injury occurred, and that failure to comply with the provisions of this section shall be a bar to recovery for such loss or injury."

Appellant alleged that the appellee failed to comply with the above provision of the contract in time to enable appellant to examine the cattle before they were removed from the unloading pens or mingled with other stock; that the appellee failed to give written notice to the appellant at the point of origin or destination within 90 days of the date of such claim for injury to his cattle; that he also failed to deliver to appellant's agent, at the point of origin or destination, within 125 days after the loss or injury occurred, a verified itemized claim as provided in the contract; that by reason of the appellee's failure to comply with the contract in these particulars he is barred from recovering damages for his alleged loss or injury; that, by the terms of the contract, appellee assumed all expenses of feeding, watering, bedding, or otherwise caring for the cattle.

There was a trial before a jury which resulted in a verdict and judgment in the sum of $200. From that judgment is this appeal.

The appellant first contends that, inasmuch as appellee by written order applied for a car to be placed at Bradford on October 9, 1918, it complied with this

request when it furnished a car for appellee's use at Bradford by 11 a. m. of that day.

The appellee testified that, at the time he applied to appellant's station agent at Bradford for the car, he told the agent that he wanted a car to ship out on the regular stock train. The appellant had two regular stock trains a week on which it transported cattle. These trains came through on Wednesdays and Sundays, somewhere from 1 a. m. until 7 or 8 a. m. They were hardly ever on time. They usually shipped from 3 to 5 a. m. Appellant would not ship out cattle on any other day. Appellee always shipped out on one of these trains.

This is not a suit on a contract between appellant and appellee to furnish a car at a certain time, but it is an action for failure to furnish cars founded on section 6808 of Kirby's Digest.

The law applicable to such cases is declared by us in *St. L. S. W. Ry. Co.* v. *Clay County Gin Co.,* 77 Ark. 357-62, as follows:

"The statute did not intend to make the duty of carriers to furnish transportation facilities an absolute one, for it would be unreasonable to conclude that the Legislature intended to impose upon them duties that under certain conditions would not be anticipated by them, and which it would be impossible to perform, and yet for such nonperformance to exact of them heavy penalties. The statute under consideration is but declarative of the requirements of the common law as to the duty of furnishing transportation facilities. After declaring what that duty is, it prescribed the penalty for its nonperformance. A common carrier for such goods as he undertakes to carry is bound to provide reasonable facilities of transportation to all shippers at every station who, in the regular and expected course of business, offer their goods for transportation. The carrier is not required to provide in advance for any unprecedented and unexpected rush of business, and therefore will be excused for delay in shipping, or even in receiving goods for shipment, until

such emergency can in the regular and usual course of business be removed." See, also, *St. L. S. W. Ry. Co.* v. *Leder,* 79 Ark. 59; *Wynne Hoop & Cooperage Co.* v. *St. L., I. M. & S. Ry. Co.,* 81 Ark. 373.

Now here the proof on the part of the appellee was to the effect that the appellant, in the regular and usual course of its traffic in the transportation of live stock, had two cattle trains a week which usually passed the station of Bradford on Wednesdays and Sundays between one and seven o'clock in the morning. Shippers had the right to rely upon this usual course of business which the appellant had established for the transportation of live stock and to present to appellant their live stock for transportation according to such established course. If appellant negligently refused to accept appellee's cattle when so presented for shipment and to furnish facilities for their transportation, then appellant was liable to the appellee for the damages which were the proximate result of such negligence, that is, for the damages of which the negligence of appellant was the direct and proximate cause.

The law applicable to railroads as common carriers of live stock is accurately stated in 4 R. C. L., sec. 426, p. 964, as follows: "A railroad company, when engaged in the business of transporting live stock, is bound to furnish suitable cars therefor upon reasonable notice, whenever it is within its power to do so without jeopardizing its other business. It necessarily follows that, if it fails to furnish cars within a reasonable time after demand by a prospective shipper, it is liable for the resulting damages. To be reasonable, the notice must be sufficient to enable the carrier, with reasonable diligence, under the circumstances then existing, to furnish the cars without jeopardizing its business on other portions of its road. But where a shipper applies to the proper agency of a railroad company engaged as a common carrier of live stock for cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper

within a reasonable time, if practicable, whether it is able so to furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live stock at the time and place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages."

Without setting out in detail the instructions of the court, it suffices to say, that the trial court was guided by the rules of law above announced, in submitting to the jury the issue as to whether the appellant had negligently failed to furnish a car to appellee and whether such failure was the proximate cause of the damages which appellee sought to recover.

The appellant contends that the undisputed testimony proved that there was an unprecedented demand for cars which the appellant was unable to supply. But after a careful examination of the evidence we are convinced that it was an issue for the jury as to whether or not the demand upon appellant for cars was so sudden and great that appellant could not reasonably have anticipated it and could not by the exercise of ordinary care have supplied the demand. The burden was upon the appellant to make this proof, and the issue was properly submitted to the jury and upon correct instructions. *St. L., I. M. & S. Ry. Co.* v. *Keefe,* 113 Ark. 215. See, also, *Cumbie* v. *St. L., I. M. & S. Ry. Co.,* 105 Ark. 415; *Midland Valley Rd. Co.* v. *Hoffman,* 91 Ark. 198.

The court, among others, gave the following instruction: "The jury are instructed that if they find from the evidence that the plaintiff made a written order for a stock car to be placed at Bradford on October 9, 1918, for the shipment of his stock, and if you further find that no time was specified when it was to be delivered on that date, and the car was delivered on October 9th in pursuance of said order, then the plaintiff would not be en-

titled to recover and your verdict will be for the defendant."

The appellant contends that the undisputed evidence shows no time was specified when the car was to be delivered on October 9, 1918, and hence under the above instruction the verdict should have been in its favor. But the appellant erroneously assumes that the undisputed evidence shows that no time was specified when the car was to be delivered on October 9, 1918. The appellee testified that he told the appellant's station agent at Bradford, at the time he applied for the car and before the agent wrote out the notice, that he wanted the regular stock train on Wednesday morning which passed Bradford usually from three to five o'clock. There was no prejudicial error to appellant therefore in giving the instruction.

The appellant requested the court to instruct the jury "that the live stock covered by this contract is not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market, and, in any suit for loss, damage, or delay, negligence shall not be presumed or inferred from mere proof of delay." Appellant contends that this clause is a binding one and should be considered by the jury with all the other proof in arriving at a verdict.

The court did not err in refusing to grant this instruction. It was calculated to confuse the jury. For, as we have already stated, this is not a suit on contract for the shipment of cattle, but the issue is one of alleged negligence in failing to furnish facilities for transportation and is ruled by the doctrine announced by this court in *St. L., I. M. & S. Ry. Co.* v. *Keefe,* and in the other cases mentioned *supra.*

Hence, it is unnecessary for us to decide whether the above would be a correct declaration of law in a case bottomed on a contract containing the above provision.

The same may be said concerning the alleged failure of the appellee to comply with the provision of the bill

of lading requiring notice in writing to the nearest station agent or general officer of one of the carriers concerned regarding any loss for injury from delay or otherwise and written notice that a claim will be presented within 90 days and a verified itemized claim within 125 days after the loss or injury. The damages sustained by appellee during the overtime the cattle were in waiting at Bradford were not covered by the contract.

In *St. L., I. M. & S. Ry. Co.* v. *Law,* 68 Ark. 218, we held that damages to cattle suffered by reason of the carrier's delay in furnishing cars for shipment are not covered by a stipulation in the bill of lading that, "as a condition precedent to any damages or any loss or injury to stock covered by this contract, the shipper will give notice to the company before the stock is removed," etc. See, also, *St. L. S. W. Ry. Co.* v. *McNeill,* 79 Ark. 407.

But if we could treat this action as one grounded on an alleged breach of contract for the prompt shipment of appellee's cattle, still appellant, under the undisputed evidence in this case, cannot avail itself of the alleged failure of the appellee to give the written notice provided in the bill of lading, for the reason that the undisputed evidence shows that on November 2, 1918, the attorney for the appellee notified the appellant of the failure to furnish appellee a car which he had ordered for the shipment of his cattle October 9, 1918. In this letter he advised the appellant of the damages he had sustained by reason of such failure to furnish him a car and gave an itemized statement of the same and requested the appellant to advise the appellee as to what disposition it would make of the claim.

On February 8, 1919, the appellant advised the appellee that his claim had been given thorough investigation, and that appellant had declined to settle for the reason that the failure to furnish the car was due to shortage of cars and for the further reason that appellant's station agent had not promised a car for any particular date or market.

In *St. L. S. W. Ry. Co.* v. *Grayson,* 89 Ark. 154, there was an interstate shipment and a similar provision to the one under consideration. We held in that case that the provision as to notice could be waived. But since then the Supreme Court of the United States has decided that where administrative questions are involved they cannot be waived. The decisions of the Supreme Court of the United States are controlling. *Penn. Ry. Co.* v. *Puritan Coal Mining Co.,* 237 U. S. 121; *Penn. Ry. Co.* v. *Sonman Shaft Coal Co.,* 242 U. S. 120; *Ga., Fla. & Ala. Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190.

In the last mentioned case the Supreme Court held that the provision in the contract as to notice similar to the one under review could not be waived.

But, while this provision of the contract as to notice cannot be waived, yet no particular form of notice is prescribed, and the letter of the appellee's attorney to appellant's claim agent was a sufficient compliance with the provisions of the contract as to notice. The letter of the claim agent in response shows that the appellant so construed it.

As was said by the Supreme Court of the United States in *Ga., Fla. & Ala. Ry. Co.* v. *Blish Milling Co., supra,* "Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency and is to be construed in a practical way. The stipulation required that the claim should be made in writing, but a telegram, which in itself or taken with other telegrams contained an adequate statement, must be deemed to satisfy this requirement."

The court, in effect, instructed the jury that if they found for the appellee they should assess his damages at such sum as they might find from the evidence would fairly and reasonably compensate him for the loss, if any, sustained by the negligence, if any, of the appellant in failing to furnish the car and further instructed them that in determining this they should take into considera-

tion the excess shrinkage and the decline in market from the day the stock should have reached the market without delay up to the time they were put on the market in this instance, and extra expense, if any, which the appellee had sustained for feed occasioned by the delay. The instruction properly limited the amount of damages to be recovered by the appellee to such damages as were the direct and proximate result of appellant's negligence, if any, in failing to furnish the car.

The instruction correctly enumerated the elements of damage which the testimony tended to prove appellee had sustained by reason of the alleged negligent failure to furnish the car. The instruction is in harmony with the law upon the subject as announced in our own cases and in the authorities generally. *St. L., I. M. & S. Ry. Co.* v. *Mudford,* 48 Ark. 502; *St. L., I. M. & S. Ry. Co.* v. *Coolidge,* 73 Ark. 112; *C., R. I. & P. Ry. Co.* v. *Miles,* 92 Ark. 574.

The damages caused by delay after the cattle are in transit would be the same whether the cause of action were one sounding in tort for an alleged negligent failure to furnish cars, or whether it were a cause of action *ex contractu* for failure to ship promptly.

"The damages recoverable against a common carrier for delay in transporting live stock are limited to the expense, keep, shrinkage, and depreciation in the value of the stock during such delay." 4 R. C. L. 389. See, also, 10 C. J. 77.

There was no reversible error in the rulings of the trial court. The judgment is, therefore, affirmed.

BENEAUX v. SPARKS.

Opinion delivered May 10, 1920.

1. REFORMATION OF INSTRUMENTS — SUFFICIENCY OF EVIDENCE.— Equity will not reform a deed on account of a mistake in description unless the proof of such mistake be clear, unequivocal and convincing, nor unless the mistake is clearly shown to have been common to both parties.

2. REFORMATION OF INSTRUMENTS—PROOF NEED NOT BE UNDISPUTED.—While there must be something more than a mere preponderance of evidence to show a mutual mistake in a deed, the proof need not be undisputed.

3. REFORMATION OF INSTRUMENT—MISTAKE IN DIVISION LINE.—Evidence *held* to show a mutual mistake as to the division line, entitling plaintiff to reformation.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; reversed.

The appellant, *pro se.*

It was clearly understood by all parties where the dividing line between Sparks and Beneaux was to run and defendants should not be allowed to profit by their own wrong, and the cause should be reversed, so that maps testified from but not introduced, and the evidence of defendant, Woodruff, be introduced to the end that justice be done to all parties.

WOOD, J. This action was instituted by the appellant against the appellees. The purpose of the suit was to have certain deeds canceled and to require specific performance of a contract for the sale of certain lands.

The appellant alleged in substance that she and appellee Sparks separately purchased certain lands of the appellee, Woodruff; that when the purchase was made by her from Woodruff Sparks was present and had notice of the lands which Woodruff was to convey to her and which she described in her complaint by metes and bounds. She alleged that she paid the purchase money and went into possession of the lands; that Woodruff also sold Sparks certain land adjoining; that when Woodruff executed the deed by mutual mistake of the draftsman the land which appellant bought was not correctly described, nor was the land purchased by Sparks from Woodruff correctly described; that Sparks under his deed was claiming the west eight feet of the land which appellant purchased of Woodruff.

Appellant prayed that the deeds be canceled and that Woodruff be required to execute a deed conveying the land which she purchased.

Appellee Sparks denied that appellant was the owner of the land as described in her complaint and denied that the lands which she purchased from appellee Woodruff were incorrectly described in her deed. He alleged that the lands which he purchased from appellee Woodruff were correctly described in his deed; that he took possession of the same and has occupied them since his purchase.

Appellee Woodruff answered alleging that the lands which he sold respectively to Sparks and appellant were correctly described in the deeds executed by him to them; that Sparks and appellant went upon the land in person and measured same off and agreed upon the division line which separated the property and that he afterward executed a deed to each of them for the land purchased by them respectively.

Appellant and four witnesses testified for appellant. The husband of appellant testified that he negotiated for his wife the purchase of the land from Woodruff. Woodruff went upon the land with witness and showed him the same. There was a gasoline engine on the place used for the waterworks. It was understood that witness' wife was to have the land one foot west of the engine bed. The concrete base of the engine and waterworks is a permanent structure. Witness paid Woodruff $500 and went into possession. Before the deeds were made Woodruff said to Sparks and witness, "Now we want an understanding about where the line between you is to come. The line is to come one foot west of the engine base. All that east of the point one foot west of the engine base belongs to Beneaux and all that west belongs to Sparks." Then he said to Sparks, "It has never been surveyed; come up there and we will measure it off." When we got up there we measured 272 feet west of the corner of Church and Fifth streets. Witness said to Mr. Wood-

ruff, "I do not believe that is far enough west to cover the engine bed," and Woodruff said, "Yes it is, but I will make the deed read more or less, and that will cover it." The way the land lay they could not tell just which way north and south was, but witness understood from what had been said by Woodruff in Sparks' presence that Sparks' land came to one foot west of the engine base. The deed to appellant had not yet been executed. Witness never saw Sparks' deed and did not know how it read. The first witness knew that Sparks was claiming any of the land purchased by the appellant was when Sparks started to put some posts on appellant's land. Sparks came out and witness told him where appellant's land came to and Sparks said, "Yes, but I got a deed to it and I am going to hold it. You can have the engine but I have a deed to the land and I am going to have it." Witness then had a surveyor to survey the land and found that Sparks was claiming the west eight feet of the land which appellant had purchased of Woodruff.

Four witnesses corroborated the testimony of Beneaux to the effect that when he and Sparks and Woodruff were negotiating as to where the line between the appellant and appellee Sparks should be located it was understood and agreed between them that the line was to run one foot west of the engine base. The purpose of this was to give Beneaux room to crank the engine. One of the witnesses said, there was a mark on the wall that Sparks, Woodruff, and Beneaux agreed to.

One witness testified that Woodruff came to the bank to get him to witness the trade between him and Sparks; that he understood from what Woodruff said "that Woodruff was to retain the gasoline engine base and one foot over to turn the crank and Sparks was to get the balance west. That was where the line was."

Sparks testified that there was nothing said about where the line was to run. He denied the statements made in the testimony of the other witnesses to the effect that it was agreed that the land of the appellant was to

extend one foot west of the engine base. He stated that they measured it off and Beneaux agreed to the corner. They put down a stake and when he got a surveyor and surveyed the land witness moved the stake 19 inches west. Witness bought the west 141 feet of the land. The land as shown by the survey was the land witness bought. Witness said that there was a board on the engine house of a greenish color and that is where witness traded to. All of the land west of that board was to be witness'; that greenish board is just where the survey puts the line. If the line ran from the front of the lots one foot west of the engine base, it would run angling across the lots; it would not run north and south. The 272 feet from the east line of Beneaux' came just to the point that witness bought to.

The court entered a decree dismissing the appellant's complaint for want of equity. From that decree is this appeal.

Equity will not reform a deed on account of mistake in the description unless the proof of such mistake be clear, unequivocal, and convincing, nor unless the mistake is clearly shown to be common to both parties. While there must be something more than a mere preponderance of the evidence to show a mutual mistake, the rule does not require that the proof be undisputed. The requirements of law are fully met when the testimony tending to show a mutual mistake in unequivocal and clear, that is such as to satisfy and convince the court that the mistake was made and that the instrument was so drawn as not to express what the parties to the contract intended. *Tyler* v. *Merchants & Planters Bank,* 89 Ark. 612; *James, Holcomb & Rainwater* v. *Furr,* 126 Ark. 251, and other cases collated in 4 Crawford's Digest, Reformation of Instruments, p. 4378, *et seq.*

The undisputed evidence shows that the waterworks including the engine and base were connected with the house situated on the tract purchased by the appellant. The waterworks, engine, and base had no connection with

the house on the property purchased by appellee Sparks. It is wholly unreasonable to conclude that appellant would have purchased the house with the waterworks, engine, and base without acquiring sufficient room to enable him to crank the engine which was essential to pump the water into the tank to supply the house.

The testimony of appellee Sparks, himself, shows that he purchased to a certain board of greenish color on the engine house. But, if he was correct in this, the line between them would have shut off the appellant from the space necessary to crank the engine to the waterworks.

Since the undisputed testimony shows that a definite point was determined upon to mark the dividing line between the appellant and appellee Sparks, and since the appellee Sparks does not deny that the purpose in fixing this dividing line was to give to appellant the concrete base of the engine and the waterworks, which was a permanent structure and essential to supplying water to appellant's house, we are firmly convinced that appellant's husband and the four witnesses corroborating him are correct in their statements that it was understood between Woodruff, the vendor, and Sparks and Beneaux, the purchasers, that the line between their properties should be "one foot west of the engine base."

Of the lands purchased by appellant and appellee Sparks from Woodruff, the above conclusion would result in giving to appellant all that portion east of the line one foot west of the engine base, and to appellee Sparks all west of that line. The appellee Woodruff, therefore, should have measurements made and execute deeds describing and conveying the property so as to effectuate the intention of all the parties, at the time the lands were purchased of him.

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

MYERS v. WHEATLEY.

Opinion delivered May 10, 1920.

1. GUARDIAN AND WARD—EXCEPTIONS TO FINAL ACCOUNT.—Where a ward excepted to her guardian's final settlement on certain grounds, and subsequently brought a suit in equity to surcharge and falsify the settlement upon the same grounds, the judgment of the probate court approving the settlement is *res judicata.*
2. GUARDIAN AND WARD—RATIFICATION OF EXPENDITURES.—Where a ward, after reaching majority, on trial of exceptions to her guardian's final settlement, testified that she was willing to pay for anything that she had received from her guardian, and that he should receive credit for whatever he had furnished her, the probate court was justified in finding that she ratified expenditures of all matters in such settlement to which she made no objection, and she can not claim, upon suit in equity to surcharge and falsify his account, that certain credits which were not excepted to were improperly allowed.

Appeal from Randolph Chancery Court; *Lyman F. Reeder,* Chancellor; affirmed.

STATEMENT OF FACTS.

Ethel Alton Myers brought this suit in equity against J. A. Wheatley and United States Fidelity & Guaranty Company to surcharge and falsify the final account-current of J. A. Wheatley as her guardian.

It appears from the record that J. A. Wheatley, as guardian of Ethel and Jesse Alton, minors, filed two annual accounts current with the probate court showing the state of his accounts as guardian of said minors. On January 15, 1919, he filed his third and final settlement in the probate court. Ethel Alton had married a man by the name of Myers and had become of age at the time the final settlement was filed in the probate court. She filed exceptions to the account of her guardian, and these exceptions were heard upon her testimony, the testimony of her guardian, and his first and second annual accounts.

Ethel Alton Myers testified in the probate court that after she had married she purchased two mules from her guardian for $300, a wagon for $50, and some feed and other things; that she had disposed of all the articles

purchased from her guardian before she became of age. These items were embraced in her guardian's second annual account.

Ethel Alton Myers gave her testimony in the present suit and again testified that she had bought these articles from her guardian while she was yet a minor and had disposed of them before she became of age. She testified that the team was not worth what she paid for it.

On the other hand, her guardian, J. A. Wheatley, testified that after she married she bought the team, wagon and other things from him to be used by her husband in farming and that they were worth what she paid for them.

Other testimony will be referred to in the opinion.

The chancellor surcharged the guardian's account as to certain items and dismissed the complaint of the plaintiff as to the others.

The plaintiff has appealed.

J. L. Taylor, for appellant.

The court erred in finding that appellant had fully ratified the expenditures complained of. The settlements of the guardian show expenditures greater than her income and contrary to law, and the evidence, shows that she never ratified them. Kirby's Digest, § 3792; 63 Ark. 450-1; 83 *Id.* 223. She not only has not ratified the illegal acts of her guardian, but she has expressly disaffirmed them by bringing suit. 44 Ark. 293. She is not required to restore the consideration. 51 Ark. 294.

The court in passing on the final settlement did not have jurisdiction to inquire into the first and second settlements. 105 Ark. 594.

Jerry Mulloy and *E. G. Schoonover,* for appellees.

1. Appellant has failed to incorporate her exceptions to the settlements incorporated in the transcript, and has failed to mention them in her abstract, in disregard to rule 9. 88 Ark. 449; 143 S. W. 159; 103 Ark. 430; 147 S. W. 445.

2. The court had jurisdiction of the subject-matter. Kirby's Digest, § 1340. Appellant is estopped to assert her claims in the suit at bar. 15 R. C. L. 963; 21 Cyc. 1541-1578; 23 *Id.* 511; 19 Ark. 420; 18 *Id.* 332; 41 *Id.* 78; 70 *Id.* 203; 80 *Id.* 309; 81 *Id.* 405.

The orders of the probate court on the settlements were judgments and appealable, but can not be otherwise attacked except for fraud or some well recognized ground of equitable relief. 121 S. W. 1056; 23 Ark. 228; 37 *Id.* 318; 40 *Id.* 219. The judgment of the probate court was conclusive against it. 165 S. W. 259; 46 Ark. 260; 15 R. C. L., pp. 1008-1012.

Appellant had an adequate remedy at law by appeal and can not seek relief in equity. 181 S. W. 908.

No fraud is alleged against the guardian, and the facts and circumstances of any fraud must be set out and distinctly charged. 35 Ark. 555; 17 *Id.* 603; 14 *Id.* 360; 20 *Id.* 526; 34 *Id.* 63; 44 *Id.* 496; 24 *Id.* 459.

Fraud is never presumed but must be proved. 99 Ark. 45; 37 *Id.* 135; 38 *Id.* 419; 92 *Id.* 502. And the burden is on the one alleging it. 12 R. C. L. 416. Evidence of fraud must be clear and satisfactory. 12 R. C. L. 436; 10 Ark. 211; 63 *Id.* 16.

No proof of fraud was made or adduced as defined by law. 20 Cyc. 8; 181 S. W. 908.

Appellant kept the mules and never offered to place the guardian *in statu quo*. 65 Ark. 392; 67 *Id.* 236; 74 *Id.* 241; 55 *Id.* 326; 50 *Id.* 217; 40 *Id.* 393; 15 R. C. L. 737; 1 Pom., Eq. Jur., par. 385. Appellant ratified the purchase of the mules when she retained the mares after reaching her majority. She also ratified the purchase of the wagon and the payment of her note and other acts. 14 R. C. L., p. 246, par. 25; 20 Ark. 600. See, also, 88 Ark. 223; 103 S. W. 170; 16 Cyc. 148.

HART, J. (after stating the facts). It appears from the record that the item of $300 for the purchase of the mules and the item of $50 for the purchase of the wagon were embraced in the exceptions to the third and

final account-current of the guardian. The plaintiff, Ethel Alton Myers, was then of age and filed exceptions to her guardian's account. The guardian and the ward both testified in that proceeding about the same items and their testimony was practically the same as it is in the present case.

The court found against the ward in favor of the guardian upon the exceptions to his third and final account-current. This was a judgment of the court which was conclusive as to these items and the matter is now *res adjudicata.* All questions relating to these items were necessarily involved in the exceptions to the final settlement of the guardian in the probate court. The approval of the final settlement was an adjudication of all matters involved in it; and if the ward thought the judgment confirming her guardian's account was erroneous, she should have appealed. *Nelson* v. *Cowling,* 77 Ark. 351; *Nelson* v. *Cowling,* 89 Ark. 334; *Beakley* v. *Cunningham,* 112 Ark. 71, and *Moore* v. *Allen,* 121 Ark. 335.

It is also claimed by counsel for the plaintiff that the accounts should be surcharged and falsified because they show that the guardian expended for the maintenance of the ward more than the clear income of the estate without having previously obtained an order of the probate court therefor, and that the case comes within the rule announced in *Campbell* v. *Clark,* 63 Ark. 450. Therefore counsel claims that the accounts should be restated by giving such credits only as the probate court should have allowed in the first instance and that the court erred in holding that the guardian might obtain credits exceeding the income of his ward's estate.

As we have already seen, the ward was of age at the time the guardian filed his third and final settlement. She filed exceptions to his account and strenuously opposed his getting credit for certain items. The record shows that the first and second annual accounts of the guardian were thoroughly gone over in that proceeding. The ward stated in plain terms in that proceeding what

items of her guardian's account she objected to. No objection was urged to the account that she was not of age at the time certain items were furnished to her and that these items exceeded the income of her estate. The items in question were necessaries, and she does not complain that she did not receive them.

On the trial of the exceptions she testified that she was willing to pay for anything that she had received from her guardian, and that he should receive credit for whatever he had furnished her.

Under the circumstances, the probate court was justified in finding that she ratified the expenditure of all matters in the final settlement to which she made no objection. It is true that judgments of this sort are not to be extended by mere intendment, to matters not necessarily involved in the determination; but it is equally clear that all questions necessarily involved in the inquiry then before the court must be regarded as finally and conclusively settled by the adjudication in that proceeding. In that proceeding the whole state of the accounts between the guardian and the ward was gone into and the court, after restating the account in certain particulars, confirmed it. The ward being then of age and having filed exceptions as to all items of the first and second annual settlement, the court was justified in finding against him on the point now under consideration. *Hudson* v. *Newton,* 83 Ark. 223.

Counsel for plaintiff places much reliance in the case of *Stubblefield* v. *Stubblefield,* 105 Ark. 594. We do not think that case has any application to the facts in the present case. There the judgment was reversed and the lower court was simply directed to take as a basis for settlement the sum shown to have been due in the guardian's last settlement unless an affirmative showing should be made that there were notes or other property in his hands not included in that settlement. The very basis of the exceptions to the guardian's final settlement in the probate court as shown by the record in the present case

was that the court had erred in allowing certain credits to the guardian.

As we have already seen, testimony was taken as to these items and they were adjudicated in that proceeding. If the ward thought the judgment of the court was erroneous, she should have taken an appeal.

Therefore, the decree will be affirmed.

SPECIAL SCHOOL DISTRICT NO. 65 OF LOGAN COUNTY *v.* BANGS.

Opinion delivered May 10, 1920.

SCHOOLS AND SCHOOL DISTRICTS—AUTHORITY TO SCHOOL DISTRICT TO CHARGE TUITION.—Special Acts 1919, No. 553, § 1, impowering the board of Special School District No. 65 in Logan County to charge such tuition as to such board seems necessary and proper, is unconstitutional, as violating §§ 1-4, art. 14, Const., providing for a system of free schools.

Appeal from Logan Chancery Court, Southern District; *J. V. Bourland,* Chancellor; affirmed.

J. H. Evans, for appellant; *W. A. Ratteree,* of counsel.

The act is not unconstitutional and void. 33 S. W. 93; Kirby's Digest, §§ 7638, 6743, 7684; 113 Ark. 19; 95 *Id.* 26. Voorhees on Law of Public Schools, p. 74. The Legislature has the power to authorize school boards to maintain in connection with the free school grades other grades or schools and charge tuition to pupils in non-free grades. The law presumes in favor of the constitutionality of acts of the Legislature. 27 Ark. 202; 25 *Id.* 246; 11 *Id.* 481; 1 *Id.* 552. All doubts are resolved in favor of the constitutionality of an act. 93 Ark. 612; 99 *Id.* 1; 86 *Id.* 231; 100 *Id.* 175; 86 *Id.* 412; 85 *Id.* 171; 66 *Id.* 466; 76 *Id.* 197; 77 *Id.* 250; 84 *Id.* 364. The court erred in granting the injunction.

John P. Roberts and *Carmichael & Brooks,* for appellees.

The injunction was properly granted. A system of *free* schools is provided for by our Constitution, and act 553 is unconstitutional and void. Art. 14, § 1. Const.; 25 Ark. 246-256; 30 L. R. A., p. 700; 35 Cyc., pp. 811-12; 37 Am. Rep. 123; 23 L. R. A. 603; 120 Ark. 81; 35 Cyc., p. 1118; 86 Ga. 605; 13 S. E. 120. See, also, 167 Ala. 325; 140 Am. Rep. 41; Anno. Cases 1914 B, p. 406.

HART, J. S. E. Bangs and John Sutton brought this suit in equity against the directors of Special School District No. 65 in Logan County, to enjoin them from charging tuition under the provisions of Act 553, Acts of the General Assembly of the State of Arkansas at its regular session in 1919.

The defendants filed an answer in which they alleged that for the lack of public funds they did not maintain a free school for any grade higher than the eighth grade and that they only charged tuition for pupils in the high school grades, which they claimed they had a right to do under the act in question.

The court sustained a demurrer to the answer of the defendants, and, the defendants declining to plead further, it was decreed that the temporary injunction should be made perpetual. The defendants have appealed.

Section 1 of the act under which the defendants acted reads as follows:

"When, in the discretion of the school board of Special School District No. 65 of Booneville, Arkansas, it is deemed necessary to charge tuition, the said school board is hereby authorized and empowered to charge such tuition as to such board seems necessary and proper." Special Acts of 1919, page 720.

The court below held that the act was unconstitutional, and we think the court was right in so holding. Article 14, Section 1 of the Constitution of 1874, reads as follows:

"Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools, whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction."

Section 2 provides that no money or property belonging to the public school fund shall be used for any other purpose.

Section 3 provides that the General Assembly shall pass general laws for the support of common schools by taxes and fixes the rate.

Section 4 provides that the supervision of public schools and the execution of the laws regulating the same shall be vested in such officers as may be provided by the General Assembly.

In obedience to these constitutional provisions the Legislature has provided by law for a general and uniform system of common schools where tuition shall be without charge and equally open to all pupils within the prescribed ages. As said in *Maddox* v. *Neal,* 45 Ark. 121, a wide range of discretion is vested in the board of directors of the public schools by our statutes in the matter of the government and details of conducting the common schools, but in the nature of things there is a limit to this discretion.

The court further said that some positive and imperative duties are imposed upon them about which they have no discretion. As we have already seen, under the plain mandate of our Constitution above quoted and referred to, the gratuitous instruction of all persons in the school district between the ages of six and twenty-one years is guaranteed in the public schools. The terms "public schools" or "common schools" are used in our Constitution to denote that such schools are open to all persons within the approved ages rather than to indicate the grade of a school, or what may or may not be taught therein. There is a great difference in the extent of edu-

cation that may be, and often is, taught in our common or public schools. This subject is confided to the care and discretion of the directors, and in the exercise thereof they may establish and maintain grades in the public schools. In the exercise of this discretion the Legislature may provide for high schools as well as the lower grades. In this State a high school is one in which higher branches of learning are taught than in one that is usually called a common school; but the term common school as used in our Constitution denotes a high school as well as one in which the lower grades are taught. This was recognized in *Dickinson* v. *Edmondson,* 120 Ark. 80, where the court said:

"There is a constant effort to raise the standard of education, and, happily for the people of our State, the effort has not failed to meet with a considerable measure of success. The establishment of high schools is within the limits of common school education, because it merely raises the standard of popular education. High schools are free schools within the meaning of the Constitution, and also common schools within the meaning of that term as used."

If they did not have sufficient funds, the directors had the authority to limit the common school to the lower grades; but the Legislature, under our Constitution, could not vest the directors with the power to establish a high school and charge tuition therefor. It could only vest the directors with power to control and manage the common schools and could vest them with authority to establish schools of lower grades and also high schools which might be free to all persons between the ages of six and twenty-one years; but it could not give the directors power to charge tuition either in the lower grades or in the high school to persons who were entitled to tuition free. There is a conflict in the case wherein the right of a public school to exact an incidental fee from students has been discussed. But we have been cited to no case in which under a Constitution like ours it has been held that

the Legislature might give the directors of the public schools the discretion to charge tuition either in a high school or the lower grades.

We are therefore of the opinion that the act under consideration is unconstitutional and void.

It follows that the decree must be affirmed.

McCULLOCH, C. J., dissents.

SKIPPER v. STREET IMPROVEMENT DISTRICT NO. 1.

Opinion delivered May 10, 1920.

1. STATUTES—READING OF BILL.—An act is not unconstitutional because, after being passed by one house, the bill was transferred to the other branch of the Legislature on the same day and there read twice, under suspension of the rules.
2. MUNICIPAL IMPROVEMENT DISTRICTS—PETITION.—Special act No. 39 of January 16, 1920, authorizing municipal improvement districts to exceed in the cost of the improvement 20 per cent. of the assessed valuation of the real property, is unconstitutional, as permitting an increase of the limit of assessment authorized by Kirby's Digest, § 5683, without requiring a new petition of property owners.
3. STATUTES—WHEN INVALID PORTION STRICKEN OUT.—The unconstitutional portion of a statute may be stricken out without impairing the effect of the remainder of the act where the provisions are wholly independent, and it can be seen that the Legislature would have enacted the remaining part of the statute.
4. MUNICIPAL IMPROVEMENT DISTRICTS—CONSTRUCTION OF STATUTE.—Special act No. 39 of January 26, 1920, § 4, authorizing local municipal improvement districts to expend money in excess of 20 per cent. of the assessed valuation of the real property, is prospective in its operation, and can not apply to districts organized before its passage.
5. MUNICIPAL IMPROVEMENT DISTRICTS—SPECIAL ACT HELD TO MODIFY GENERAL ACT.—Special act No. 39 of January 26, 1920, § 4, authorizing a local improvement district to exceed in expenses 20 per cent. of the assessed valuation of real property, being repugnant to Kirby's Digest, § 5683, limiting the expenses to such amount, operates *pro tanto* to modify such general statute.

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

STATEMENT OF FACTS.

During the year 1918, two separate petitions were circulated in the city of Morrilton for the establishment of two improvement districts designated respectively as Street Improvement District No. 1 and Street Improvement District No. 2. District No. 1 was organized for the purpose of paving certain streets within the city of Morrilton, and District No. 2 for the purpose of constructing gutters and curbs upon the streets that were to be paved in District No. 1. The statute in regard to the organization of local improvements in cities and towns was followed, and in each case a majority in value of the owners of real property within the proposed district signed the petition praying for the improvement. An ordinance was duly passed in each case creating the district. It was ascertained that neither improvement could be constructed within the statutory limitation of twenty per cent. of the assessed valuation of the property within the proposed district. At the special session of the Legislature which convened in January, 1920, a bill was introduced which removed the twenty per cent. limitation provided by the statute and authorized the expenditure of a greater per cent. than twenty per cent. of the value of the real property of the district as shown by the last county assessment. The constitutionality of the statute is attacked on this ground. Under the allegations of the complaint the cost of the improvement in each district will exceed twenty per cent. of the value of the real property in such district as shown by the last county assessment.

The prayer of the complaint is that the chancery court enjoin the commissioners from proceeding further in the construction of the improvement.

A demurrer was interposed to the complaint which was sustained by the court. The plaintiff elected to stand upon his complaint and the complaint in each case was dismissed for want of equity.

The cases were consolidated and tried together in the court below and are here on appeal.

J. A. Eades, for appellant.

The court erred in sustaining the demurrer to the complaint. Act 39, Acts 1920, was not constitutionally passed and it was void. *Booe* v. *Imp. Dist.* 4, 141 Ark. 140, settles the question. 112 Ark. 254-9.

Sellers, Gordon & Sellers, for appellees.

The act is valid and was constitutionally passed. *Booe* v. *Imp. Dist.,* 141 Ark. 140. The 20 per cent. limitation being required by the Constitution could be dispensed with by the Legislature, and was. *Gibson* v. *Spikes,* April 15, 1920, 143 Ark. 270; 59 Ark. 513-529. The bill was properly passed by the Legislature, as the record evidence shows.

Strait & Strait, amici curiae.

(1) The act 39, Acts 1920, is unconstitutional and void, because the notice required by law was not given as required by art. 5, § 26, Const. (2) It violates art. 5, § 22, of the Constitution, and (3) it violates art. 5, § 25 of the Constitution. The Constitution is mandatory. 23 Ark. 1; 32 *Id.* 516; 34 L. R. A. 448; 103 Ark. 109. The Legislature can not read a bill the *third* time and pass it in one house and on the same day read it a *first* and *second* time in the other house. 38 L. R. A. 71; 34 *Id.* 488. A majority of the land owners of the district did not consent to the construction of the improvement and the cost exceeded the 20 per cent. limit. Art. 5, § 25, Constitution; 117 Ark. 190.

HART, J. (after stating the facts). It is first insisted that the bill increasing the twenty per cent. limitation on the cost of the improvement is unconstitutional because, after being passed by one house, the bill was transferred to the other branch of the Legislature on the same day and read twice there.

This court has decided adversely to the contention of plaintiff in *Reitzammer* v. *Desha Road Imp. Dist. No.* 2, 139 Ark. 168. In that case the court held that under our Constitution a bill can not be read more than

twice in either house on one day; but that after it has passed one house it may be carried to the other house on the same day and read the first and second times there, provided the rules be suspended as required by the Constitution.

Section 1 of the act passed at the special session of the Legislature of 1920 provides that the commissioners of the two improvement districts above referred to are authorized to proceed with the work of constructing the improvement, although the cost thereof in each improvement shall exceed twenty per cent. of the assessed value of the real property in the district. Special Act 39, approved January 26, 1920.

Counsel for the plaintiff contend that this provision of the statute is unconstitutional and in that contention we think counsel are correct.

Article 19, section 27 of the Constitution provides that nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in town or cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. This section of the Constitution was complied with in organizing the district, and a majority in value, of the owners of real property within the proposed district in each case signed the petition asking for the construction of the improvement. At that time section 5683 of Kirby's Digest was in force. It provides that no single improvement shall be undertaken which alone will exceed in cost twenty per cent. of the value of the real property in such districts as shown by the last county assessment.

According to the allegations of the complaint the cost of the improvement in each district will exceed the twenty per cent. allowed by the statute.

From the provision of our Constitution set out above it is apparent that local improvements in cities and towns

must be based upon the consent of a majority in value of the owners of real property in the proposed improvement district. The foundation of the improvement is the petition of the owners of real property situated in the proposed district. The Legislature passed statutes for the purpose of carrying into effect the provision of the Constitution just referred to. One provision of the statute is that no single improvement shall be undertaken which alone will exceed in cost twenty per centum of the value of the real property in such districts as shown by the county assessments. Kirby's Digest, § 5683. This section was in force at the time the original petition in each of these districts was signed. It was evidently the intention of the framers of the Constitution that the petition when signed by the property owners must be considered with reference to the statutes then existing for the purpose of carrying into effect the Constitution. Otherwise a majority of the owners of real property might sign a petition thinking that the amount of taxation they would have to pay for the improvement was limited by the existing laws and the Legislature might afterward materially increase their burden of taxation. This principle was recognized in *Deane* v. *Moore,* 112 Ark. 254. In that case it was held that an amendatory act to the effect that the interest on the money borrowed by the improvement district should not be computed as a part of the cost of an improvement in so far as it related to the limit of twenty per centum. The court said that to give the amendatory statute that effect would be to impose an additional burden upon the property owners without obtaining their consent as required by the Constitution. It is claimed that this language was not necessary to a decision of that case. Strictly speaking, this is true, but the language used was a part of the reasoning of the court, and in any event it states a sound principle of law. When the consent of the property owners was first obtained, the petition signed by them should have been construed with reference to the existing laws on the subject. If the laws

carrying into effect the provision of the Constitution are subsequently changed so as to increase the burden of the taxpayers, a new petition must be filed as required by the Constitution. Of course, the statute might be amended in regard to the details of carrying out the improvement, but an additional burden can not be imposed upon the citizens by increasing the tax limit without getting up a new petition and obtaining a majority in value of the owners of real property in the proposed district. This principle was also recognized in *Bell* v. *Phillips,* 116 Ark. 167, and *Sembler* v. *Water & Light Imp. Dist.,* 109 Ark. 90.

Counsel for the improvement district rely upon the case of *Faver* v. *Wayne,* 134 Ark. 31, where the court held that the Legislature could by special act remove the thirty per cent. limitation provided in the Alexander Road Law as the limitation to be expended upon improvements undertaken under that act. The Alexander Road Law is purely a creature of the statute, and the Legislature in the first instance might have dispensed with the requirement that a majority in numbers, acreage, or value, of the owners of real property in the district should sign the petition for the creation of the district. Having the power to dispense with the requirement in the first instance, the Legislature might dispense with the requirement by a subsequent statute. Here the Constitution provides that a majority in value of the owners of real property within the proposed district shall sign the petition before the improvement can be undertaken. The petition must be considered with reference to the existing laws, and no subsequent act can add to the per cent. of taxation to be paid by the property owners without again obtaining their consent to the petition.

To sustain their contention, counsel for the improvement district also rely on sections 4 and 5 of Special Act No. 39, approved January 26, 1920. Section 4 reads as follows:

"Any local improvement district that may hereafter be organized in the city of Morrilton may expend any sum necessary to complete the improvement in the district, not

in excess of the assessment of benefits, and such district shall not be limited in cost of improvements to twenty per cent of the assessed valuation of the real property in the district."

Section 5 provides that if any part of the act is held to be invalid it shall not affect the remainder of the act.

Counsel for the improvement district contend that, even if section 1 of Special Act 39 is held to be unconstitutional, it may be stricken out without impairing the effect of the remainder of the act, because sections 1 and 4 are wholly independent, and section 5 provides that if any part of the act shall be held invalid, it shall not affect the remainder of the act. The contention of counsel is correct. This court has held that the unconstitutional portion of a statute may be stricken out without impairing the effect of the remainder of the act where the provisions are wholly independent, and it can be seen that the Legislature would have enacted the remaining part of the statute. *Snetzer* v. *Gregg,* 129 Ark. 542, and *Heinemann* v. *Sweatt,* 130 Ark. 70. This does not help counsel under the facts as disclosed by the record. Section 4, by its terms, is prospective in its operation and cannot apply to a district organized before its passage. It is clearly and manifestly repugnant to section 5683 of Kirby's Digest, which provides that no single improvement shall be undertaken which alone will exceed in cost twenty per centum of the value of the real property in such district as shown by the last county assessment. The special act raises the limitation of the cost of the improvement. The special act, being a later act, operates necessarily to engraft upon the prior and general statute a modification to the extent that the city of Morrilton in improvement districts organized after the passage of the special act may exceed the twenty per cent. limitation provided in the general act and to that extent was intended as a substitute for the general act so far as improvement districts thereafter organized in the city of Morrilton are concerned. 36 Cyc. 1093; 25 R. C. L., sec. 178, p. 929; *Walla Walla City* v. *Walla Walla Water Co.,* 172 U. S. 1; *United*

States v. *Matthews,* 173 U. S. 381, and *State* v. *Cosgrove* (Neb.), 26 L. R. A. (N. S.) 207.

This section, however, cannot apply to the present case because the proceedings for the organization of the district were commenced before the statute was passed.

It follows that the court erred in sustaining a demurrer to the complaint, and for that error the decree will be reversed and the cause remanded with directions to the chancery court to grant the prayer of the complaint.

CHISM v. THOMAS.

Opinion delivered May 10, 1920.

TENANCY IN COMMON—FIDUCIARY RELATION.—Where a tenant in common was acting for himself and his cotenants in the conduct of a partition suit leading to a decree for a sale and division, a relation of trust existed, which prevented him from acquiring rights in the land antagonistic to his cotenants.

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

STATEMENT OF FACTS.

This litigation arose out of prior litigation in which one Robert Tucker was declared to be a trustee for the benefit of himself and the other heirs of his mother and certain land held by him in trust was ordered sold for the purpose of partition. Commissioners who were appointed to partition the land reported that it was not to the best interest of the parties concerned that the land be partitioned in kind, and the court approved that report and ordered the sale, and appointed a commissioner to make the sale. There were nine beneficiaries of the trust so declared, and appellant's wife was one of them, and, by purchase, appellant had acquired two others' shares, which, with the one owned by his wife, gave him control of three shares, or a one-third interest. Appellant employed the attorney to file the original suit, and was active in its prosecution.

The land was advertised to be sold on October 31, 1918, and was sold on that day for a sum which netted the owner of each one-ninth interest the sum of $619.33. On the day before the sale appellee executed to appellant a deed to her one-ninth interest for a consideration of $250, paid in cash at the time, and after the sale by the commissioner she applied to, and received from the commissioner the sum of $619.33. Thereafter appellant brought this suit in the circuit court to recover the sum so received from the commissioner, and upon appellee's motion the cause was transferred to equity.

Appellee tendered into court the sum of $250 which had been paid her at the time she executed the deed, and she alleged in her answer that the execution of the deed had been procured by fraud, it having been represented to her by appellant that he wanted her to sign an instrument authorizing the court to sell the land, and that it was necessary, before the land could be sold, for her to sign the paper.

Appellant is appellee's brother-in-law, and both are negroes, and while both were ignorant of court procedure, appellee appears to have been even more so than appellant. Appellee testified that on the day before the sale appellant came to her and said, "I have got a paper here that you will have to sign before you can get any money," and as appellant had been looking after the litigation in which they were jointly interested, she executed and acknowledged the deed, and that when she discovered the effect of her action she told appellant she had been deceived, and he replied that "the law don't allow nothing for ignorance."

Appellant denied that he had practiced any deception, or had made any misrepresentation, but stated that appellee told him she had grown tired of the litigation and would be glad to take $250 for her interest and get out of it.

The notary public who took the acknowledgment testified that appellant was not present when the acknowl-

edgment was taken, and that the notary read the deed over to appellee, who stated that she knew what it was and that she voluntarily signed it. Appellee's signature was by mark.

Appellee admitted that the notary public read the deed over to her, but she supposed that it was the "sales paper," which appellant said would have to be executed for the court to sell the land, and that she was told by appellant (and believed it to be true) that she would get $250 then and would be paid more later when the land was sold.

Christina King, a sister of appellee, testified that appellee told her she was going to sell her interest in the land, and that the statement was made after the suit had been decided in their favor; but this witness went with appellee to the notary public and signed and acknowledged the deed at the same time, yet she said that "I signed, but I didn't sign to sell; I signed it to let them know I was willing for it to be sold, and get as much for it as I could. I had an understanding that I would sign this deed and I was to get whatever it brought with (appellant) Chism." And, notwithstanding the fact that Christina King signed and acknowledged the deed, she was not paid any sum by appellant, but received her full share from the commissioner.

It is appellee's theory that Christina King was a party to the fraud; but whether this is true or not, it is apparent that her conduct furnishes strong corroboration of appellee's statement. If, as she stated, she signed the deed in order that the land might be sold, then she, too, had been deceived, although no advantage was taken, or attempted to be taken, of her; and if she was not herself deceived, then it is reasonable to say that she was a party to the fraud.

The court rendered a decree in favor of appellee for the $619.33, less the $250 paid her when the deed was executed, and as that sum had been deposited with the clerk

of the court as a tender, appellant's complaint was dismissed. Other facts will be stated in the opinion.

Bratton & Bratton, for appellant; *Gardner K. Oliphint*, on the brief.

1. The case was properly triable at law and it was error to transfer it to equity. Defendant in a court of law could have availed herself of every defense. She assents, and plaintiff was entitled to a jury to pass upon his case.

2. The evidence shows positively that plaintiff perpetrated no fraud upon defendant. There was litigation over the estate of the deceased mother for a long time, ending with defendant being awarded, along with other heirs, an interest in the lands, the amount of such interest being incapable of ascertainment in dollars and cents before a sale was made by the commissioner. Defendant was well aware that she had been decreed an interest—that a sale would be made at some future time, and not until then could she realize any cash money. She wanted the money and was tired of the whole matter—her children were sick and she needed money badly. She sought the plaintiff to buy her interest; he at no time sought her. He finally agreed to pay her $250 for her interest. She appeared in the absence of plaintiff before a notary, when the deed was read and explained to her and she signed and acknowledged the deed for $250. The facts show that defendant not only intended to retain the $250 paid her, but that she intended to retain $619.33 wrongfully obtained from the clerk and if plaintiff had not instituted suit to recover the sum wrongfully obtained by her. She was perfectly willing and was going to sit peaceably and enjoy the fruits of her own fraud. The evidence does not support the decree, as plaintiff perpetrated no fraud upon defendant. 9 Ark. 482; 22 *Id.* 184-6. The decree should be reversed upon the evidence.

Carmichael & Brooks, for appellee.

The record shows a bold case of fraud on part of appellant. The confidential relation of cotenants had not terminated at the time the appellant made the purchase and appellee was misled. This court can easily see, as the court below found, that the whole thing was a trick or scheme to beat appellee out of her interest. The decree of the chancellor is not against the preponderance of the evidence and should not be disturbed. This case is very similar to 58 Ark. 542; 49 *Id.* 242. The law forbids a trustee or *quasi* fiduciary from taking personal advantage touching the subject of such fiduciary position. Chism was a tenant in common by descent, as well as Chism's wife, and the fiduciary relation did not change until there was a sale and the money divided, and the case should be affirmed.

SMITH, J. (after stating the facts). Appellant was the purchaser at the commissioner's sale, and, although he testified that the land was worth only fifty to sixty dollars per acre, he admitted that he was prepared to pay $150 per acre for the land, a sum largely in excess of the price he was required to pay; but even at the price which he did pay a single interest was worth $619.33; and yet, on the day before the sale, he paid appellee only $250 for her interest.

The court below did not cancel appellee's deed, as it was unnecessary to do so to administer full and complete relief; but the testimony would have warranted that action had it been necessary. Appellant and his wife were tenants in common with appellee, and appellant had been acting for himself and his cotenants in the conduct of the suit leading to the decree under which the sale was had, and a relation of trust and confidence thus arose, the law of which relationship is stated in *Dunavant* v. *Fields,* 68 Ark. 542, as follows: "In *Clements* v. *Cates,* 49 Ark. 242, this court said: 'The law forbids a trustee, and all other persons occupying a fiduciary or *quasi* fiduciary position from taking any personal advantage touching the

thing or subject as to which such fiduciary position exists;' or, as expressed by another, 'wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights in the subject antagonistic to the person with whose interest he has become associated. * * * This rule applies to tenants in common by descent with the same force and reason as it does to persons standing in a direct fiduciary relation to others.' There is no perceptible difference, in this regard, between the case of tenants in common by descent and that of tenants in common by devise."

The decree is correct, and is therefore affirmed.

CHAS. F. LUEHRMANN HARDWOOD LUMBER COMPANY v. COATS & GREEN.

Opinion delivered May 10, 1920.

1. SALES—BREACH OF CONTRACT BY BUYER.—Where a contract for the sale of lumber stipulated that inspection and payment should be made at the point of shipment, and the buyer refused to make such payment until the lumber was delivered, this constituted a breach of the contract.
2. SALES—EFFECT OF BREACH OF CONTRACT.—Where the buyer of lumber committed a breach of the contract by refusing to pay for the lumber at the point of shipment, the seller was not liable for failure thereafter to perform the contract.
3. APPEAL AND ERROR—CONCLUSIVENESS OF COURT'S FINDINGS.—Findings of fact by the chancellor which do not appear to be clearly against the perponderance of the evidence will not be disturbed on appeal.

Appeal from Lawrence Chancery Court, Eastern District; *Lyman F. Reeder,* Chancellor; affirmed.

Oliver & Oliver, for appellant.

1. According to the finding of the court below the lumber replevied belonged to appellant. They had bought it, inspected it, taken possession of, tagged and

insured it. It was their property and if it had been fully paid for appellant would be entitled to judgment against appellee for its full value. As it had not been fully paid for, and as the payments that had been made on it were applied to the payment of the lumber received by appellant, appellant is entitled to judgment against appellees for the difference between the purchase price of the lumber and its value at the time of its conversion, which the proof shows was on every grade from $10 to $12 per thousand feet. So, regardless as to who breached the contract, appellant should recover not less than $10 per thousand on the lumber converted, or $140. The court erred in refusing to find in appellant's favor on this point.

2. The finding of the court below was that appellant had breached the contract with appellees by its failure to place a regular stock order for additional lumber and by its failure and refusal to inspect and take up lumber on the yards and to pay therefor in cash when loaded, and that this default in the performance of the conditions of the contract released defendants from further performance on their part. The evidence is clearly contradictory to the court's findings on these propositions. The only breach of contract assigned or pleaded by appellees is that appellant agreed to make advances and failed and refused to do so as agreed upon by the parties. The contract under which appellant bought the lumber, and admitted to be the contract by all parties, says that the lumber is to be put on sticks and shipped when ordered out, terms to be 2 per cent. off for cash *when loaded.* The evidence shows that the court erred in its findings. There is no evidence to sustain its findings and the decree should be reversed.

3. The measure of damages is the difference between the contract price at the time and place of delivery and the market price on the date on which appellant first learned or was notified that appellees would refuse to comply with their contract. 57 Ark. 257; 79 *Id.* 338; 117 *Id.* 442; 121 *Id.* 150.

The proof is uncontradicted that the market value of the lumber at Ponder's Switch, where the lumber was to be delivered on March 8, 1918, the date on which appellees notified appellants that they would not comply with their contract, was $10 per thousand feet above the contract price. They failed to deliver 343,016 feet which they agreed to deliver and were liable for $3,430.16, from which is to be deducted $482.35, the amount which appellant owed on the lumber received, and appellant should have judgment for $2,947.81, with 6 per cent. interest from March 1, 1918.

Smith & Gibson, for appellees.

The evidence fully sustains the findings of the chancellor and the decree should be affirmed.

SMITH, J. Appellant is a corporation, with its situs in St. Louis, Missouri, and is a dealer in lumber. Appellees were a copartnership, and owned and operated a sawmill at Ponder's Switch, about six miles east of Hoxie on the Frisco railroad. Appellant and appellees entered into a contract in writing on June 6, 1917, whereby appellees, for a priece there specified, agreed to saw for appellant 400,000 feet of gum lumber. The contract contained the following provisions:

"To begin cutting by 1st of July, and complete the order in three months. Lumber to remain on sticks from 90 to 120 days, or as ordered loaded by C. F. Luehrmann Hardwood Lumber Company.

"This order to be followed up with regular stock order from Chas. F. Luehrmann Hardwood Lumber Company."

On August 14, 1917, appellant advanced $500, and on September 9, 1917, made an additional advance of $250, and on each occasion took a bill of sale for certain piles of lumber therein described. Appellees contended that these bills of sales were mere mortgages intended to secure the advances made; but the court found that they were in fact bills of sale, and appellees have prosecuted no appeal from that finding.

A controversy arose between the parties, and appellant brought suit in replevin for the lumber covered by the bills of sale, and by an amended complaint prayed judgment for damages for breach of the contract to deliver lumber. An answer was filed to the original complaint, in which ownership of the lumber replevied was denied; and while no answer appears to have been filed to the amended complaint, its allegations were treated as being in issue. The cause was transferred to the chancery court, and was tried without any question of misjoinder of causes of action having been made, and as these causes could, under the act of May 11, 1905 (Acts 1905, page 798), have been consolidated and heard together, had they been brought separately, we proceed to a consideration of the merits of the questions presented, as did the court below.

Appellees resisted the claim for damages upon the ground that appellant had breached the contract by a failure to comply with its terms and had thereby absolved appellee from the legal duty of continued performance. The court below expressly found the fact to be that appellant had failed to make advances upon the lumber; but it does not appear that the contract contained any such requirement.

Under the order of delivery which issued in the cause appellant took possession of the piles of lumber contained in the bills of sale, and, after inspection, shipped it out. The lumber thus shipped measured out 56,984 feet, whereas in the bills of sale the piles so shipped were estimated to contain 70,000 feet, and judgment was prayed for the loss of profits sustained on this difference of approximately 14,000 feet. As to the lumber covered by the bills of sale the court found that the sums of money there recited as paid were advanced as portions of the purchase money, and that nothing remained to be done except to grade the lumber according to the "National Rules," as provided by the contract between the parties, and to pay the balance of purchase money when so de-

termined. The court found this balance to be $482.33, and rendered judgment in appellee's favor for that amount.

The testimony showed an enhancement of from ten dollars up per thousand in the market price of the lumber; but the court refused to award any sum as damages for the deficiency of 14,000 feet for the reason that the recitals in the bills of sale as to amount of lumber sold was a mere estimate, and the bills of sale conveyed only the lumber in the piles—much or little, and we are unable to say that that finding is clearly against the preponderance of the evidence.

The court also expressly found the fact to be that appellant had failed to furnish regular stock orders for additional lumber, and had failed to pay in cash for lumber when loaded, and that these defaults in the performance of the conditions of the contract released appellees from further performance on their part, and the correctness of this finding presents the controlling question in the case.

The senior member of the firm of Coats & Green was also the senior member of the firms of Coats & Inman and Coats & Milner, and appellees insist that this was but one partnership, in which Milner bought Inman's interest and, in turn, sold to Green. It is not clear, however, that this statement is correct; and it does appear that Coats operated at least two mills, and one of them under the firm name of Coats & Milner. That firm also had a contract with appellant to saw lumber, and there was a controversy over its terms; but it would, of course, make no difference whether appellant breached its contract with Coats & Milner if it in fact complied with the terms of the contract it had with appellees.

The record contains correspondence between the parties, which shows that the differences between them became accentuated as the correspondence progressed. Appellees were complaining of appellant's failure to inspect and load out the lumber, and in a letter dated March 7, 1918, appellees declared themselves absolved from fur-

ther obligation to perform because of breaches of the contract on appellant's part. The circumstances stressed in this letter was that a draft drawn to cover three cars of lumber (which had been inspected and loaded and shipped by appellant's representative) had been drawn on, and dishonored by, appellant. A reply to this letter was written in which it was stated that, "While, if the writer had been in town when this draft was returned, might not have returned it, still I am of the opinion that, without any advice from Mr. Alexander, to the effect that you were going to draw a draft on us for the stock, and if he had advised us you were going to ship this stock subject to delivered inspection, and taking in consideration the fact that the office had no means of knowing how you are in your inspection, it would appear to be perfectly all right for the office to have had a doubt as to the advisability of paying the draft without having specific instructions." This letter also stated that, "We think, however, that we should see the lumber before we pay for it practically in full." The imposition of this condition in regard to inspection operated as a demand that final inspection should be made at the point of delivery, rather than at the point of shipment, and the contract did not give that right. By the terms of the contract lumber was "to be taken up on grades, National Rules to govern (at prices stated), all f. o. b. a 13-cent rate to St. Louis," and the terms of payment specified in the contract were "2 per cent. for cash when loaded." The lumber was "to be taken up" at the mill, and the contract provided how the inspection would be made, and the insistence that the inspection should be made otherwise or elsewhere, as a condition precedent for payment, while the contract required payment when loaded, constituted a breach of the contract.

One can not refuse to perform a contract according to its terms, and thereafter insist that the other party perform. So if, as the court found, appellant had failed to perform the contract, either by furnishing specifica-

tions for sawing, or in paying for lumber taken up, then it could not thereafter demand, as damages, the profit which would have accrued had appellees continued in the performance of the contract, notwithstanding appellant's prior breach thereof. *Gauger* v. *Sawyer & Austin Lbr. Co.*, 88 Ark. 422; *Harris Lbr. Co.* v. *Wheeler Lbr. Co.*, 88 Ark. 491; *Rodgers* v. *Wise*, 106 Ark. 310, 43 L. R. A. (N. S.), 1009.

The court's finding of fact appears to be not clearly against the preponderance of the evidence, and will, therefore, be affirmed.

CONLEE v. MILLER.

Opinion delivered May 10, 1920.

1. HIGHWAYS—MAINTENANCE DISTRICT.—The organization of an improvement district for the purpose of maintaining and keeping a public highway in repair does not constitute an invasion of the jurisdiction of the county court.
2. STATUTES—SPECIAL STATUTE—NOTICE.—Special acts 1920, No. 63, approved February 6, 1920, validating assessments of benefits in a certain road improvement district, will not be held invalid on the ground that thirty days' notice could not have been given to apply for passage of an act curing such assessments, the assessment rolls not being filed with the county clerk thirty days prior to the approval of the act, as the General Assembly might have found that the assessments were completed some time before they were filed.

Appeal from Yell Chancery Court, Dardanelle District; *Jordan Sellers*, Chancellor; affirmed.

Reid, Burrow & McDonnell, for appellant.

SMITH, J. The two cases herein consolidated involved attacks on the constitutionality of Act No. 244, passed by the Legislature of 1919, creating the Dardanelle Road Improvement District of Yell County, and the suits also attack the constitutionality of Act No. 63 of the special session of 1920, validating the assessment of benefits in said district.

Appellants candidly concede that the points involved in the attack upon Act 244 have, since the institution of the litigation, been involved in other litigation and decided adversely to their contentions here; but say that these questions have been considered at such recent date and are of such paramount importance that the attention and consideration of the court is asked before these questions are finally foreclosed.

The chief insistence is that the organization of an improvement district for the purpose of maintaining and keeping a public highway in repair constitutes an invasion of the jurisdiction of the county court. But that question was disposed of in the recent case of *Dickinson* v. *Reeder,* 143 Ark. 228, adversely to appellant's contention.

It is insisted that Act No. 63, passed at the special 1920 session and approved by the Governor on February 6, 1920, is void, for the reason that thirty days' notice could not have been given of the intention to apply for the passage of an act curing these assessments, for the reason that the assessment rolls were not filed with the county clerk of Yell County until January 26, 1920, which is less than thirty days prior to the approval of the curative act by the Governor.

But this showing is not conclusive of the question of notice. The General Assembly might have found, for instance, that the assessments were completed some time before they were filed, and since the decision in the case of *Davis* v. *Gaines,* 48 Ark. 370, it has been uniformly held that all questions relating to the sufficiency and form of notice, and proof of publication of notice, in regard to special bills, were matters which were addressed to the Legislature, and which could not be reviewed by the courts. *Gibson* v. *Spikes,* 143 Ark. 270.

No error appearing in the finding or decree of the court below, the decree is in each case affirmed.

HART, J., not participating.

NEW CORONADO COAL COMPANY v. JASPER.

Opinion delivered May 10, 1920.

1. REMOVAL OF CAUSES—JOINT LIABILITY.—Material allegations of a complaint charging joint liability against a resident and a nonresident defendant must be traversed in a petition for removal to the Federal court by a statement of facts conclusively showing that the plaintiff fraudulently joined the defendants in the suit to deprive the nonresident defendant of his right to a trial of the cause in the Federal court, and such petition should preclude every theory of joint liability.
2. REMOVAL OF CAUSES—SUFFICIENCY OF PETITION FOR REMOVAL.—In an action against resident and nonresident defendants to recover damages for conversion of coal, a petition for removal of the cause to the Federal court which failed to traverse material allegations of the complaint as to the joint liability of the defendants was insufficient.
3. MINES AND MINERALS—WRONGFUL MINING OF COAL.—In an action against several defendants for conversion of coal, evidence *held* to sustain a finding that the acts of the defendants in taking coal from plaintiff's mine were wilful, wanton and malicious.
4. EVIDENCE—RECORD IN ANOTHER SUIT.—In an action against several defendants for wrongful taking of coal and wrongful pulling of pillars in a mine, it was not error to permit the complaint and proceedings in a prior suit to be read for the purpose of showing that defendants' foreman knew the location of the dividing line between plaintiff's and defendants' mines at the time the pillars were pulled; such foreman having testified to the nature of the former suit, thereby showing a knowledge of the contents of the complaint.
5. PARTNERSHIP—EFFECT OF JUDGMENT AGAINST.—Where two members composing a partnership are sued, but service is only upon one of them, a judgment against the partnership binds the latter personally, and also the partnership funds impounded by attachment or garnishment.
6. APPEAL AND ERROR — HARMLESS ERROR.—A judgment against a partnership by its firm name, when only one of the two partners was served, was not prejudicial to the partner who was served.
7. TRIAL — AMBIGUOUS INSTRUCTION — SPECIFIC OBJECTION.—Specific objection should be taken to an ambiguous instruction.
8. MINES AND MINERALS—LOSS OF PROFITS AS DAMAGES.—Where an adjoining owner wrongfully pulled the pillars in plaintiff's mine causing a squeeze and rendering it impossible for plaintiff to mine coal which he had contracted to sell, it was proper to charge that the measure of damages was the profit which plain-

tiff would have netted on the unrecoverable coal; such profits being ascertainable with reasonable certainty.

9. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.—It was no abuse of discretion to refuse a new trial for newly discovered evidence where one of the defendants prior to the trial knew of the witness by whom the evidence was to be shown and that he might testify favorably for defendants.

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

Warner, Hardin & Warner, for appellants.

1. It was error to overrule the petition for removal filed by defendant Malone to the Federal court. The petition was properly verified and a bond in proper form offered. 50 Ark. 388; 75 *Id.* 116; 87 *Id.* 136; 29 U. S. (Law. Ed.) 962; 33 *Id.* 144; 51 *Id.* 430; 30 Okla. 235; 122 U. S. 514; 108 *Id.* 561; 111 *Id.* 358; 130 *Id.* 230.

2. The testimony is insufficient to sustain the finding that the defendants mined, or caused to be mined, the pillars of coal in the plaintiff's mine. The burden of proof was on the plaintiff. 92 Ark. 297; 84 Atl. 9; 173 Mass. 45; 54 S. E. 287; 52 Atl. 349; 56 S. E. 695; 38 Cyc. 1121; 93 Ark. 397.

3. There was no wanton, wilful and malicious conversion of coal by the defendants. Plaintiff was entitled only to a judgment equivalent to the royalty on the coal mined in its natural state on the ground. 123 Ark. 127; 65 *Id.* 448; 122 *Id.* 341.

4. The court erred in giving plaintiff's instruction No. 1. 30 Cyc. 556; 20 R. C. L. 936. As a whole the instruction is ambiguous and confusing.

5. The court erred in giving instruction No. 2 for plaintiff. 74 Ark. 19; 69 *Id.* 380; 71 *Id.* 518.

6. It was error to allow the complaint and summons to be read in evidence. 1 Enc. of Ev. 426; 102 Ark. 640. The evidence of the deputy sheriff was also improperly admitted. It was incompetent.

7. The motion for new trial should have been granted because of the newly discovered evidence.

There was an abuse of the discretion of the court. 41 Ark. 229; 107 *Id.* 498.

Covington & Grant, for appellee.

1. The evidence warranted the verdict.

2. The law is well settled. The jury found that appellants had wilfully committed the unlawful acts complained of and their finding is conclusive. Appellants took the coal intentionally and with a reckless disregard of the rights of appellee, and they must respond in damages for the full value of the property unlawfully converted without deduction for labor or expenses incurred in removing or preparing it for market. If they took it unintentionally or in the honest belief that they had a lawful right to it, they are liable for the value of the coal in the ground. 173 Fed. 340; 87 Ark. 80; 69 *Id.* 302; 65 *Id.* 448. The case in 92 Ark. 297 is not applicable to the facts here, nor is 123 *Id.* 127.

3. There is no error in the instructions given. Appellants and did not move to make McKoin a defendant, and it too late to complain now. 66 Ark. 560; 215 S. W. 694; 8 R. C. L. 508; 17 C. J. 785; 103 Ark. 588.

4. There was no error in admitting the testimony offered for plaintiff. 102 Ark. 640 does not sustain their contention.

5. The motion for new trial for newly discovered evidence was properly overruled. It was not sufficient.

HUMPHREYS, J. Appellee, John W. Jasper, instituted this suit against appellants, Arkoal Mining Company, a corporation, C. A. Beggs, B. J. Malone, Minnie Malone, M. A. Malone, A. M. Malone, and the New Coronado Coal Company, a partnership, alleged to have been composed of the five last named parties, in the Sebastian Circuit Court, Greenwood District, to recover damages in the sum of $55,681.50, on account of (1) wanton, wilful and malicious conversion of 2,820 tons of coal out of Central Mine No. 5, on the southeast quarter of the southeast quarter, section 21, township 5 north, range 31 west, in said county, and (2) the wanton, wilful and malicious

pulling of pillars in said mine, causing the roof to fall or squeeze down, thereby preventing appellee from mining 16,410 tons of solid coal and 10,000 tons of pillar coal.

The complaint contained an allegation, among others, that the appellants owned and operated a mine known as the "Phoenix property" just south of "Central No. 5 property" aforesaid; that B. J. Malone was general superintendent and C. A. Beggs mine foreman of the New Coronado Coal Company, and the members of said partnership operating the "Phoenix property;" that B. J. Malone, as such general superintendent, wrongfully directed the other employees of said company, as well as the mine foreman; and that C. A. Beggs, as such mine foreman, wrongfully directed the other employees to make openings from the land and coal in the Phoenix property into and through the land and coal of Central No. 5 property, and, pursuant to said unlawful, wilful and wanton directions, did wrongfully take 2,820 tons of coal and cause the roof to cave in so as to prevent appellee from mining 16,410 tons of solid coal and 10,000 tons of pillar coal.

A. M. Malone filed a petition and bond for removal of the cause to the United States District Court for the Western District of Arkansas, setting up that the controversy involved issues between himself and appellee alone, in which appellee claimed damages against him in the sum of $55,681.50, on account of an alleged wrongful act of removing and mining coal underneath land held by appellee under lease; that he was a nonresident and appellee a resident of the State of Arkansas; that the only residents of the State made defendants in appellee's suit were C. A. Beggs, B. J. Malone and Minnie Malone, who had no interest whatever in the issues involved in the litigation; that they were joined as defendants in appellee's suit for the fraudulent purpose and with the fraudulent intent to prevent a removal of the cause from the State to the Federal court; that the mining operations of the "Phoenix property" were under his immediate direc-

tion; and that C. A. Beggs, B. J. Malone and Minnie Malone were in the employ of petitioner and his partner, C. M. McKoin, and that neither of said parties was charged with the duty of directing or superintending the mining operations of the petitioner and C. M. McKoin aforesaid; that none of the alleged wrongful acts set forth in the complaint were done by either C. A. Beggs, B. J. Malone or Minnie Malone, or with their knowledge or under their directions.

The petition to transfer the cause was overruled by the court, to which ruling, appellants objected and excepted.

Thereupon, A. M. Malone filed a separate answer, in which he admitted that the New Coronado Coal Company was composed of C. M. McKoin and himself, and that they mined 1,497 tons of coal out of a solid body in "Central No. 5 property," but charged that they did so in good faith, under an agreement which they believed gave them the right to do; that he was willing to pay a reasonable royalty for the coal so mined; and in which he specifically denied all other material allegations of the complaint.

C. A. Beggs, B. J. Malone and Minnie Malone filed separate answers, in which each specifically denied all the material allegations in the complaint.

The Arkoal Mining Company and M. A. Malone were not served and did not appear, and C. M. McKoin was not made a party and did not appear.

The proceeding was by attachment and garnishment. In response to the writs of garnishment, the McAlister Fuel Company admitted an indebtednes of $4,899.92 to the New Coronado Coal Company, and paid the amount into court; and the Merchants National Bank of Fort Smith admitted an indebtedness of $3,165.30 to the New Coronado Coal Company and $142.60 to A. M. Malone, personally, and gave bond to pay same into court; and the Huntington State Bank admitted an indebtedness to C. A. Beggs of $142.60 and paid it into court.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, which re-

sulted in a verdict and judgment in favor of appellee for $11,000.35 against the New Coronado Coal Company, a partnership composed of A. M. Malone and C. M. McKoin, and against A. M. Malone and C. A. Beggs, upon the theory that said parties had wrongfully converted 1,497 tons of coal belonging to appellee, of the value of $3,068.85, at the rate of $2.05 per ton, the price for which appellee had contracted to sell it on board cars; and for $7,931.15, lost profits on 26,413 tons of coal rendered unrecoverable by wrongfully pulling pillars in "Central No. 5 property," thereby causing the roof to cave in or squeeze down and obstruct the opening to the coal. The garnishments were all sustained, the money, deposited in the court in response to the writs, was ordered paid to appellee, and judgment rendered in his favor against the garnishee and its bondsman which had not paid the fund into court. From the judgment, an appeal has been prosecuted under proper proceedings to this court.

The record is too voluminous to incorporate a summary of the evidence of each witness in this opinion, and, for that reason, we can only make a general statement. Certain defendants were dropped from the suit for want of service and other causes, so the suit is one by appellee against C. A. Beggs, A. M. Malone and the New Coronado Coal Company, composed of A. M. Malone and C. M. McKoin. In the fall of 1917, appellee purchased a tract of land called "Mottu property," west of "Central No. 5 property," which is a coal mine on the land heretofore described. On January 8, 1918, he leased "Central No. 5 property" for a term of two years for mining purposes, agreeing to sell the output of the mine for $2.05 per ton, on board cars, to the owners of the property. Prior to the purchase of the "Mottu property" and the lease of "Central No. 5 property," appellee, in connection with L. E. Lake, under the corporate name of "Phoenix Coal and Mining Company" for a number of years operated the coal mine known as the "Coronado property" under lease. On July 20, 1917, the Phoenix Coal

& Mining Company was ousted and the land sold and afterward conveyed to the Arkoal Mining Company, a nonresident corporation. A. M. Malone and C. M. McKoin leased it as partners under the partnership name of New Coronado Coal Company. The New Coronado Coal Company began to operate the mine in October, 1917. B. J. Malone was employed as general superintendent and directed the work on top of the ground. C. A. Beggs was employed as foreman and had direction of the work under ground. Between October, 1917, and June, 1918, the New Coronado Coal Company, by direction of A. M. Malone, under the supervision of the company's foreman, C. A. Beggs, crossed over the north line of the "Coronado property" on to "Central No. 5 property," mined and hauled out of the solid body of coal thereon 1,497 tons, taking it to the surface through the "Coronado property." After having mined that amount, the owner, Central Coal & Coke Company, enjoined appellants in the courts from mining more. Appellants' testimony tended to show that they mined the coal in good faith, believing appellee had surrendered his lease on the particular land from which the coal was taken, and that they had made an arrangement for exchange of coal by which they would acquire the title to the coal so mined.

Appellee's testimony tended to show that he declined to surrender his lease, and, in the face of his refusal and with full knowledge of his rights, appellants mined the coal.

Upon the damage issue growing out of the alleged pulling of the supporting pillars between the "Coronado property" and "Central No. 5 property," appellants' witnesses, to the number of eight or nine, testified that the pillars in question were pulled by appellee in the spring of 1917, while operating the "Coronado property" in the corporate name of "Phoenix Coal Company;" that the caving of the roof occurred while witnesses were in the employ of the Phoenix Coal Company,

and not after the New Coronado Company began to operate the mine; that the condition of the roof in "Central No. 5 property" at the time they testified was the same as when they pulled the pillars in the spring of 1917.

Appellee's witnesses testified that the squeeze, which obstructed the entry or slope and covered the track from the "Mottu" mine into and through "Central No. 5 property" along the south side thereof to the body of coal on the east end, was caused by the pulling of the pillars in the spring of 1918, along the line between the two latter properties; that they did not pull them; that early in the month of July, 1917, and later in the month when the Phoenix Coal Company was ejected from the "Coronado property," the pillars were intact and had been standing for ten or twelve years.

Appellants' motion for new trial contained a request for new trial on account of newly discovered evidence of L. E. Lake. The evidence set out in the motion, to which Lake would subscribe, if present, was that he had personal charge of the mining operation of the Phoenix Coal & Mining Company in "Central No. 5 property" prior to and up to May 1, 1917, and that in April of that year the pillars in question were pulled under the supervision of Bert Agnew at his direction; that appellants had no knowledge or means of knowing, and, after making diligent inquiry, did not learn of the facts to which Lake would testify or that he resided in Newton County until after the trial. The motion for new trial was denied over the objection and exception of appellants.

It is first contended that the court committed reversible error in overruling the petition to remove the cause to the Federal court. The sole guide for a proper determination of this question must be found in the allegations of the complaint and petition for removal. The material allegations of the complaint, charging joint liability against resident and nonresident defendants, must be traversed in the petition of removal by a statement of facts conclusively showing that the plaintiff fraudulently

joined the defendants in the suit to deprive the nonresident defendant of his right to a trial of the cause in the Federal court. *C., R. I. & P. Ry. Co.* v. *Schwyhart,* 227 U. S. 184. We do not think the charge in the complaint that C. A. Malone individually, and as a partner in the New Coronado Coal Company, became a joint tort feasor with B. J. Malone and C. A. Beggs on account of their acts, respectively, as general superintendent and mine foreman, in ordering their employees to mine coal and pull pillars in appellants' mine, was sufficiently traversed. It is true A. M. Malone in the petition attempts to controvert joint liability by alleging that the wrongful acts charged "were not done or suffered to be done by either the said Beggs, B. J. Malone or Minnie Malone, nor were they done with their knowledge or under their directions, and that they are in no way responsible for the alleged damages." In other words, it is charged in the petition for transfer that A. M. Malone himself directed the employees, including Beggs and B. J. Malone. It is not denied in the petition to transfer that B. J. Malone was superintendent and C. A. Beggs mine foreman of the New Coronado Coal Company, composed of A. M. Malone and C. M. McKoin. Without such denial, the traverse was insufficient because A. M. Malone, individually and as a partner, would be liable jointly with either or both for acts done by them within the scope, or apparent scope, of their authority. In order to effect the transfer of the cause, the petition of removal should have precluded every theory of joint liability of the resident and nonresident defendants. There was no error in overruling the petition to transfer.

It is next insisted that the evidence is insufficient to support the verdict (1) because there is no evidence to show appellants pulled the pillars, which produced the squeeze that obstructed appellee's passageway to his coal in "Central No. 5 property." Appellee testified that in April, 1918, he laid a track from the "Mottu property" on the west in an easterly direction through the old workings

in "Central No. 5 property" to a solid block of coal on the east side thereof for the purpose of mining it; that the New Coronado Coal Company was at the time working in the "Coronado property" immediately south of No. 5, aforesaid; that the pillars were standing when he built his track; that he did not pull them; that they were pulled, which caused the roof of "No. 5" to cave in, cover his track and obstruct his passageway to the solid body of coal on the east. Marvin Repass testified that he helped appellee lay the track; that it was 800 or 900 feet long; that the squeeze, which covered it up and shut appellee out from the solid body of coal, came after the track had been laid and the caving of the roof came from the direction where the New Coronado Coal & Mining Company, or Malones, were mining; that none of the pillars were pulled by appellee or his employee.

The two mine inspectors, Boyd and Shaw, testified that the pillars along the line between the two properties were standing in the spring of 1917, Boyd saying they were standing as late as July 7, 1917.

It is impossible to read the evidence without concluding that either appellants or appellee pulled the pillars in question. The evidence just detailed was substantial testimony from which the jury were warranted in concluding that appellants pulled the pillars, which caused the squeeze that cut appellee off from his coal and was sufficient in this particular to support the verdict. (2) Because there is no evidence to show a wrongful conversion of the coal taken or a wrongful pulling of the pillars. The testimony offered by appellee, with reference to the conversion of 1,497 tons of coal, tended to show that it was converted after several futile attempts to get appellee to surrender his rights thereto under lease from the owners of "Central No. 5 property," and that appellants continued the trespass until restrained by court order; and that offered, with reference to wantonly pulling the pillars, that they were pulled with knowledge as to the location of the line between the two properties and that

the effect of pulling them would be to destroy appellee's entry, cover up his track of 800 or 900 feet, over which he was hauling coal from the east end of his mine, and to permanently cut him off from it and the pillar coal in the mine. This evidence was sufficient upon which to base an inference that the acts were wanton, wilful, malicious ones, and therefore enough legal, substantial evidence to support the verdict in this regard.

It is next insisted that the court erred in permitting the complaint and other proceedings to be read to the jury in a suit filed November 17, 1917, by the Central Coal & Coke Company against C. A. Beggs and others, to prevent them from taking coal off of the tract of land in question. This evidence was offered and admitted by the court for the sole purpose of showing that C. A. Beggs, foreman of the New Coronado Coal & Mining Company, knew the location of the dividing line between "Central No. 5 property" and the "Coronado property," at the time the pillars in said No. 5 were pulled. C. A. Beggs testified to the nature of the injunction suit and disposition made of it, thereby showing a knowledge of the contents of the complaint. We think the complaint and proceeding admissible for the purpose offered.

It is next insisted that the court erred in giving appellee's instruction No. 1 (1) because the jury was directed to find against the New Coronado Coal Company for 1,497 tons of coal. This was the coal A. M. Malone and C. A. Beggs admitted taking from "Central No. 5 property" for the partnership and for which they offered to pay a reasonable royalty. The contention is made that the instruction is in conflict with the rule of law that a partnership can not be sued as an entity and judgment rendered against it as such. The suit was not against the partnership as a legal entity, nor was judgment rendered against it as such. The suit was against the New Coronado Coal Company, a partnership composed of A. M. Malone and C. M. McKoin. Judgment was rendered against it as an association of persons. There being no

personal service on C. M. McKoin, the other partner, the effect of the suit and judgment was to bind A. M. Malone personally and as a partner, as well as the partnership fund impounded by attachment and garnishment. We are unable to see how any prejudice resulted to A. M. Malone, the only partner served, by the direction given to the jury of which complaint is made. (2) Because the instruction assumed without justification that there was testimony from which the jury could find that C. A. Beggs directed the employees of the partnership and of A. M. Malone to remove the pillars from appellee's mine. We do not think the instruction assumed that there were separate employees of Malone and the partnership and that C. A. Beggs directed all of them to do the wrongful act. The instruction in effect told the jury that A. M. Malone was liable individually and as a partner if the foreman wrongfully directed the employees, meaning one set of employees, to pull the pillars which caused the roof in said mine No. 5 to fall. If there was any doubt as to whether the court meant one or two sets of employees, appellants should have made a specific objection challenging the instruction on account of ambiguity. (3) Because the instruction was misleading in that it was impossible for the jury to determine from the wording which Malone was the servant and which the master. The failure to insert the initials "B. J." before Malone could not have misled the jury. The undisputed evidence showed that B. J. Malone was the superintendent or employee, and by another instruction he was exempted from liability, so there could not have been a misunderstanding that A. M. Malone was intended by the use of the word "master" in the instruction. (4) Because there was no evidence to warrant the submission of the issues as to whether appellants wrongfully removed the pillars in question. We ruled otherwise in the discussion of the question whether there was sufficient legal evidence to support the verdict. (5) Because the instruction permitted a recovery for coal wrongfully converted at its

reasonable value at the mouth of the shaft without deducting 25 cents per ton provided for in his contract of sale thereof to the Central Coal & Coke Company. The deduction provided for was a means adopted by appellee to pay an indebtedness of $1,139.03 he owed the Central Company on a past transaction, so it would have been improper to deduct this amount from the damages assessed against appellants for wilful conversion.

It is also insisted that the court erred in giving appellee's instruction No. 2, by charging therein that the measure of damages was the profit that appellee would have netted on the unrecoverable coal lost by the wrongful removal of the pillars. The contention is made that the correct rule for the measure of damages was the value of the leasehold estate, if destroyed by a wanton act of appellants, and not the profit which appellee might have made. It seems allowable as a general rule to award profits as damages resulting from tortious acts, if ascertainable with reasonable certainty. 8 R. C. L. 508; 17 C. J., p. 785. In the instant case, the proof showed that appellee lost 27,800 tons of coal, 1,389 tons more than he claimed, on account of the squeeze, which the jury found was occasioned by appellants' wanton act of pulling the pillars in "Central No. 5 property," which was contracted to be sold at $2.05 per ton on board cars, with expense of $1.70 per ton for mining and placing same on top at pit mouth; that the entire amount, with reasonable effort, could have been mined before the expiration of appellee's lease. Appellee's net profit would have been 35 cents on each ton claimed, or a total of $9,244.55, if placing the coal on top at pit mouth meant on board cars at pit, and there is nothing to show to the contrary. The jury awarded a much less amount as damages. The damages allowed were reasonably well established by the evidence.

Lastly, it is contended that the court erred in not granting a new trial on account of the newly discovered evidence of L. E. Lake, who was a stockholder and man-

ager of the Phoenix Coal & Mining Company in 1917, when, according to appellants' contention, the pillars were pulled and roof caused to fall by said company. C. A. Beggs, one of the appellants, must have been cognizant of Lake's interest in and management of the Phoenix Company, as he worked for the company as foreman for a long time and during the spring of 1917. Lake was not far away. No effort was made to get him or his evidence before the trial. The only excuse offered is that appellants had no idea what Lake would testify to until after the trial. Beggs' former connection with the company ought to have suggested that Lake, the former manager, could testify favorably for them. Sufficient diligence was not shown before the trial, and it can not be said the court abused its discretion in refusing the motion for a new trial on account of newly discovered evidence.

No error appearing, the judgment is affirmed.

YOUNG v. STATE.

Opinion delivered May 17, 1920.

1. WITNESSES—IMPEACHMENT AS TO COLLATERAL MATTER.—Where, in a prosecution for carnal abuse of a girl under age of consent, the State asked the prosecutrix in effect whether she had had intercourse with a man other than defendant by inquiring whether the first act of intercourse with defendant pained her, it was reversible error to exclude testimony offered by defendant which would have warranted the inference that she had had intercourse with another man,
2. CRIMINAL LAW—PHOTOGRAPHS AS EVIDENCE.—Photographs, when properly authenticated, are often competent to give the jury a view of objects which could not otherwise be brought to their attention.
3. CRIMINAL LAW—PHOTOGRAPH AS EVIDENCE.—In a prosecution for carnal abuse where the age of the prosecutrix was an issue, a photograph taken several years before the trial was properly excluded since the jury had an opportunity to determine her age while she was on the witness stand.
4. CRIMINAL LAW — INSTRUCTION — REASONABLE DOUBT.—Where the court charged that in order to convict the jury must believe beyond a reasonable doubt that defendant is guilty, it was

not error to refuse to charge that "a reasonable doubt of defendant's guilt is not the same as the probability of his innocence, but may exist where the evidence fails to convince the jury that there is a probability of defendant's innocence."

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

E. L. McHaney, X. O. Pindall, P. S. Seamans and *Geo. W. Murphy,* for appellant.

1. The court erred in refusing to permit the defendant to introduce in evidence on cross-examination of the prosecutrix the photograph of the prosecutrix and when it was taken. The photograph was admissible in evidence to prove the age of the prosecutrix. 135 Ark. 350.

2. The record of the charge preferred in the magistrate's court was admissible in evidence. Defendant should have been allowed to ask Mrs. White and show by her cross-examination that others than the defendant had been seen with and in the presence of the prosecutrix.

3. Rainwater should have been allowed to testify. His testimony was competent. 125 Ark. 272; *Ib.* 339; *Howell* v. *State,* 141 Ark. 487.

4. The court erred in refusing the instruction as to reasonable doubt. 10 So. Rep. 517; 106 Ala. 35; 150 *Id.* 24; 117 *Id.* 139; 120 *Id.* 365; 133 *Id.* 108; 175 *Id.* 11; 8 Ala. App. 42.

5. There was prejudicial error in the closing argument of the State's attorney, as there was no evidence justifying his statements to the jury. 132 Ark. 531.

John D. Arbuckle, Attorney General, and *J. B. Webster,* Assistant, for appellee.

1. There was no error in refusing to admit the photograph in evidence taken a year or so prior to the trial. The age of the prosecutrix was fully shown by testimony and the photograph was clearly inadmissible and was properly excluded. 160 Mass. 403; 122 N. Y. S. 14; 135 Ark. 350.

2. The record of the justice of the peace's preliminary trial was properly refused to be admitted as evidence. 66 Ark. 545.

3. No error was committed in excluding the testimony of Mrs. White on cross-examination. It was immaterial.

4. Rainwater's testimony was clearly inadmissible. 79 Ark. 594.

5. Appellant did not request a proper instruction on reasonable doubt and he can not now complain. 114 Ark. 49.

6. There was no error prejudicial in the remarks of the State's attorney. 112 Ark. 452; 115 *Id.* 101; 23 *Id.* 32; 293. S. W. 89. No abuse of discretion by the court is shown.

McCULLOCH, C. J. Appellant stands convicted of the crime of carnal abuse, alleged to have been committed by having sexual intercourse with a girl under the age of sixteen years. According to the testimony, appellant and the prosecuting witness both resided in the town of McGehee, and became acquainted with each other and began to associate together about the latter part of February or the early part of March, 1918. Appellant was a practicing physician—an unmarried man—and the girl in question was, at the time she became acquainted with appellant, working in the office of another physician in the same building where appellant's office was located. Soon after they became acquainted with each other, appellant and the girl were together a great deal and frequently rode together in an automobile, and they visited each other during office hours—either in the office of appellant or in the office of the other physician where the girl worked.

The girl testified at the trial that within two or three weeks after she became acquainted with appellant and they began to associate with each other, he solicited her to have sexual intercourse with him and that she yielded to his embraces—that thereafter they had sexual inter-

course two or three times a week for nearly a year; that she became pregnant during the month of November, 1918, and gave birth to the child in August, 1919. She testified that there was no engagement of marriage between her and appellant. On the contrary, appellant's testimony was to the effect that he was engaged to marry the girl, but never had sexual intercourse with her, and that when he ascertained in February or March, 1919, that the girl had been seen under questionable circumstances with another man and when she admitted her guilty association with the man, he broke off the engagement of marriage.

There is a conflict in the testimony as to the age of the girl, but the verdict of the jury settled the conflict against appellant on that issue.

The State introduced witnesses to prove appellant's frequent association with the girl, which testimony was, of course, intended as corroboration of her testimony that she had had sexual intercourse with him and that he was the father of her child. There was no dispute, however, as to the fact that appellant was with the girl a great deal and frequently took automobile drives with her, and also that he frequently accompanied her on other occasions. Appellant admitted those things and testified that he was engaged to be married to the girl and intended to marry her until he ascertained that she was untrue to him.

After the close of the State's testimony, appellant's counsel called the girl to the witness stand for further cross-examination, and while on the stand the prosecuting attorney asked her the question whether or not the first time she had intercourse with appellant Young it hurt her, and she replied, "It certainly did." Appellant testified that in January or February, 1919, after the girl had returned from a visit to relatives in another town he was driving along one of the streets in McGehee with an acquaintance, a Mr. Rainwater, about 10 o'clock at night, and that he observed this girl walking with another man,

that he drove along slowly to watch them, and that they turned into the stairway of a certain office building and disappeared up the stairway. He testified further that the next day he made an engagement with the girl to take her riding and asked for an explanation of her conduct on the night before, and that the girl broke down and cried and admitted her illicit relations with the other man.

Appellant offered to testify that she gave him the name of a certain man there as the father of her child, but the court excluded that testimony. Appellant also offered to prove by Rainwater that he was driving with appellant on the night in question and saw this girl in company with another man about 10 o'clock at night going up the stairway of the office building mentioned.

It is insisted by counsel for appellant that the court erred in refusing to permit them to prove this alleged conduct of the girl, which was of questionable character, as the jury might have inferred from it that she was resorting to the building in question as an assignation place for the purpose of having sexual intercourse. It is argued that the State, by asking the girl the question about the first act of intercourse with appellant being painful, thus put in issue the question whether or not she had had intercourse with another man. It has been decided by this court that in cases of this kind if the State elects to put in issue the question whether or not the injured girl has had intercourse with a man other than the defendant, then the accused has the right to introduce proof, in contradiction and impeachment of the witness, to show that she had in fact had sexual intercourse with other men. *McArthur* v. *State,* 59 Ark. 435; *Howell* v. *State,* 141 Ark. 487.

The prosecuting attorney did not ask the girl the direct question whether or not she ever had intercourse with another man, but the question propounded with reference to the first act of intercourse with appellant being painful drew out a statement which the jury could only

consider as tending to show that it was her first act of sexual intercourse with any man. We can not understand what other purpose there was in view than to show that the girl was chaste when she began having sexual intercourse with appellant, and it would have tended to break down her testimony if appellant had been allowed to show that she was associating with another man under circumstances which would warrant the inference that she was resorting to an assignation place for the purpose of having sexual intercourse. The effect was the same as if the girl had been asked a direct question whether or not she had ever had sexual intercourse with another man, and appellant was, under the rule announced in the cases herein cited, entitled to contradict her, either by direct testimony or by circumstances, that she had sexual intercourse with other men or another man. Appellant was permitted by the court to testify himself concerning this circumstance about seeing the girl go into the office building at night with another man, and he offered to establish the same fact by Rainwater, another witness, but the court excluded the testimony. Previous to offering this testimony, appellant asked the girl on the witness stand whether or not she had gone into the building and whether or not appellant had, as stated by him on the witness stand, interrogated her on the subject and that she admitted it, to which inquiry she answered in the negative. The conclusion is therefore reached by this court that an error was committed by the trial court in refusing to allow appellant's counsel to go into this subject, and that the error was prejudicial.

There are other assignments of error, some of which, in view of another trial of the case, should be noticed.

Appellant offered in evidence a photograph of the girl taken several years before the trial and the court refused to allow it to be shown to the jury. It is argued by counsel that, in view of the conflict in the testimony as to the age of the girl, the photograph was competent to shed light on that issue, in that the girl might have been

simulating an immature age while on the witness stand, so as to show that her age was under sixteen years, and that the picture taken at a prior date would more clearly show to the jury what her true age was. In other words, it is argued that the girl might have made up for the occasion of testifying before the jury, so as to appear younger than she really was, and that the photograph might show more natural posture and reflect her correct age.

Photographs, when properly authenticated, are often competent evidence in cases, either civil or criminal, for the purpose of giving the jury a view of objects which could not be otherwise accurately brought to the attention of the jury. There are several decisions of this court on that subject. In the case of *Tillman* v. *State,* 112 Ark. 236, we decided that no prejudice resulted from the introduction by the State of a photograph of the murdered girl and the place where her body was found. In the opinion we said that we were unable to see what bearing those photographs could have had upon the case, inasmuch as the scene of the murder had been described by witnesses. In the present case we are unable to see how the introduction of this photograph would have aided the jury in determining the age of the girl. Certainly a photograph would not afford the jury any better opportunity for estimating her age than close observation of her while she was on the witness stand. If there was anything about the appearance of the girl, either at the time of the trial or in the photograph, calculated to disguise her true age, the jury could doubtless discover the disguise more readily from an observation of the girl in person, than by an inspection of the photograph. There was no error, we think, in refusing to allow this photograph to be introduced in evidence.

The court gave no instruction to the jury on the subject of reasonable doubt, except to tell the jury that in order to convict they must believe beyond a reasonable doubt that appellant was guilty. Counsel for appellant

requested the court to give the following instruction, which they insist is a correct definition of reasonable doubt and should have been given: "A reasonable doubt of defendant's guilt is not the same as the probability of his innocence, but may exist where the evidence fails to convince the jury that there is a probability of defendant's innocence."

Appellant relies on a line of decisions rendered by the Supreme Court of Alabama, cited on the brief, holding that an instruction on reasonable doubt in this particular form is correct, and that it was error not to give the instruction. In the case of *Williams* v. *State,* 52 Ala. 411, that court decided that an instruction in this language was improper because it was confusing and calculated to mislead the trial jury. In subsequent decisions the case of *Williams* v. *State* was overruled. We think, after careful consideration, that the original decision of the Alabama court was correct. There is indeed a distinction between the probability of innocence and reasonable doubt of guilt of the accused. The testimony may leave in the minds of the jury a reasonable doubt, even though not sufficient to show probability of innocence, but the instruction is not a complete definition of reasonable doubt and does not attempt to define the term "probability of innocence" in its relation with reasonable doubt, and we think it could only have added confusion in the minds of the jury. The term "reasonable doubt" defines itself and any further attempt to define it, unless done with clearness and accuracy so that a man of average intelligence will understand the definition, is calculated to do more harm than good in giving a jury a clear understanding of the meaning and application of the term. However appropriate other definitions of reasonable doubt may be, we are convinced that there was no prejudice in refusing this instruction.

It is unnecessary to discuss other assignments of error, but, for the error indicated in refusing to admit the testimony of witness Rainwater, the judgment is reversed and the cause remanded for a new trial.

MADDEN *v.* SUDDARTH.

Opinion delivered May 17, 1920.

1. VENDOR AND PURCHASER—LIEN FOR PURCHASE MONEY.—A vendor of land has a lien in equity for the purchase money, though the lien is not recited on the face of the conveyance; and such lien is enforceable against third persons who purchased with notice of the fact that the price had not been paid.
2. VENDOR AND PURCHASER—NOTICE OF VENDOR'S LIEN.—A recital in a deed that a lien is retained to secure the residue of the purchase money, without specifying the amount, is sufficient to put the grantee's purchaser upon inquiry as to whether the grantee had paid the purchase money.
3. VENDOR AND PURCHASER—NOTICE OF RECORDED DEED.—A purchaser of land is bound to take notice of a recorded deed in the line of his title.
4. VENDOR AND PURCHASER—NOTICE OF VENDOR'S LIEN.—A finding of the chancellor that defendant purchased land with notice of a prior grantor's lien for purchase money is sustained by evidence of actual knowledge and by the fact that such grantor's deed reserves a lien without specifying the amount thereof.

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

June R. Morrell, for appellant.

1. The deed relied on by appellee did not retain a lien on the land, nor contain facts sufficient to put a subsequent purchaser on notice that a part of the purchase price remained unpaid. Where the granting and *habendum* clauses in a deed are irreconcilable, the *habendum* clause must yield to the granting clause. 92 Ark. 324.

2. A purchaser of land is not bound to take notice of a vendor's lien unless the balance of the purchase money is recited in the deed and *expressly made a lien* in such deed. 28 S. E. 336; 95 Va. 263. If appellee had a lien for unpaid purchase money, it was *latent* and not disclosed by the deed of conveyance. 2 Jones on Liens, p. 61.

3. The oral testimony was not sufficient to warrant the chancellor in finding that appellant purchased with notice of the lien. Appellee's deed, prepared by himself

or by a notary of his own selection, is at least misleading, and appellant should not suffer for appellee's mistakes if there were any, and the court erred in its finding.

The appellee, *pro se.*

1. The statements and recitals in the deed were sufficient to put appellant on notice or at least on inquiry, and he was not an innocent purchaser. 97 Ark. 397; 94 *Id.* 615. See, also, 3 Wash. Real Prop. (6 ed.), §§ 1258-60; 123 S. W. 801; 72 Ill. 553; 26 Miss. 434.

2. Appellant does not claim that he did not have actual notice of the deed from Suddarth to Barton and the failure, but merely says that Nora Barton told him that there was no encumbrance on the land. Appellee was not estopped from setting up his right to the lien.

McCULLOCH, C. J. Appellee owned a certain tract of land in Little River County, and on March 9, 1918, sold and conveyed the same to Nora Barton for the price of $500, of which $150 was paid in cash, and said grantee executed to appellee her promissory note of that date for the remaining sum of $350, due and payable one year after date. The deed of conveyance executed by appellee and his wife to Nora Barton reads, in part, as follows: "Know All Men by These Presents:

"That we, James L. Suddarth and Elizabeth Suddarth, his wife, for and in consideration of the sum of ..... dollars, paid and to be paid by Nora Barton cash in hand (the receipt of which is hereby acknowledged), ... do hereby grant, bargain and sell unto the said Nora Barton and unto her heirs and assigns, forever, the following lands situated in Little River County and State of Arkansas, towit:" Then follow the clause containing a description of the property conveyed and the habendum and warranty clauses, and then the following recital appears: "It being expressly agreed and understood that a lien is hereby retained upon said lot or parcel of lands to secure the residue of the purchase money

hereinbefore mentioned." The deed was duly recorded, and Nora Barton subsequently sold and conveyed the land to appellant.

Appellee instituted this action against Nora Barton to recover the amount of the note and to enforce the lien on the land and appellant was made a party defendant. Nora Barton made no defense and testified as a witness in the case, and she conceded that the note constituted a part of the purchase price of the land. Appellant defends on the ground that he is an innocent purchaser of the land without actual notice of the lien, and that the lien was not expressed in the recitals of the deed of conveyance. A vendor of land has in equity a lien on the land for the purchase money, although the same is not recited on the face of the conveyance. *Lay* v. *Gaines,* 130 Ark. 167. A lien is enforceable against third persons who purchased with notice of the fact that the price had not been paid.

The only question in the present case is whether or not appellant had notice of the unpaid purchase price, as it is shown beyond dispute that the note in suit was executed to cover a part of the purchase price. There is a conflict in the testimony as to actual notice to appellant. He testified that his vendor, Nora Barton, represented to him that the price had been paid in full and that the land was clear from any lien. She testified to the contrary, and denied that she made any such representations to appellant, and stated that appellant agreed to pay the note to appellee as a part of the consideration for her deed to him. Two other witnesses introduced by appellant testified to matters which tended to corroborate appellant; they stated that they were present when the trade was made between appellant and his vendor, Nora Barton, and that the latter stated that the land was clear of all encumbrances. The testimony of one of those witnesses is discredited by the fact that he made a statement the day before he testified in direct conflict with his testimony on the witness stand. The testimony of the other

witness is not clear on the subject, as he was not close enough to the parties, apparently, to hear all that was said.

In addition to that, there is enough in the face of the deed of appellee to Nora Barton to give notice of the existence of a lien, or to put a subsequent vendee on notice. The granting clause of the deed in which the purchase price was described contained blank spaces, showing obvious omissions, and the deed contained an express recital of the reservation of a lien on the land for the unpaid purchase price, without specifying any amount. This deed was in the line of appellant's title, and he was bound to take notice of it. It is true the amount of the purchase price, except as to the $150 cash payment, was not stated, but there is enough in the recital to put a subsequent purchaser upon inquiry, and we think that appellant is bound by it.

Upon the whole, we can not say that the finding of the chancellor was against the preponderance of the evidence, considering the direct evidence introduced concerning appellee's actual knowledge and the inference which he might have drawn from the recitals of the deed. The decree is therefore affirmed.

COOPER v. ALLISON.

Opinion delivered May 17, 1920.

1. FRAUD—WAIVER.—Where defendant fraudulently represented to plaintiff, in an exchange of lands, that P. would purchase of plaintiff at a certain price the house and lot to be conveyed to plaintiff by defendant, plaintiff's right of action for such fraud was not waived by plaintiff executing a release to P. from the contract of purchase which P. executed; P. having made the contract in collusion with defendant, and having abandoned it, and the release being given to obtain a release from P. which the insurance company required before paying to plaintiff the insurance on the house which had burned.
2. FRAUD—DAMAGES.—The measure of damages for fraudulent representation of defendant in pretending to secure a purchaser of exchanged property at a stipulated price as consideration for

the exchange is the difference between the actual value and the price so promised, where plaintiff's sole purpose in the exchange was to make the sale.

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

S. W. Garratt, for appellant.

1. The verdict and judgment are not sustained by sufficient evidence. Fraud and deceit were not proved, but, admitting fraud and deceit as alleged, plaintiff would not be entitled to recover unless he showed a loss, and not then if, with full knowledge of the facts, he entered into a written contract, on his own motion, to settle the whole matter, which was accepted and carried out by him and proposed and written by his own counsel. 12 R. C. L., p. 413. The evidence wholly fails to prove fraud or deceit or misrepresentations as to value of the rentals, or that one Parnell would purchase for $3,000.

2. The court erred in its instructions on the measure of damages. The proof shows no fraud or deceit nor any damages and that there was a complete release and settlement of the conditions complained of.

Berry H. Randolph and *Jas. E. Hogue,* for appellee.

1. Collusion is proved between appellant Cooper and Parnell. The instrument presented as a release is signed by J. R. Parnell and not by appellee. The alleged release was in no way binding on appellee.

2. There is no error in the instructions as to the measure of damages. The verdict was for $1,000 and is sustained by the law and the evidence.

McCULLOCH, C. J. Appellee owned a farm in Lonoke County which was heavily mortgaged, and there was about to be a foreclosure of the mortgage. Being desirous of disposing of his equity before the foreclosure, he entered into negotiations with appellant for the exchange of his equity in the Lonoke County farm for certain real property in the city of Hot Springs, where appellant resided. The negotiations were conducted by a real estate

agent, who brought the parties together and the negotiations resulted in an exchange of the respective properties.

This is an action instituted by appellee against appellant to recover damages for alleged fraud and deceit committed by appellant in inducing appellee to make the exchange of the properties. Appellee alleged in his complaint, and the testimony tended to prove, that appellant represented to him that he had a purchaser for the property in the person of one Parnell at the price of $3,000, and that Parnell was ready, willing and able to consummate the purchase of the Hot Springs property for that sum, that such representations were false, and that appellee accepted the property in exchange for the farm lands solely on the faith of said representations. The proof shows almost beyond dispute that appellant made certain representations concerning the opportunity to resell the property to Parnell for the price mentioned. The testimony adduced by appellee also tended to show that appellee relied on those representations and that he had no other use for the property and would not have accepted it in exchange, except for resale, and that he relied solely on those representations which the evidence tended to show were false. This was denied by appellant and his witnesses, who testified that Parnell was desirous of buying the property and did in fact make the purchase from appellee immediately upon the latter's acceptance of the exchange and that Parnell paid appellee $100 as part of the purchase price.

There was a written contract entered into between Parnell and appellee, whereby the sum of $100 paid in advance was to be forfeited in the event Parnell failed to complete the purchase. The testimony shows that appellee refused to accept the property in exchange for his farm until there was a contract entered into with Parnell and it is also shown that appellant furnished the $100 which was used in putting up the forfeit for Parnell. There is enough evidence, we think, to warrant the conclusion that the purchase by Parnell and appellant's rep-

resentations as to the opportunity to resell the property to Parnell were not made in good faith, but were collusive between appellant and Parnell, and that those facts constituted actionable deceit practiced by appellant upon appellee, which induced the latter to enter into a contract for the exchange of the properties. The testimony shows very clearly that appellee did not want the property for any other purpose except for immediate resale and that he purchased under the belief that Parnell was, as represented by appellant, a purchaser ready, willing and able to accept the property. Parnell forfeited the $100 and abandoned the contract, and nothing further was done under it.

In the exchange between the parties, this property was estimated at the value of $3,000, which was the amount of the purchase price in the resale to Parnell, but the testimony adduced tends to show that the property was only worth from $1,500 to $1,800.

There is also a charge that appellant misrepresented the amount of rents being paid by the tenant who occupied the premises at the time, and there is testimony tending to support that charge. The issue of fraud and deceit was clearly submitted to the jury, and we are of the opinion that there was enough evidence to support the verdict.

It is earnestly contended that appellee was precluded from asserting a right of action for deceit because of the fact that he released Parnell from the contract. The testimony on that subject was undisputed. Parnell abandoned the contract without taking possession of the property and later the house was burned. There was an insurance policy on it payable to appellee in the sum of $1,500. There was an adjustment of the loss by the insurance company in the sum of $1,000, but the company refused to pay over the money to appellee unless a release by Parnell should be obtained. In order to collect the insurance, appellee's agent undertook to get a release from Parnell, but the latter required, as a condition for

that release, that appellee release him from the performance of the contract of purchase.

If, as appellee charges and as the proof tends to show, there was collusion between Parnell and appellant to practice deceit on appellee, and Parnell's attitude as a purchaser was not in good faith, and if, as is shown, Parnell abandoned the contract and had no intention of performing it, then appellee did not waive his right of action to recover damages for the deceit by executing the release to Parnell in order to secure a release of the insurance so that the company would pay it over to appellee, who was entitled to it under the policy. The proof shows this was done merely for the purpose of clearing the way for the collection of the insurance and not for the purpose of releasing Parnell from the performance of the contract which he was ready, willing and able to perform.

There is another assignment of error in regard to an instruction given by the court on the measure of damages. The correct measure of damages was the difference between the actual market value of the property received by appellee in the exchange and the price which he was to get on the resale to Parnell, for, as before stated, the sole purpose of the exchange was to resell the property to Parnell at a stated sum. This was in effect the instruction given by the court, although there is slight ambiguity of the language used. The evidence tended to show that the property was not worth more than $1,800 at the time appellant received it in exchange, and the damages as measured by the standard laid down by the court were sufficient to warrant recovery of the amount of $1,000 awarded by the jury.

Judgment affirmed.

DUFRESNE v. PAUL.

Opinion delivered May 17, 1920.

1. INJUNCTION—TRESPASS.—A complaint in equity to enjoin trespasses on land which does not allege the insolvency of defendant, or that there would be a continuing trespass making necessary a multiplicity of suits to redress the injury at law, or facts showing an irreparable injury to the freehold, is insufficient to state a cause of action in equity; the remedy at law being complete and adequate.
2. INJUNCTION—TRESPASS NOT ENJOINED WHERE TITLE IN DISPUTE.—Whenever the plaintiff's title in cases of trespass is in dispute, equity will interfere by injunction on the ground of multiplicity of suits unless he has successfully established his title by trial at law.
3. INJUNCTION—JURISDICTION CONFERRED BY CROSS-BILL.—In an action to enjoin trespass where defendant prayed that his answer be taken as a cross-bill, that plaintiff's deed be canceled, and for damages for breach of the lease under which defendant claimed the right to possession, equity had jurisdiction to settle the rights of the parties, though the complaint failed to state a cause of action to have the trespass enjoined.
4. COURTS—WAIVER OF OBJECTION TO JURISDICTION.—In an action to enjoin trespass defendant waived objection to the court's jurisdiction where he filed a cross-bill asking for equitable relief and proceeded to final adjudication upon the issues thus joined.
5. LANDLORD AND TENANT—CONSPIRACY TO OUST TENANT.—Where a lease provided for its termination upon sale of the premises by the lessor, the latter, by making a pretended sale for the purpose of ousting the lessee, became liable to him for damages growing out of such a breach of the contract, including the illegal or wrongful issuance of a temporary restraining order.
6. LANDLORD AND TENANT — TERMINATION OF LEASE — DAMAGES.—Where a lease provided for its termination upon sale of the premises by the lessor, and the lessor made a *bona fide* sale to a third party and notified the lessee and offered to pay for his improvements in compliance with the lease, but the lessee refused to accept such offer and thereafter set up a claim to the land in controversy and was interfering with the lessor's grantee in his possession, the lessee was not entitled to possession nor to damages by reason of issuance of a temporary restraining order.
7. LANDLORD AND TENANT—OUSTER OF TENANT—BURDEN OF PROOF.—Where a lease provided for its termination upon sale of the premises to a third person, a purchaser of the premises in an action to enjoin trespass on the land by the lessee had the burden

merely of showing the sale; the burden being on the lessee to show that the sale was fraudulent where he relied upon that defense.

8. Fraud—circumstantial evidence.—While fraud may be established by circumstantial evidence, the circumstances must be so strong and well connected as to clearly show fraud.

9. Contracts—fraud—sufficiency of evidence.—Written instruments whose execution is clearly established can not be overturned by circumstances which lead merely to a suspicion of their execution for a fraudulent purpose.

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

Botts & O'Daniels, for appellant.

1. The injunction was wrongfully issued, (1) because no affidavit was made to the complaint; (2) the allegations and proof show that no injunction should have been issued, and (3) the whole transaction shows fraudulent effort to cancel the DuFresne contract. Kirby's Digest, § 3969; 15 Ark. 264. The demurrer should have been sustained because the complaint did not state facts sufficient to constitute a cause of action and the complaint shows that plaintiff is not entitled to the relief sought. There is no allegation that DuFresne is insolvent, nor proof that he was, nor does plaintiff allege or show that there would be a multiplicity of suits. 119 Ark. 384; 22 L. R. A. 233; 75 Ark. 286; 92 *Id.* 118; 11 *Id.* 304.

2. The whole transaction on the part of Moody and Paul shows that the alleged transaction was fraudulent and was for the purpose of attempting to cancel DuFresne's lease contract. 73 Ark. 179; 133 *Id.* 260.

3. The Massey place was not sold. In equity fraud need not be shown by direct and positive proof, but here the evidence does show misrepresentations and concealments that are direct and positive, and besides this the circumstances prove but one purpose—that to deceive. 41 Ark. 378; 74 *Id.* 186.

4. Much of appellee's testimony was incompetent and should not be considered. 84 Ark. 420. If the in-

junction was wrongfully issued, as we contend *supra,* then DuFresne was damaged in 1918 crop in the sum of $11,616.76, and would be the same approximately for 1919. Appellee does not come into court with clean hands.

John W. Moncrief, for appellee.

1. Appellant was not entitled to damages on the proof made by him. 132 Ark. 599; 102 *Id.* 108-114.

2. The court had jurisdiction and the evidence sustains the findings. 134 Ark. 254-261; 100 *Id.* 28-35; 136 *Id.* 578-582; 129 *Id.* 197; 79 *Id.* 499; 74 *Id.* 104; 105 *Id.* 559-575.

3. Under the terms of the contract between Moody and DuFresne, Moody had the right to sell the property involved in the suit. The contract is set out in full in the transcript and he had the right to sell to Paul or any other party. He gave DuFresne and his daughter the first opportunity to purchase, although appellant had violated his contract in many ways, as the evidence shows. The rule as to burden of proof is stated properly in 20 Cyc. 108. See, also, 45 Ark. 492; 25 Atl. 558. Fraud must be proved. 37 Ark. 145; 63 *Id.* 16-22; 11 *Id.* 378; 39 *Id.* 419. Every alleged, pretended or imaginary fraud on which appellant relied was explained away and destroyed by appellant's own witnesses. All of DuFresne's acts in reference to the timber were in violation of the contract. 24 Cyc. 1348; Jones on Landl. & Ten., § 388. Under the contract held by DuFresne a sale terminated the lease and the lessee was required to vacate. Failure to fence the land with a good fence in a certain time terminated the lease. That time had expired.

The evidence fully sustains the findings of the chancellor and should not be disturbed. 101 Ark. 368-375; 91 *Id.* 69; 41 *Id.* 378.

Gibson & Burnett and *John W. Moncrief,* for appellee.

The burden of proof was on appellant and he has failed, and the court properly dismissed his cross-complaint. Appellee has paid the purchase money for this land; he has improved it and assumed obligations which would only be assumed by a *bona fide* purchaser, and he should not be deprived of his property. 88 Ark. 433.

Wood, J. John M. Moody lived in Philadelphia, Pa. On the 16th day of January, 1917, a contract was entered into by Moody with J. A. DuFresne, whereby the former leased to the latter a tract of land consisting of 240 acres known as the "Valentine place," in Arkansas County, Arkansas. The lease was for a consideration of $1 and certain covenants whereby the lessee undertook to improve and put the land in cultivation as a rice plantation.

The improvements specified included substantial fences of hog and barbed wire, a well costing not less than $1,800, an engine and boiler costing not less than $2,000, proper housing and sheds for the well and machinery and belting and fixtures necessary for their operation.

The lessor had the right to cancel the lease if the lessee failed within six months to perform his covenants with regard to the improvements. The lessee was to keep insurance on the rice plant thus installed, to keep same free from all incumbrances and to pay all taxes, water rents and assessments.

Among the specific covenants of the lease is the following: "X. It is mutually covenanted and agreed that the party of the first part may at any time during the operation of this lease sell all or any part of the property hereby leased, and that this lease shall thereupon terminate, and if this lease be so terminated before the expiration of five (5) years, then in that event the said party of the first part shall pay to the said party of the second part the sum which the said party of the second part may have expended in erecting or causing to be erected the

aforesaid plant with the fixtures and appurtenances thereto, less a sum which shall be computed on the basis of a rental at seven hundred and sixty dollars ($760) a year for such time as the said party of the second part shall have occupied said premises, provided second party shall have until December 31, following date of sale, in which to harvest his crop, if sale is made after second party has begun crop for that year."

There was also a provision that if the lessee breached any of his covenants the lessor had the right to take possession of the premises. There was a covenant on the part of the lessor that if the lessee performed the covenants on his part he should hold the premises for a period of five years.

John M. Moody also owned another tract of land in Arkansas County known as the "Massey place," consisting of 270 acres, adjoining the "Valentine place," which by letter he promised to lease in connection with the "Valentine place," but the "Massey place" was not included in the written lease.

DuFresne entered into possession through subtenants.

On November 30, 1917, John M. Moody and George P. Paul executed what purported to be a contract by which Moody agreed to sell, and Paul to buy, the "Valentine place" for the express consideration of $14,400. The contract provided that the deed should be executed and delivered upon the receipt of the purchase money on December 29, 1917.

John M. Moody and his wife, Henrietta, executed what purported to be a warranty deed to George P. Paul, conveying to him the "Valentine place" for the express consideration of $14,400. This deed purported to be executed and acknowledged by John M. Moody on December 21, 1917, and by his wife on January 17, 1918.

This action was instituted by the appellee against the appellant on January 5, 1918.

The appellee alleged that he had bought the lands from John M. Moody; that appellant was a tenant of Moody in 1917; that his tenancy had terminated in 1917, but that he was attempting and threatening to enter upon the appellee's premises and that unless restrained the appellant and his subtenants would enter and trespass upon the appellee's land and cut and use timber therefrom to appellee's irreparable injury; that he had offered to pay appellant for the improvements which he had put upon the land; that appellant had permitted numerous leases, liens, and incumbrances to be placed upon the land and had forfeited his rights under the lease contract with Moody.

A temporary restraining order was issued against appellant by the county judge of Arkansas County, as prayed in the petition.

The appellant answered and denied that the appellee had purchased the lands from John M. Moody and denied that appellee was the owner thereof. He alleged that he was the tenant of Moody in 1917 and was still his tenant. He set up the lease contract with Moody, but denied that he had breached the same. On the contrary, he averred that he had fully complied with its terms and that same was still in full force and effect. He alleged that John M. Moody conceived the idea of executing and recording a deed conveying the lands in controversy to the appellee Paul; that he believed that Moody and Paul entered into a conspiracy against him for the purpose of canceling his lease contract and for the purpose of ousting appellant from the possession of the premises. He alleged that he believed that Paul never purchased the land but permitted Moody to execute the deed to him for the purpose of annulling his lease contract; that such action on the part of Paul and Moody was a fraud upon the rights of appellant. Appellant alleged that he and his agents had a right to occupy the premises, and, notwithstanding the fact that appellant was in actual possession of the premises under the lease contract, that a temporary restraining

order had been issued against him restraining him from entering upon the premises and from exercising any control or custody thereof; that after such restraining order was issued possession was taken by Moody or some one in his employ or control. He alleged that he believed the complaint was caused to be filed by Moody and not by Paul. Appellant alleged that he had been greatly damaged by the conduct of Paul and Moody as above set forth; that Moody had breached the lease contract; that the cost of the improvement placed on the premises less the sum of $760 per year, which he was to pay Moody as rent, was justly due him.

Appellant prayed that his answer be taken as a cross-bill against Moody and Paul and that the alleged deed from Moody to Paul be canceled; that he have damages for the breach of contract and for the improvements placed on the premises and for his costs and all other relief.

Paul, answering the cross-complaint, denied its allegations as to the conspiracy between him and Moody. He renewed the allegations of his complaint, stated that if any indebtedness was due the appellant for improvements less the rental the same was due from Moody and not from the appellee. He continued the tender for value of these improvements and prayed the court to determine the amount due the appellant, if any, and that the appellee have judgment for this sum against Moody. He prayed that the appellant's cross-bill be dismissed.

The cause was heard upon the pleadings, exhibits, documents and depositions.

The chancery court found that there was no equity in the appellant's cross-complaint and dismissed the same and entered a decree making the temporary restraining order perpetual in favor of the appellee and found that the amount due the appellant for his improvements was the sum of $3,993.60 and directed the clerk to pay the same, less the costs, out of the $5,000 in his hands deposited by appellee. Further directed the clerk to refund or

pay to appellee the balance in his hands. From that decree is this appeal.

The complaint of the appellee did not state a cause of action within the jurisdiction of a court of equity because the facts as alleged, if true, do not show that the appellee did not have a complete and adequate remedy at law. As was stated by this court in *Western Tie & Timber Co.* v. *Newport Land Co.,* 75 Ark. 286-88: "The insolvency of the defendant is not alleged. There is no allegation that there would be continuing trespasses making necessary a multiplicity of suits to redress the injury at law. No facts are alleged to show that there will be irreparable injury to the freehold." *Ex parte Foster,* 11 Ark. 304; *Myers* v. *Hawkins,* 67 Ark. 413; *Haggart* v. *Chapman & Dewey Land Co.,* 77 Ark. 527; *Burnside* v. *Union Saw Mill Co.,* 92 Ark. 118.

But, even if the allegation of insolvency of the appellant had been made and if there had been an allegation as to the necessity of a multiplicity of suits in order to stay the hand of the trespasser, still the complaint would not have stated a cause of action in equity for the reason that the appellee's title was in dispute. "Whenever the complainant's title is disputed in case of trespass, the court of equity will not interfere by injunction on the ground of a multiplicity of suits unless he has successfully established his title by trial at law." Syllabus 5, *Carney* v. *Hadley,* 32 Fla. 344, 22 L. R .A. 233.

Nevertheless, the trial court had jurisdiction to adjudicate all matters in controversy between the appellant and the appellee for the reason that the appellant prayed that his answer to appellee's complaint be taken as a cross-bill against the appellee and asked that the deed from Moody to appellee be canceled and that he have damages for the breach of the lease contract between himself and Moody. This gave the court jurisdiction over the subject-matter of the controversy between the appellant and the appellee, and, having acquired jurisdiction for any purpose, the trial court correctly exercised it for the

purpose of settling the rights of the parties to the action. *Pollack* v. *Steinke,* 100 Ark. 28-35; *Galloway* v. *Darby,* 105 Ark. 559; *Ferguson* v. *Rogers,* 129 Ark. 197-203.

The appellant waived "all objections to the jurisdiction by filing a cross-bill asking for affirmative relief, and upon the issue thus joined, proceeding to final adjudication." *Harbottle* v. *Central Coal & Coke Co.,* 134 Ark. 254-6, and cases there cited.

If there was a breach of the lease contract by Moody in entering into a conspiracy with Paul for the purpose of ousting the appellant from the possession of the premises, then Moody was liable to the appellant for all the damages growing out of such a breach, including the illegal or wrongful issuance of the temporary restraining order. But, on the other hand, if Moody made a *bona fide* sale of the land in controversy to the appellee and notified the appellant of that fact and offered to pay appellant for his improvements in compliance with the provisions of the lease contract, and if appellant refused to accept such offer and thereafter set up a claim to the land in controversy and was interfering with the appellee or his vendee in his possession and control of the premises, then the appellant breached the lease contract and in an action in equity by him to cancel the deed from Moody to Paul, the court of equity would be justified in finding that the appellant had no right to continue to hold the land and that no damages had accrued to him by reason of the issuance of the temporary restraining order.

This brings us to a consideration of the issue as to whether or not the purported contract for the sale of the land by Moody to Paul and the purported deed afterward executed by him to Paul in pursuance of such contract were *bona fide* transactions or whether they were the result of a conspiracy between Moody and Paul for the purpose of canceling the lease contract as alleged in appellant's answer and cross-bill.

The testimony on this issue is exceedingly voluminous, and it would unduly extend this opinion, and could

serve no useful purpose as a precedent, to set out the testimony in detail and discuss the reasons for the conclusion we have reached. The issue is purely one of fact. The testimony has been carefully analyzed and elaborately argued in the briefs of the respective counsel. Counsel for the appellee has challenged the accuracy of appellant's abstract of the testimony and we therefore have examined the record and do not find that any essential particulars for the proper presentation of appellant's cause have been omitted.

After a careful consideration of the facts found in the record we are convinced that the appellant has not proved by a preponderance of the testimony that the deed executed by Moody to Paul does not evidence a *bona fide* sale and purchase of the land in controversy. Appellee met the burden of proof required of him to sustain the cause of action stated in his complaint when he showed by his testimony and the testimony of Moody that the land in controversy was purchased by the appellee from Moody. Both Moody and the appellee so testify and they adduce a contract for the sale and purchase and also the deed evidencing the transfer. They testify to the execution of these instruments.

The appellant alleged that the contract and deed were but the consummation of a conspiracy to defraud the appellant of his rights. The burden was upon the appellant to show that the contract and deed which he asked to have canceled were fraudulent. Appellant brings forward testimony of circumstances which would warrant the suspicion that the alleged sale of the land by Moody to Paul was a bogus transaction.

We have considered the entire testimony in the record which tends to throw light upon the transaction, and our conclusion is that the testimony adduced by the appellant is not sufficient to show by a clear preponderance that Moody and appellee had entered into a conspiracy to defraud the appellant. On the contrary, the testimony of Moody and the appellee and the facts and circumstances

proved by other witnesses together with various exhibits, letters and documents adduced at the hearing prove by a preponderance of the evidence that the transaction between Moody and Paul was *bona fide.* At least it can not be said that their conduct was wholly incompatible with an honest purpose.

While fraud may be established by circumstantial evidence, yet the circumstances must be so strong and well connected as to clearly show fraud. Solemn written instruments, the execution of which are proved beyond peradventure, can not be overturned by circumstances which only lead to a mere suspicion of their execution for a fraudulent purpose.

In *Bank of Little Rock* v. *Frank,* 63 Ark. 16-22, Judge BATTLE announced the familiar rule that circumstances "may be sufficient to excite suspicion, but suspicion is not the equivalent of proof. Circumstances necessary to prove fraud must be such as naturally, logically and clearly indicate its existence." *Russell* v. *Brooks,* 92 Ark. 509, and other cases collated in 3 Crawford's Digest, pp. 2299-3002.

Moody, under the lease contract, had the right to sell his land when, where and to whom he pleased. The only limitation being that in the event of a sale he should pay to the appellant the amount expended by him in the establishment of the rice plant, and, if the sale were made after the appellant began his crop for any year, that he should have until December 31 following the sale to harvest his crop.

The conduct of Moody and Paul in connection with the alleged sale and purchase of the land in controversy, under the evidence, is consistent with, and justified by, the provision of the contract of lease between the appellant and Moody.

The amount which the appellant had expended for improvements was likewise a question of fact, and the finding of the chancellor on that issue is not clearly against the preponderance of the evidence.

We find no error in the decree, and it is, therefore, affirmed.

QUERTERMOUS v. BILBY.

Opinion delivered May 17, 1920.

1. QUIETING TITLE—NECESSARY PARTIES.—Under Kirby's Digest, § 656, providing that a decree of confirmation in any cause "shall not bar or affect the rights of any person * * * who within seven years preceding had paid the taxes on the land unless such person shall have been made a defendant in the petition and duly summoned to answer the same," a decree of confirmation is void on direct attack at the instance of one who had paid the taxes on the land within seven years preceding such confirmation, and who was not made a defendant and served with process in the action.
2. JUDGMENT—DIRECT ATTACK.—A suit brought for the express purpose of setting aside or vacating a decree of confirmation of title is a direct attack thereon.
3. QUIETING TITLE—DIRECT ATTACK ON DECREE—FRAUD.—One who has paid the taxes within seven years preceding the filing by another of a petition for confirmation, and who was not made a party thereto, is entitled to have a decree rendered therein vacated in a direct action therefor, without proving that a fraud was practiced by the petitioner.
4. QUIETING TITLES — SUIT TO SET ASIDE DECREE — LIMITATION.—A person who has paid the taxes for the seven years preceding the filing of a petition for confirmation of title by another, under Kirby's Digest, ch. 25, was not required to bring suit to vacate such decree within three years and to offer to file a meritorious defense as required by § 657, as that section has no reference to any person who within seven years preceding had paid the taxes on the land.

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

W. N. Carpenter, for appellants.

The decree of confirmation in favor of J. W. Benson in 1912 was valid and legal and defendants (appellants) are the owners of this land. Appellee has not shown such a state of facts as entitles him to attack the decree of confirmation. Chap. 25 of Kirby's Digest. All

presumptions are in favor of the validity of a decree of a court of competent jurisdiction. 101 Ark. 395. This is a collateral attack on such a decree and the record must show all facts essential to jurisdiction. The decree finds that petitioner and his grantors held actual adverse possession of the land, claiming title for more than seven years. The court erred in refusing to vacate the judgment, as the allegations of the complaint were sufficient and a good defense was shown to exist. Kirby's Digest, §§ 630, 653-4-6-7. The Benson decree shows that the law was literally complied with. 83 Ark. 154; 104 *Id.* 624; 90 *Id.* 420; 65 *Id.* 51. Every issue raised by appellee was heard and tried in the Benson decree case. 90 Ark. 263. The fraud that would vitiate the judgment must have been practiced in the procurement of the judgment. 68 Ark. 492; 73 *Id.* 440. Where it is free from fraud in its procurement, it is conclusive on the merits. 91 Ark. 397. See, also, 93 *Id.* 471; 94 *Id.* 332-592. The question as to the payment of taxes or not is concluded by the judgment on collateral attack. 49 Ark. 336; 55 *Id.* 37; 55 *Id.* 398; 57 *Id.* 423. The court should reconsider the Benson decree and vacate it. 95 Ark. 180; 99 *Id.* 79; *Ib.* 317; 95 *Id.* 456; 108 *Id.* 451. The fraud must be in the procurement of the decree itself. 103 Ark. 451; 107 *Id.* 146; 94 *Id.* 589; 108 *Id.* 417. Appellee's allegations and proof do not measure up to the standard required by our law. 108 Ark. 578; 109 *Id.* 81; 111 *Id.* 202; 114 *Id.* 493. Appellee has not shown due diligence. 120 Ark. 258. See, also, 124 Ark. 284. Every judgment of a court of competent jurisdiction is presumed to be right unless it is shown affirmatively that it is erroneous. 104 Ark. 570; 105 *Id.* 9. On collateral attack on domestic judgments the question of notice or no notice must be tried by the court on inspection of the record only where the record recites due notice that is conclusive. 11 Ark. 519; 50 *Id.* 338; 61 *Id.* 464; 110 Ark. 79; 75 *Id.* 176. After the lapse of the term no court has power to set aside its judgment, except for the statutory causes. 118 Ark. 457. This is

a direct attack upon the judgment or decree. 122 Ark. 74-78; 122 *Id.* 349-353; 12 So. Rep. 228. It is presumed that the court has jurisdiction. 10 A. & E. Ann. Cases, p. 1104. To set aside a judgment for fraud the fraud must be extrinsic and collateral to the questions examined and determined by the court in the action. 98 U. S. 65-6; 25 U. S. (Law. Ed.) 93; 75 Ark. 425. The fraud must be in the procurement of the judgment practiced upon the court. Kirby's Dig., § 443. Under the law a complaint must be filed, verified by affidavit. Here the pleadings do not measure up to the requirements of the law. 120 Ark. 258. The findings of the court are not sustained by the proof or the law.

C. L. O'Daniel, for appellee.

In equity fraud need not be shown by direct and positive proof. Circumstances of fraud are sufficient if established. 41 Ark. 378. Benson had no title to these lands when they were confirmed and could convey none to Quertermous. Due diligence has been shown. Kirby's Dig., § 657; 204 S. W. 756; 135 Ark. 321-329. This is a direct attack on the Benson decree. 211 S. W. 145. The Benson decree is inoperative and void as to appellee, as shown.

WOOD, J. On the 24th day of September, 1912, J. W. Benson obtained a decree of confirmation of title to a large body of land situated in Arkansas County, Arkansas. The decree was obtained under the provisions of chapter 25 of Kirby's Digest. The decree, among other things, recites:

"J. W. Benson, *Ex parte,* Petitioner.

"Now on this day comes the petitioner by his solicitor and this proceeding is submitted to the court for its consideration and judgment upon the petition and its exhibits, the proof of publication of the notice and warning published herein, tax receipts, muniments of title, affidavits and other proof.

"It doth appear that heretofore at the time and in the manner prescribed by law the petitioner filed in the office

of the clerk of this court his petition, wherein he described the land hereinafter described the title to which is sought to be quieted and confirmed in this proceeding and stated such facts as show a *prima facie* title and right to said land in him and that there is no adverse occupant thereof or any part thereof. That the clerk of this court hath published in the weekly "Arkansawyer," a weekly newspaper published in Arkansas County and having a *bona fide* circulation therein, for more than six consecutive weeks prior to the first day of the present term of this court, in which he described the said land, a notice of the filing of said petition warning and calling upon all persons who claim any interest in said land to appear in this court and show cause, if any they can, why the title of the petitioner, J. W. Benson, to said land should not be quieted and confirmed.

"That the proof of the publication of said notice for the time and in the manner required by law has been made and filed herein. And the court doth find that the allegations of the petition have been proved and is therefore satisfied as to the facts set out in said petition and doth find that the said petitioner herein is the legal owner in fee simple of the said lands hereinafter described and that he and his grantors have paid all the taxes due or assessed against said land for more than seven years last past and that said J. W. Benson and his grantors have been in actual possession and claiming title."

Then follows a recital decreeing the title to certain lands, describing them, in J. W. Benson. These lands were afterward conveyed by Benson to J. P. Quertermous.

This action was instituted by the appellee against the appellants in the chancery court of Arkansas County to vacate the above decree.

The appellee alleged that he was the owner of the lands and described the same in his complaint. He alleged that the lands were wild and unimproved; that he deraigned title from the Arkansas Real Estate Company

by warranty deed in 1885; that the decree was procured by fraud; that Benson had no title to the lands and no possession thereof at the time of the confirmation; that Benson had never paid the taxes on the land as alleged in his complaint and set forth in the decree based thereon; that Benson acquired no title by virtue of the decree and that the appellants who claimed under him, therefore, had no title.

Appellee prayed that the above decree be vacated and that the various deeds (which he set out in his complaint) based on the above decree be canceled as a cloud upon his title and that he have all the relief legal and equitable to which he was entitled.

The appellant answered, denying that the above decree of confirmation in favor of Benson was void and setting up title under such decree as a complete defense to appellee's action.

The facts as disclosed by the undisputed testimony are as follows: At the time of the decree of confirmation the appellee was a resident of Oklahoma; the lands in controversy were wild and unimproved; appellee had paid the taxes on the lands for more than twenty years; appellee did not know that Benson had obtained a decree of confirmation until February, 1917. Tax receipts were in evidence by agreement of counsel showing that appellee had paid the taxes for the years 1905 to 1912 inclusive. There was also introduced a warranty deed to the lands in controversy from the Arkansas Real Estate Company to the appellee dated and recorded in 1885.

The trial court found that the appellee was the owner of the land in controversy; that the lands are wild and unimproved and that appellee had record color of title to same since 1888; that he had paid the taxes on the land since the year 1905 to 1917 inclusive; that he had paid the taxes on the lands seven years consecutively prior to the decree of confirmation procured by J. W. Benson in 1912; that appellee was not made a party to the suit in which that decree was rendered; that that decree and the

deeds grounded on it under which appellants claim were a cloud on the appellee's title.

The court thereupon entered a decree canceling the confirmation decree, *supra,* and the deeds under which appellant claimed title and quieting and confirming the title to the lands in controversy in the appellee. From that decree is this appeal.

Section 656 of chapter 25 of Kirby's Digest of the statutes, under which the confirmation decree herein assailed was rendered, provides: "The decree in the cause shall not bar or affect the rights of any person * * * who within seven years preceding had paid the taxes on the land unless such person shall have been made a defendant in the petition and duly summoned to answer the same."

This statute contemplates that any person who has paid the taxes as therein provided shall, *eo nomine,* be made a party to the petition for confirmation. If a resident of the State he must be served with process of summons, and, if a nonresident, he must be served by warning order directed against him personally as required by statute for constructive service in ordinary adversary proceedings. Secs. 6055-56-68, Kirby's Digest. In other words, the proceedings for confirmation of titles under chapter 25 of Kirby's Digest are not *in rem,* but are personal and adversary as to persons who have paid the taxes within seven years preceding the filing of the petition.

The decree of confirmation on its face shows that the appellee was not made a party defendant in the petition for confirmation. The undisputed evidence shows that he was not personally served with process, and it is not proved or even contended by the appellant that any warning order was issued and published directed against the appellee so as to obtain upon him constructive service. The decree does not recite that the appellee was served with summons or that he had constructive notice. Therefore, the decree of confirmation as to the appellee was absolutely null and void. Sec. 4424 of Kirby's Digest.

In *Van Etten* v. *Daugherty,* 83 Ark. 534-42, we held that: "In statutory proceedings every act which is jurisdictional or of the essence of the proceeding or prescribed for the benefit of the party affected is mandatory."

This is a suit brought for the express purpose of setting aside or vacating the decree of confirmation in favor of Benson and was, therefore, a direct attack upon that decree. See *Hooper* v. *Wist,* 138 Ark. 289.

A person who has paid the taxes within seven years preceding the filing of the petition for confirmation is precisely in the same attitude as one who, at the time of the filing of the petition, is an adverse occupant of the land. It is not incumbent upon the appellee, therefore, before he could vacate the confirmation decree, to prove that a fraud was practiced by Benson upon the court in procuring such decree; nor was it necessary for the appellee to bring his suit within three years and offer to file a meritorious defense as provided in section 657 of chapter 25, *supra,* of Kirby's Digest. That section does not have reference to any person who within seven years preceding had paid the taxes on the land but refers to other parties. *Hargis* v. *Lawrence,* 135 Ark. 321.

To obtain the relief which appellee sought by this action it was only necessary for him to prove that he had paid the taxes within seven years preceding the filing by Benson of the petition for confirmation and that appellee was not made a party defendant to that suit and that he had no notice of the action by summons or by the publication of a warning order issued and directed against him.

The appellee made such proof. Therefore, the decree of confirmation in favor of Benson rendered by the chancery court of Arkansas County was absolutely null and void as to the appellee, and the trial court was correct in so declaring. The court was also correct in canceling the deeds conveying title derived from the confirmation decree.

The decree is in all things, therefore, affirmed.

POOL v. GORDON.

Opinion delivered May 17, 1920.

1. EXECUTORS AND ADMINISTRATORS — UNCOLLECTED RENT NOTE.— Where plaintiff, on her mother's death, agreed, in consideration of her stepfather conveying to her a part of her mother's land, that her stepfather should occupy the homestead during his lifetime and annually receive a certain amount from the rents of the other land, to be evidenced by a rent note, and that on the stepfather's death the unpaid or unused portions of such payments should go to the plaintiff, an uncollected rent note belonged to the stepfather, and at his death to his administrator.
2. EXECUTORS AND ADMINISTRATORS — CLAIM FOR USED PORTION OF NOTE.—Where plaintiff, on her mother's death, for a consideration, agreed that her stepfather should receive a certain amount of rent annually from plaintiff's land, but that on the stepfather's death the uncollected rent note or unused portion of such annual payment should go to the plaintiff, the latter, in order to recover from the stepfather's administrator the unused portion of the proceeds of a rent note, should present her claim therefor within the time required under Acts 1907, p. 1170.

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

STATEMENT OF FACTS.

Tennie B. Pool sued J. M. Gordon, administrator of the estate of Henry Haynes, deceased, to recover $200, the amount of a note alleged to belong to her and which she claims the defendant converted to his own use.

The defendant filed an answer, denying the allegations of the complaint.

The facts are as follows: Henry Haynes married the mother of Tennie B. Pool. On the death of his wife, Henry Haynes and his stepdaughter, Tennie B. Pool, entered into a written contract for the execution of a quitclaim deed by Henry Haynes to Tennie B. Pool to sixty acres of bottom land which his wife had owned in her lifetime and her homestead in the town of Morrilton. In consideration of the execution of said deed to her, Tennie B. Pool agreed that Henry Haynes should occupy the homestead in the town of Morrilton during his natural

life and, further, "that said Henry Haynes shall have and receive out of the rents of the other property herein described the sum of $200 (two hundred dollars) per annum during his natural life, the first payment to be made now and out of the rents for the present year 1909, and annually thereafter out of said rents to be paid in the following manner: The rent notes when executed each year to be deposited by the said Tennie B. Pool in the Bank of Morrilton for collection, and, when collected, said $200 (two hundred dollars) to be passed to the credit of the said Henry Haynes, said payment to cease and all of said property, both real and personal, including any unpaid or unused portion of said annual payment to pass and become the property of the said Tennie B. Pool at the death of said Henry Haynes.

"And in consideration of the above agreement I, Henry Haynes, hereby release all my claims on said property, both personal and real, except as herein specified.

"Signed in duplicate this 9th day of November, 1909."

In the early part of 1914, the rent note of the bottom farm for $200 was placed in the Bank of Morrilton and had not been collected by the bank at the time that Henry Haynes died in October, 1914. By virtue of his office as sheriff, J. M. Gordon became administrator of the estate of Henry Haynes, deceased, and took charge of the $200 note and after it was collected expended the same toward the payment of the expenses of the last illness of Henry Haynes, consisting of his doctor's bill and nurse hire and also his funeral expenses. He filed his final account current on the 2d day of July, 1915. Tennie B. Pool never filed any claim against the estate of Henry Haynes, deceased.

The circuit court found that the defendant as public administrator had made a proper disbursement of all the funds in his hands belonging to the estate of Henry Haynes, deceased, and adjudged that the plaintiff recover nothing of him in this suit.

From the judgment rendered the plaintiff has duly prosecuted an appeal to this court.

J. Allen Eades, for appellant.

The $200 note did not belong to the estate of Henry Haynes, and appellant was not required to probate her claim against his estate. She had a written contract signed by the deceased that all unused or unpaid portion of said annuities should be her own property at his death, and appellee admits that he collected the $200 note after the death of Henry Haynes. It is so alleged in the complaint that the $200 note was for rent of plaintiff's land for 1914. This is not denied in the answer. The contract makes the $200 not paid over the absolute property of plaintiff. The contract was duly filed and recorded in the recorder's office at Morrilton and appellee had notice. The estate is liable. 33 Ark. 142-150.

Edward Gordon, for appellee.

The findings of the court on a question of fact, as here, are conclusive if there is any legal evidence to support them. The testimony is conclusive on appeal. Authorities too numerous to cite. Only the unused portion of the note was to belong to appellant at Haynes' death, and the court so properly held.

HART, J. (after stating the facts). Counsel for the plaintiff seek to reverse the judgment on the ground that the $200 note, the proceeds of which are alleged to have been converted by the defendant, did not belong to the estate of Henry Haynes, deceased; and that she was not required to probate her claim against his estate.

We cannot agree with counsel in this contention. The contract which we have copied in part in our statement of facts provides that the rent notes when executed each year should be deposited by the said Tennie B. Pool in the Bank of Morrilton for collection and when collected should be placed to the credit of Henry Haynes. Continuing, the contract further provides that said payments should cease, and that all of said property, in-

cluding any unpaid or unused portion of said annual payment, should pass and become the property of Tennie B. Pool, at the death of Henry Haynes. Henry did not die until October, 1914. It was the evident intention of the parties, by the contract to provide a fund for the support and maintenance of Henry Haynes during his lifetime, and that only the unused portion thereof should go to Tennie B. Pool at his death.

It is true that the note was not actually collected until after Henry Haynes died, but the proceeds were used and applied toward the payment of his last illness and his funeral expenses. We think under the contract that it was the intention of the parties that the note should belong to Henry Haynes when it was deposited in the bank and that only the unused portion of it should go to Tennie B. Pool after his death. It then became a part of his estate when he died. In the first place, the evidence for the defendant shows that the proceeds of the note were applied to the payment of the expenses of the last illness and funeral expenses of Henry Haynes, deceased, and that no unused portion was left.

On the other hand, if it should be contended that his other property should have been devoted to that purpose and that Tennie B. Pool was entitled to the proceeds of the $200 note, she should have presented her claim to the administrator, duly authenticated, within the time required by the statute. See Acts of 1907, page 1170. This she did not do, and for that reason her claim against his estate is barred.

It follows that the judgment will be affirmed.

G. H. HAMMOND COMPANY v. JOSEPH MERCANTILE COMPANY.

Opinion delivered May 17, 1920.

1. FACTORS—NATURE OF BUSINESS.—A factor or commission merchant is one engaged in an independent calling, and who buys and sells on commission, and who may sell any personal property which is left with or consigned to him for sale.

2. FACTORS—AUTHORITY OF AGENT.—Where defendant was not in the exercise of an independent calling, and had no authority to sell meats for persons generally, but only to sell the products of the plaintiff on a commission, he was not a factor.

3. PRINCIPAL AND AGENT—AUTHORITY TO SELL PRINCIPAL'S GOODS.—Though plaintiff permitted defendant as its agent to sell "overs," the increase in weight shipped to such agent resulting from salt put on it, or to sell his own goods on his individual account, this did not authorize him to sell meat of plaintiff for which he had exchanged "overs" without plaintiff's knowledge or consent.

Appeal from Greene Circuit Court; *R. H. Dudley*, Judge; reversed.

STATEMENT OF FACTS.

The plaintiff, G. H. Hammond Company, alleges in its complaint that it is a Michigan corporation duly authorized to do business in the State of Arkansas; that on the 6th day of May, 1918, the defendant, Joseph Mercantile Company, a domestic corporation, took into its possession and converted to its own use 1,165 pounds of bacon extras belonging to the plaintiff and of the value of $308.10.

The defendant answered denying the allegations of the complaint. The facts are substantially as follows:

Ray Perkins of Paragould, Arkansas, entered into a written contract with the plaintiff for the sale of its meat to be consigned to Perkins and kept by him in a storehouse in Paragould, Arkansas, and sold by him for the plaintiff. Perkins agreed to keep the goods in a suitable building and not mingle them with other merchandise and to sell the same without expense to the plaintiff except the commission he was to receive.

When dry salt meat was shipped to Perkins in carload lots, there would be some meat left over by reason of the meat being salted and sacked out. This would occur because Perkins only accounted to the plaintiff for the meat by weight. Perkins would put this left-over meat to one side in the house where he kept the plaintiff's meat and was accustomed to sell it as his own. In May, 1918, he had a quantity of this dry salt meat and asked

the representatives of the defendant to purchase it from him. They told him that they could not use the dry salt extras, but that they could use some bacon extras if he had it. Perkins went back to the warehouse and exchanged the dry salt extras, which he claimed for bacon extras belonging to the plaintiff of equal value, and sold the bacon extras to the defendant as his own. The defendant paid Perkins for the bacon extras.

On cross-examination the president of the defendant company testified that he knew that Perkins was a broker for the plaintiff company and that he had no right to sell the plaintiff's goods in his own name and receive payment therefor. He further stated, however, that he thought the goods he bought belonged to Perkins and that he had frequently bought goods from Perkins which were called "overs," and which he understood belonged to Perkins. The bacon in question in this case was packed in the original boxes when it was delivered to the defendant. After it was delivered to the defendant, Perkins' warehouse burned down. The plaintiff did not know that Perkins claimed what he called the "overs" from carload lots and that he sold the same on his individual account. The plaintiff demanded payment of the bacon extras from the defendant and payment was refused by the defendant. Hence this lawsuit.

There was a verdict and judgment for the defendant and the case is here on appeal.

D. G. Beauchamp, for appellant.

1. The court erred in giving instruction No. 7 for plaintiff. Defendant could not take title from Perkins, for it knew that Perkins was the broker or factor of plaintiff and had no right to convert plaintiff's goods and sell them as his own. Perkins was authorized to sell its goods on his own account, and the doctrine of *caveat emptor* applies, and the jury should have been told if they found that the goods were sold to the defendant by Perkins as his individual goods and as a matter of fact they belonged to plaintiff, then their verdict should be

for the plaintiff. 54 Tex. 565; 42 Ark. 473; 47 *Id.* 363; 68 *Id.* 230; 93 *Id.* 521; 103 *Id.* 425.

2. The verdict is contrary to the legal evidence, and the verdict should be set aside with directions to find for the amount due plaintiff with interest.

Huddleston, Fuhr & Futrell, for appellee.

1. There is no error in giving instruction No. 7. The verdict is neither contrary to the law nor the evidence but is sustained by both. It is a reasonable and legal presumption that every one knows the usage and custom of the place where he trades by himself or factor and if the usage is not illegal he will be bound by it. 7 Mass. 46. See, also, 49 Tex. 143; 49 *Id.* 161; Wharton on Agency, § 134; Story on Agency, § 437; 3 Rawle 101; 13 Wall. 363; 49 N. Y. 464; 21 R. C. L. 902; 72 Am. St. 631; 3 Mo. App. 486; 69 Am. St. 799; 41 Am. Dec. 45; 63 S. E. Rep. 950.

2. Where a principal allows his goods to be so managed by his factor as to indicate to third parties that the factor is the owner, the factor may make a valid sale in discharge of a previous debt to one who has no notice, actual or constructive. 46 Tex. 391; 64 Md. 348; 1 Atl. Rep. 709; 54 Am. Rep. 770; 55 Am. St. 916, note. See, also, 6 Cal. 382; 46 Tex. 391; Story, Agency, §§ 110, 227, 390, 437; 2 Black (U. S.) 372; 6 Tex. 488; 7 Tenn. Rep. 359-360. Under the evidence the jury could not have returned a different verdict.

HART, J. (after stating the facts). It is earnestly insisted by counsel for the plaintiff that the court erred in giving instruction No. 7, which is as follows: "If the plaintiff authorized or knowingly permitted its factor, Perkins, to sell 'overs,' or any other of its goods, or his own goods, on his individual account as individual owner to customers, and said Perkins sold the bacon in question to defendant in that way, and the defendant, acting in good faith, and in ignorance of the rights of the plaintiff, and in the exercise of such care as an ordinary prudent person would use under the circumstances to ascer-

tain whether said Perkins was selling his own goods or those of the plaintiff, and at the time believed Perkins to be the true owner, or authorized to sell in his own name, then you will find for the defendant."

We think counsel for the plaintiff is right in his contention. The court in giving the instruction seems to have proceeded upon the theory that Perkins was a factor or commission merchant. Such is not the case. A factor is generally defined to be an agent who has a business, as well as goods, or merchandise consigned and delivered to him by, or for his principal for a compensation commonly called a commission. 19 Cyc. 115; 11 R. C. L. 753; Story on Agency (8 ed.), § 33, and Story on Sales, § 91.

The presumption of an authority to sell in these cases is inferred from the nature of the business of the agent, and it fails when the case will not warrant the presumption of his being a common agent for the sale of property of that description. 2 Kent's Com. (14 ed.), *622. A factor or commission merchant then is one engaged in an independent calling and is one who buys and sells on commission and who may sell any personal property which is left with or consigned to him for sale.

In discussing the difference between a factor and a broker or agent, the Supreme Court of the United States said: "The difference between a factor or commission merchant and a broker is stated by all the books to be this: A factor may buy and sell in his own name, and he has the goods in his possession; while a broker, as such, cannot ordinarily buy or sell in his own name, and has no possession of the goods sold." *Slack* v. *Tucker & Co.*, 23 Wall. (U. S.) 321.

In the case at bar Perkins was not in the pursuit of an independent calling and did not have the authority to sell meat for persons generally, but only had the authority to sell the products of the plaintiff on a commission. It is true he sold the "overs," as he called them, on his own individual account, but he did not have the author-

ity to sell meat generally for persons consigning same to him or leaving it in his possession. He did not attempt to exercise such authority. He was the exclusive agent for the plaintiff and his course of business clearly constituted him as the plaintiff's broker or agent as contradistinguished from a factor, or commission merchant. The president of the defendant company knew that Perkins was the broker or agent of the plaintiff and that he had no right to sell the plaintiff's goods for himself. According to the evidence adduced in favor of the plaintiff, he did not authorize Perkins to sell "overs" or any of its goods on his own account.

It is true that, according to the testimony of Ray Perkins, the manager of the plaintiff company knew that the quantity of the meat shipped by it to Perkins would gain in weight on account of the salt put on it, and that he told Perkins that the company would be satisfied to receive the amount of meat it shipped to Perkins, thereby tacitly giving him the right to use what was called the "overs" on his own account. The fact, however, that the plaintiff company might permit Perkins to sell "overs," or his own goods on his individual account, did not warrant the jury in finding for the defendant. The meat in question was not "overs," but was meat of the plaintiff for which Perkins had exchanged "overs" without the knowledge or consent of the plaintiff. The president of the defendant company admitted that he knew that Perkins was the broker or agent of the plaintiff and that he had no right to sell the plaintiff's goods in his own name. Perkins was not a factor or commission merchant and had no right to sell the products of the plaintiff in his own name. Therefore, the court erred in assuming to the jury that Perkins was a factor and in telling the jury to find for the defendant if it should further find that the plaintiff authorized or knowingly permitted its factor, Perkins, to sell "overs," or any of its goods, or his own goods on his individual account.

Hence the instruction was erroneous and necessarily prejudicial to the rights of the plaintiff.

For the error in giving instruction No. 7, the judgment must be reversed and the cause remanded for a new trial.

SOVEREIGN CAMP WOODMEN OF THE WORLD v. ARTHUR.

Opinion delivered May 17, 1920.

1. INSURANCE—FRATERNAL BENEFIT ASSOCIATION—HAZARDOUS OCCUPATION.—A provision in the constitution of a fraternal benefit association, made a part of the benefit certificate, that if a member engages in any one of certain hazardous occupations mentioned without notifying the clerk and paying certain increased dues he "shall stand suspended and his beneficiary certificate be null and void" is self-executing.
2. INSURANCE — FRATERNAL BENEFIT ASSOCIATION — MEMBERSHIP IN GOOD STANDING.—A provision that a benefit certificate should not be contested when it has been in force for five consecutive years immediately preceding the death while in good standing of the member holding the same has no application to the case of a member who engaged in a hazardous occupation without notice to the clerk and without payment of increased dues, since he was not a member in good standing at his death, and his certificate had not been in force for five consecutive years immediately preceding his death.
3. INSURANCE — HAZARDOUS OCCUPATION — EMPLOYMENT IN MINE.—Under the constitution of a fraternal benefit association requiring, among others, those "employed in mines" to pay increased assessments, as being a hazardous occupation, the word "mine" is used in its primary and restricted sense of an underground excavation for getting out minerals, and does not include open workings, like a bauxite mine.

Appeal from Faulkner Circuit Court; *George W. Clark,* Judge; reversed.

STATEMENT OF FACTS.

Harriet A. Arthur sued the Sovereign Camp Woodmen of the World to recover the sum of $1,000, the amount of a benefit certificate issued upon the life of her son. The certificate was issued to Joe B. Arthur on the 1st day of April, 1913, and his mother, Harriet A. Arthur,

was named as the beneficiary in the policy. Joe B. Arthur died from a gunshot wound inflicted by C. T. Herrick about the 1st of December, 1918. At the time Joe B. Arthur was working in the bauxite mines near Bauxite, Arkansas, and had been working there six or seven months.

W. A. Kinser was a foreman of the mines. According to his testimony, from about July 15, 1918, until the time of his death, Joe B. Arthur worked under him. He was asked how long Joe B. Arthur had worked in the mine and to state fully what work Arthur had been doing. His answer is as follows:

"I have no idea how long he was here, but think it must have been six or seven months. He worked in the open mines. His work caused him to be near and pass by where dynamite was being used, but when blasting was done signals were given so that everybody could get out of the way. He was working in open cut when banks were blasted down. Someone signals and all men leave. He was just simply mining and ditching is all he ever done for me. This work did not include driving and handling of teams, placing of railroad ties and tracks, but only what we call "ditching," which means that we were digging ditches for the drainage of water to pass out of mine."

Continuing we quote from the transcript the following from the deposition of W. A. Kinser:

"Q. State, if you know, in what business the said Joe B. Arthur was engaged at the time he was killed, and, also, state how long previous to the time he was killed, to your knowledge, he had been engaged in said business.

"A. He was engaged in ditching up to the time of his death and had been ditching for a week or ten days. Before this time he was working in the mines."

Another witness testified that Joe B. Arthur did not work in an underground mine, but was engaged in load-

ing cars with bauxite by using a pick and shovel and that his work was on top of the ground.

On cross-examination he testified that they first blow the ore up with dynamite to loosen it and then load it in the cars. They dig down in the ground ten or fifteen feet in places. When a pit is dug they blast the ore out and load it in the cars. He further stated that Arthur dug up some of the ore and that some of it he just shoveled into the cars; that the usual way was to loosen up the ore by blasting and then to shovel it in the cars which were on the track which had been laid in the pit.

The benefit certificate provided that the constitution of the order should be a part of it. Section 42 of the constitution provides that persons engaged in certain classes of business or employment shall not be admitted to membership in the order. Section 43 provides what occupations shall be admitted hazardous and so much thereof as is necessary to the issue raised by the appeal reads as follows:

"Sec. 43. Persons engaged in the following occupations, towit:

"(a) Structural iron workers, circus riders and trapeze performers, conductors and brakemen on railway freight trains, locomotive engineers and firemen, switchmen, hostlers, and other similar railway or steamship employees, excepting agents, office men and those engaged in employment not more hazardous; those employed in mines not otherwise prohibited; sailors on seas, electric linemen, employees in electric current generating plants and enlisted men in the army and navy during war, may be admitted to membership if accepted by the sovereign physician, but their certificate shall not exceed two thousand dollars each and their rate of assessment shall be three dollars and sixty cents per annum for each one thousand dollars of their beneficiary certificate in addition to the regular rate while so engaged in such hazardous occupations.

"(b) If a member engage in any of the occupations or business mentioned in this section, he shall within thirty days notify the clerk of his camp of such change of occupation, and while so engaged in such occupation shall pay on each monthly installment of assessment thirty cents for each one thousand dollars of his beneficiary certificate in addition to the regular rate. Any such member failing to notify the clerk and to make such payments as above provided shall stand suspended and his beneficiary certificate be null and void."

Section 68 is the incontestability clause and reads as follows:

"When a beneficiary certificate has been in force for five consecutive years immediately preceding the death, while in good standing, of the member holding the same, the payment thereof shall not be contested on any ground other than that his death was intentionally caused by the beneficiary or beneficiaries, or by the hands of justice, or from the direct result of drinking intoxicating liquors or from the use of opiates, cocaine, chloral or other narcotic or poison, or shall die while engaged in war except in defense of the United States of America or engaged in a hazardous or prohibited occupation."

It appears from the record that the insured had paid his regular dues, but that he did not pay the additional amount required by section 43 of the constitution and did not notify the company of his change of occupation, or that he was working at a bauxite mine. The company did not have any knowledge that he was working at a bauxite mine until after his death.

The above case was tried before the court sitting as a jury, and the court found in favor of the plaintiff.

From the judgment rendered the defendant has duly prosecuted an appeal to this court.

T. E. Helm and *Gardner K. Oliphint*, for appellant.

The insured was engaged in a hazardous occupation exactly covered by the provisions of this contract, and he violated the provisions of his contract by not notifying

the company and by refusing to pay the assessments legally made on him, which rendered his certificate null and void at the time of his death. The case should be reversed and dismissed. The agreements were warranties and the certificate was void under the testimony and the law. The insured did not pay the amount required by section 43 of the constitution of the order and did not notify the company of his change of occupation. 136 Ark. 149; *W. O. W.* v. *Newsom,* 143 Ark. 132; Act 462, Acts 1917.

R. W. Robins, for appellee.

1. The certificate had become incontestable under section 68 of the appellant's constitution.

2. Joe B. Arthur was not engaged in mining within the meaning of the constitution of the order. Webster, Dict., p. 1374; Webster, New Internat. Dict., p. 1375; 20 A. & E. Enc. L. (2 ed.) 682-3; 27 Cyc. 53; 18 R. C. L. 1092; Rapalje and Lawrence, Law Dict., vol. 2, p. 821; 35 L. J., ch. 337; 2 B. & A. 65; 3 *Id.* 424; 39 L. R. A. 249-251. Under the law Arthur was not engaged in mining at the time of his death nor at any time prior thereto.

HART, J. (after stating the facts). It is first sought to uphold the judgment on the ground that the insured was not employed in a mine at the time of his death, and that his policy was not forfeited under section 43 of the constitution which is copied in the statement of facts.

We can not agree with counsel in this contention. The foreman, under whom the insured worked, stated in positive terms that he was engaged in ditching for a week or ten days before he was killed and that before this time he was working in the mines. According to his testimony they were digging ditches for the drainage of water to pass out of the mines.

Another witness testified that the insured had been engaged in digging and loading ore in cars; that the bauxite ore was first loosened by blasting and was then loaded into the cars by the insured and other persons. In this way a pit between ten and fifteen feet deep was

dug in the ground. A track was laid down in it and the insured and others would load the ore into the cars on the track. The cars would then be drawn out of the pit. When the blasts were made the workmen would be notified so that they could get out of the way. It is true the mines were not under the ground, but the undisputed testimony shows that the insured was engaged in working in the mines. A part of his duties was to load the ore in the cars after it had been loosened by blasting so that it could be handled with a shovel. As they proceeded with this work, they would dig down deeper and deeper into the ground so that the pit was from ten to fifteen feet deep. Another part of the insured's duty was to help dig ditches for the purpose of draining the mines. There is no contradiction to this testimony, and it constituted working in the mine, just as much as was the work of the employee who did the blasting. It is contended that the work was not particularly dangerous and that there was no reason to increase the dues of the insured for engaging in that kind of occupation. Be that as it may, the parties had the right to contract with each other and designate working in mines as a hazardous occupation which required notice to the company and an increased payment of dues. The contract does not restrict the clause in question to those engaged in underground mining. The language used is "those employed in mines, not otherwise prohibited," etc.

Clause (b) of the section provides that if the member engages in any of the occupations mentioned in clause (a) of the section, he shall within thirty days notify the clerk of his camp of his change of occupation and shall pay on each monthly installment of assessments thirty cents of each thousand dollars of his beneficiary certificate in addition to the regular rate.

It further provides that any member failing to notify the clerk and to make the payment as provided shall stand suspended and his beneficiary certificate shall be null and void. Thus it will be seen that the section of

the constitution is self-executing. It provides in specific terms that if the member does not comply with the provisions of the section he shall be suspended and his benefit certificate shall be null and void.

As we have already seen, the insured was engaged in working in the bauxite mine at the time he was killed by Herrick, and he had not complied with the provisions of the section of the constitution just referred to. The beneficiary certificate made the constitution a part of the contract of insurance. The Legislature of 1917 passed an act pertaining to the regulation and incorporation of fraternal beneficiary associations. Acts of Ark. 1917, vol. 2, p. 2087.

Under section 8 of the act the certificate, the charter of the company, the constitution and laws of the society and the application for membership and medical examination signed by the applicant constitute the agreement between the society and the members. The society in question is a fraternal benefit association.

In *Acree* v. *Whitley,* 136 Ark. 149, and in *Sovereign Camp Woodmen of the World* v. *Newsom,* 143 Ark. 132, the court held that the insurance certificate of a fraternal society, being an Arkansas contract, is governed by the statute just referred to.

Again, it is contended by counsel for the plaintiff that the judgment of the lower court should be upheld under the incontestability clause of the benefit certificate. We do not agree with counsel in this contention. The clause referred to is section 68 of the constitution. It provides that when a beneficiary certificate has been in force for five consecutive years immediately preceding the death, while in good standing, of the member holding the same, the payment thereof shall not be contested on any ground other than those stated in the section.

It appears from the record that the insured had not made the payments required by section 43 of the constitution when he became employed in the bauxite mines. He did not notify his camp of his change of occupation

and did not pay the additional monthly dues required by the section. The concluding part of the section provides that any such member failing to notify the clerk and to make such payments as above provided shall stand suspended and his beneficiary certificate shall be null and void. Thus it will be seen that the provision is self-executing, and that the benefit certificate was null and void because the member had not complied with the section in the respects just mentioned. Therefore he was not a member in good standing at the time of his death and the certificate had not been in force for five consecutive years immediately preceding his death. Hence the incontestability clause of the constitution can avail the plaintiff nothing in this case.

It follows that the court erred in finding for the plaintiff, and for that error the judgment will be reversed and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

HART, J. (on rehearing). Counsel for the plaintiff in his brief on rehearing earnestly insists that the words, "those employed in mines not otherwise prohibited," as used in the policy, do not stand alone, but are connected with the context which plainly shows that the parties had in mind those employed in underground mining and not open workings.

Upon reconsideration of the question a majority of the court is of the opinion that counsel is correct in his contention. Insurance policies are written on printed forms specially prepared by experts for the insurance company and the insured has no voice whatever in their preparation; and for these reasons it is well settled that insurance contracts must be construed strictly against the insurer.

Section 42 of the constitution and by-laws of the order specifically designates certain classes of business or employment as prohibited and provides that persons engaged in such occupations shall not be admitted to membership in the order.

Section 43 deals with hazardous occupations. It uses the words, "those employed in mines not otherwise prohibited." The words, "not otherwise prohibited," evidently refer to the prohibited occupations named in section 42. This brings us to a consideration of the meaning of the words, "those employed in mines." As just stated, the company was dealing with hazardous occupations and the context showed what classes of occupations were deemed hazardous by the company. Now there are two meanings to the word "mine." In its primary and restricted sense a mine denotes an underground excavation made for the purpose of getting out minerals. The enlarged meaning of mine is the place where minerals are found and under certain circumstances, it includes minerals obtained by open workings. Bindley on Mines (3 ed.), vol. 1, §§ 88-89. Bauxite is a mineral, but it is mined by open workings. The surface of the earth is cleared off and the bauxite is blasted and is then removed by open workings. Bauxite is mined in precisely the same way that stone or marble is quarried. There is no distinction whatever between the operation of a bauxite mine and the quarrying of stone or marble where the latter is found just beneath the surface of the earth as in the case of bauxite. In such a case the marble or stone is removed by open quarrying or blasting and bauxite is removed in prcisely the same way. If the insurance company had considered bauxite mining to be a hazardous occupation, doubtless it would have also mentioned quarrying. The fact it did not do so, and the further fact that the words, "those employed in mines," are used in connection with structural iron workers, circus riders, trapeze performers, and those engaged in the actual operation of railway trains, employees in electric current generating plants, and enlisted men in the army and navy, show that the words were used in connection with hazardous occupations. This indicates that the company used them in their primary or popular signification

to refer to underground mining and not to open workings.

It follows that the motion for a rehearing should be granted and that the judgment of the trial court should be affirmed. It is so ordered.

SMITH, J., dissents.

ALLISON v. SCHWEITZER.

Opinion delivered May 17, 1920.

1. EASEMENT—CONSIDERATION.—Where plaintiff agreed that defendant might build two inches over the dividing line so as to touch plaintiff's wall, the parties agreeing that in this way dampness between the two walls would be obviated, the agreement was supported by consideration.
2. APPEAL AND ERROR—DEFENSE NOT PLEADED BELOW.—The defense of the statute of frauds can not be raised on appeal when not pleaded below.
3. FRAUDS, STATUTE OF—GRANT OF EASEMENT.—Though a grant of an easement is embraced within the operation of the statute of frauds, and must therefore be in writing, a parol grant, when executed as by building a wall, will be upheld and sustained under the same circumstances and on the same principle that a parol contract for the sale of land would be.

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

E. G. Mitchell, for appellant.

The agreement was without consideration and, being *in parol* only, is within our statute of frauds and void. Kirby's Digest, § 3892, subd. 4 and 5; 54 Ark. 519.

Shouse & Rowland, for appellee.

Appellant (1) has failed to establish title in herself; (2) she did not aptly plead the statute of frauds and (3) she is bound by the equitable estoppel and the decree should be affirmed. She did not come into equity with clean hands. The finding of the chancellor is fully sustained by the evidence, and appellant is estopped.

SMITH, J. This is a suit in ejectment for two inches of ground and by consent was transferred to the chancery court, where upon the final submission the court made the following findings of fact:

"That prior to the erection of the defendant's wall complained of, the plaintiff gave oral permission to the defendant to build his said wall upon the west two inches of her lot described as subdivisions 1 and 2 of lot 2, block 7, in the original town of Harrison, Arkansas; that the plaintiff at the time knew that the defendant contemplated expending large sums of money in the erection of his said building; that the defendant did erect said building, expending therefor large sums of money and that the plaintiff witnessed the building of the same and knew at the time that defendant was spending large sums of money therefor, relying on oral permission of plaintiff for him to do so, and that the plaintiff permitted defendant to so erect said building and expend said money on the same without protest or complaint; and that it would now be inequitable for plaintiff to be permitted to compel defendant to remove said wall; and that said wall could not be removed from said two inches of ground without great and irreparable injury to defendant's building, and without the expenditure by defendant of large sums of money. And the court further finds that the plaintiff is now estopped from complaining of defendant's acts in the erection of said building upon said two inches of ground."

The facts recited in this finding are practically undisputed; but appellant, who was plaintiff below, insists that the agreement was without consideration and therefore void; and, further, that the easement claimed was within the statute of frauds and could have been created only by a grant in writing.

Upon the question of consideration, it may be said that the testimony shows that before appellee built his wall he discussed with appellant the question of its location, and they agreed that each wall would support the

other by putting them together, and that in this way snow and ice would not accumulate between the walls, and there would less dampness by putting them together than there would be by leaving the two-inch space between.

Upon the question of the application of the statute of frauds, it may be said that the statute was not pleaded in the court below and cannot now be pleaded here for the first time. *St. L., I. M. & S. Ry. Co.* v. *Hall,* 71 Ark. 302; *Ark. Lbr., etc., Co.* v. *Benson,* 92 Ark. 392; *Dierks Lbr. Co.* v. *Coffman,* 96 Ark. 510; *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 189; *S. H. Kress Co.* v. *Moscowitz,* 105 Ark. 638.

Upon the merit of the case, it may be said that the question presented is not that of the enforceability of an executory parol contract for an easement. Appellee is in possession of the land in dispute, and the question is, "Can appellant be heard to say that no easement exists?" In 9 R. C. L., at page 746, it is said: "It is recognized, however, that, though a grant of an easement is embraced within the operation of the statute (of frauds), and must, therefore, be in writing, yet a parol grant executed will be upheld and sustained under the same circumstances and on the same principle that a parol contract for the sale of land would be." Among the numerous cases cited in the note to the text quoted are our own cases of *Wynn* v. *Garland,* 19 Ark. 23, and *Walker* v. *Shackelford,* 49 Ark. 503. See, also, *Salyers* v. *Legate,* 93 Ark. 608; *Rudisill* v. *Cross,* 54 Ark. 519.

The testimony fully warrants the finding of the court below, and the decree is, therefore, affirmed.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN *v.* MATLOCK.

Opinion delivered May 17, 1920.

1. INSURANCE—WARRANTY AS TO USE OF INTOXICANTS.—Where a benefit certificate reissued to include an additional beneficiary, reaffirms the answers, warranties and agreements contained in the original application, the certificate does not lapse because at the time of reissuance insured had become addicted to the use of intoxicating liquor; the warranty as to the use thereof referring to the use of liquors at the time the original certificate issued.
2. INSURANCE—FORFEITURE BY REASON OF USE OF INTOXICANTS.—In a suit on a fraternal benefit certificate, providing that if the insured shall become intemperate in the use of liquor to such an extent as to impair his health the certificate shall be void, the certificate is not forfeited in the absence of testimony showing the use of liquor on the part of insured to an extent which would impair his health.
3. INSURANCE—CORONER'S VERDICT OF SUICIDE.—In an action on a benefit certificate where it was claimed that insured committed suicide, the verdict of the coroner's jury, finding that he committed suicide, was inadmissible where the contract of insurance did not provide that it should be admitted.
4. INSURANCE—INSTRUCTION.—In an action on a benefit certificate wherein it was contended that insured committed suicide, an instruction distinguishing between a voluntary and an accidental act, and not between a sane and an insane act, *held* not erroneous, in the absence of specific objection or request that if the insured was a suicide it was immaterial whether he was sane or insane.
5. EVIDENCE — PRESUMPTION AGAINST SUICIDE.—The presumption against suicide arises even when it is shown that death was self-inflicted, as it is presumed to be accidental until the contrary is made to appear.
6. INSURANCE—SUICIDE—SUFFICIENCY OF EVIDENCE.—In an action on a benefit certificate, wherein it was contended that insured had committed suicide, evidence *held* to make it a jury question whether he had committed suicide.

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

R. W. Wilson and *C. H. Moses,* for appellant.

1. The policy was void *ab initio* because of false warranties and material misrepresentations. 58 Ark.

528; 72 *Id.* 620; 84 *Id., Fid. Ins. Co.* v. *Beck;* 90 Ark. 264; 96 *Id.* 499; 104 *Id.* 538; 120 *Id.* 605; 135 *Id.* 65.

2. The case should be reversed for a new trial. It was positively proved and undisputed that Doctor Matlock was a continuous user of intoxicating liquors. It was error to exclude the coroner's verdict; it was competent evidence for the jury. 93 Ark. 209; 92 N. W. 1104; 181 U. S. 49; 126 Ark. 483; 113 S. W. 695; 141 *Id.* 936; 175 *Id.* 266; 70 N. E. 1066; 90 Atl. 73.

3. The court erred in giving and refusing instructions. "Suicide sane or insane" was inserted in the policy for the purpose of avoiding liability for all kinds of suicide, regardless whether or not the self-destruction was voluntary and intentional, or the result of insane impulse, or mental aberration over which the insured had no control. 78 N. E. 488; Vance on Ins., p. 522; Elliott on Ins., 368. Our construction or these "suicide" or "self-destruction" clauses has been long sustained by the courts. 93 U. S. 286; 42 N. W. 156; 41 Atl. 351; 57 Pac. 936; 39 N. W. 658; 88 *Id.* 687; 127 U. S. 661. The constitution and by-laws of a fraternal benefit association form a part of the contract (81 Ark. 512), and one binding as part of the contract. 105 Ark. 140-146; 52 *Id.* 202; 55 *Id.* 210; 81 *Id.* 512; 104 *Id.* 538; 135 *Id.* 65; 98 *Id.* 421. Instructions 3 and 4 should have been given, and it was reversible error to refuse them. 132 Ark. 63.

4. The prejudicial arguments of plaintiff's counsel call for a reversal. 117 Ark. 551; 132 *Id.* 455. We have a special statute controlling fraternal benefit societies, and they are exempt from the provisions of the other insurance laws of our State. Act 462, Acts 1917, p. 2087; 168 S. W. 593; 196 *Id.* 427; 200 *Id.* 76.

5. At best a judgment for only $400 should be entered here. All the circumstances point to drunkenness and suicide. 95 Ark. 456.

Gaughan & Sifford, for appellee.

1. The policy was not void *ab initio.* This case is governed by 90 Ark. 264-8.

2. The covenant was not forfeited under article 15, constitution and by-laws of the order, because there is a total lack of any evidence to show that deceased used liquor to such an extent as to impair his health, and it is not shown that the excessive use of liquor caused his death, and it was not shown that article 15 was in force or effect on December 18, 1915.

3. There was no error in excluding the coroner's verdict. 191 S. W. 25.

4. There was no error in the instructions complained of. They state the law. 80 Ark. 190; 128 *Id.* 155; 133 *Id.* 176.

5. As to the prejudicial remarks of counsel, no request was made below for the court to rule on them. The record is silent as to what may have been said, or the court's ruling thereon. 103 Ark. 359; 100 *Id.* 437.

6. Suicide was not shown by the evidence or physical facts. 80 Ark. 190; 133 *Id.* 176. 95 Ark. 456, is an entirely different case from this.

SMITH, J. This is an action by appellee, as guardian and next friend of her infant children, against appellant, for a sum alleged to be due on a policy of insurance for $2,000, issued on the life of Dr. Matlock, the father of said children. Payment of said policy is resisted upon the grounds, that Dr. Matlock, the insured, had made false representations in regard to the use of intoxicating liquors when he obtained the policy sued on, and had become intemperate in the use of intoxicating liquors; and liability in any event in a greater sum than $400 is denied under a clause of the policy reading as follows: "I agree, for myself and beneficiary, that, in case of suicide, sane or insane, there shall be due and payable only one-fifth of the otherwise value of the covenant." The instruction submitted to the jury only the question of suicide, and there was a finding on that issue for appellee, as the verdict returned was for the full amount of the policy, and this appeal is from the judgment pronounced upon that verdict.

The policy or benefit certificate sued on was issued December 18, 1915; but this appears to have been a reissuance of a certificate dated January 10, 1910, and the certificate was reissued to include as a beneficiary the name of a baby born after the original certificate had been issued.

There is testimony to the effect that between January, 1910, and December, 1915, the insured drank liquor to excess, and it is claimed that under an article of the constitution of the society the certificate forfeited on that account, the article of the constitution referred to so providing. There is no evidence that at the time of the original application, or prior to that time, the insured used liquor to excess; and there is no evidence that any of the statements made by the insured were false.

The certificate sued on contained the following clause: "It is understood and agreed that my original application and medical examination, including answers to questions, warranties, and agreements therein contained, and which was the basis upon which the original covenant was issued, are hereby reaffirmed, and the same, and this application, shall be considered as a part of the contract under which the new covenant herein applied for, the same as though set out at length herein."

It is insisted that as the insured had become addicted to the use of intoxicating liquors at the time the certificate sued on was issued the policy lapsed on that account. But the case of *Supreme Lodge Knights of Pythias* v. *Davis,* 90 Ark. 264, is against that insistence. The question here raised was there decided, and the court said that the warranty contained in the last certificate referred to the use of liquors at the time the original certificate issued.

It is contended that the policy forfeited under article 15 of the constitution of the society. This article provides that if the guest or beneficiary holding a certificate shall become intemperate in the use of liquor to such an extent as to impair his health, the certificate shall be void

and of no effect. This insistence appears to be fully answered by the reply made that there is a total lack of any testimony which shows the use of liquor on the part of the deceased to an extent which would impair the insured's health.

It is next insisted that error was committed by the court on the trial below in refusing to admit in evidence the verdict of the coroner's jury of inquest, which reflected a finding by the jury that the insured had committed suicide. This question was presented to and decided by this court in the case of *American Nat. Life Ins. Co.* v. *White,* 126 Ark. 483, where we held that the coroner's verdict was inadmissible in cases where the contract of insurance itself did not provide that it should be admitted; and the certificate here sued on contained no such provision.

It is next insisted that error was committed in giving over appellant's objection the following instruction:

"(B) The jury are instructed that, though you should find from the evidence that deceased, Dr. Matlock, came to his death from a gunshot wound, and that, at the time of the shooting, he held the gun in his hand, this of itself is not sufficient to warrant you in finding for the defendant, unless you further find from the greater weight of evidence that the gun was fired voluntarily by the deceased with the intention of inflicting upon himself the injury, and was not the result of accident."

The objection to this instruction is that it virtually eliminates from the case the question of the insured's sanity; whereas the policy provides for the payment of only one-fifth the sum otherwise due if the insured should commit suicide, whether sane or insane. But no objection to that effect was made at the trial below; and it is apparent that the court was not attempting to distinguish between a sane and an insane act, but between a voluntary act and an accident, and as thus interpreted the instruction finds full support in the case of *Grand Lodge A. O. U. W.* v. *Banister,* 80 Ark. 190, from which case it appears

to have been practically copied. See, also, the cases of *Aetna Life Ins. Co.* v. *Taylor,* 128 Ark. 155; *Aetna Life Ins. Co.* v. *Wepfer,* 133 Ark. 176.

A specific objection to the instruction should have been made; or an instruction should have been requested, telling the jury that if the insured was a suicide, then it was immaterial whether he was sane or insane, if it was thought that the instruction given was open to the objection now urged against it.

The necessity for a specific objection is more apparent when it is stated that the question whether Dr. Matlock committed suicide was submitted to the jury under an instruction which stated that "The defendant insurance company defends on the ground and theory that the death resulted from the voluntary act of the deceased in intentionally inflicting upon himself the fatal wound. The court tells you that that is a perfect defense, if proved."

It is very earnestly insisted that the court should not have submitted to the jury the question whether Dr. Matlock committed suicide, because no other reasonable inference is deducible from the testimony. And this contention presents the difficult question in the case.

The insured was a physician, and enjoyed an extensive practice, and about four p. m. of a day in August, 1916, he came from town to his home, and went into his dining room, where his eldest daughter served as his lunch some canned goods he had brought with him. Shortly after finishing his lunch he went into another room and got his double-barreled shotgun and shot his wife in the face, but although severely wounded she later recovered. There is no testimony whether he had previously quarreled with his wife or not. A neighbor testified, however, that just before the shot was fired which struck Mrs. Matlock she was heard talking to her husband in pleading tones. Mrs. Matlock fell wounded and bleeding on the floor, and Dr. Matlock walked to a nearby door, and in a few seconds another shot was heard. This shot was fired from the same gun, and killed Dr. Matlock

instantly, blowing his chin and face away by shot that entered underneath his chin and ranged upward and slightly outward. Dr. Matlock was a left-handed man, and the shot which killed him ranged slightly to the right, hitting the top of the door facing of the dining room at an angle of nearly ninety degrees, and when the body was found the gun was lying parallel with the body.

Appellant attaches much importance to the fact that Dr. Matlock came home and ate his lunch at four p. m.; but it was not shown that this was an unusual thing for him to do.

We think it must necessarily be true that Dr. Matlock shot his wife; but it does not necessarily follow that he also intentionally took his own life. No one knows what happened in the interval between the two shots. There was no testimony that Dr. Matlock had said or had done anything which indicated that he contemplated committing suicide. No explanation is attempted of the shooting of Mrs. Matlock, and we can only surmise how angered or excited her assailant must have been after firing that shot, or what his conduct was. As was said in the case of *Grand Lodge A. O. U. W.* v. *Banister, supra,* there is a presumption against suicide, and this presumption arises even when it is shown by proof that death was self-inflicted, as it is presumed to be accidental until the contrary is made to appear; and we cannot say that the jury should have found that insured committed suicide unless from the facts recited we must declare the law to be that no other conclusion could reasonably be drawn. We are unable to say, as a matter of law, that the fatal shot was not fired as the result of some act, such as violently striking the gun against the floor, or striking it against some object; and while it must be confessed that the theory of suicide does appear more probable than any other theory, the question of probabilities is one addressed to the jury, and not to us.

In the case of *Industrial Mutual Indemnity Co.* v. *Watt,* 95 Ark. 459, we said that if reasonable men, view-

ing the facts shown by the testimony, might come to different conclusions as to whether the deceased committed suicide, then the facts, although undisputed, were properly submitted to the jury, and in the application of that test to the facts of this case we do not reverse the judgment of the jury, because we are unable to say that reasonable men must necessarily conclude that Dr. Matlock was a suicide.

It is earnestly insisted that the decision in the Watt case is conclusive of this case. But we think a comparison of the facts of the two cases will show significant acts and statements of the deceased which were present there but are absent here, which preclude us from saying here, as was said there, that "the condition of the body when it was found, and the course of the bullet, coupled with his recent statements and acts in regard to self-destruction, are conditions and circumstances inconsistent with any other reasonable cause of death than that of suicide."

No error appearing, the judgment is affirmed.

PITTMAN v. HINES.

Opinion delivered May 17, 1920.

1. CARRIERS—DUTY IN OPERATING VESTIBULED TRAINS.—It is the duty of carriers operating vestibuled trains to exercise the highest degree of care for the safety of their passengers which a prudent and cautious man would exercise consistently with the practical operation of the train.
2. CARRIERS — NEGLIGENCE IN LEAVING OPEN DOOR OF VESTIBULED TRAIN.—In an action for personal injury suffered by an insane man in jumping from an open vestibule door on a railroad train while in the care of attendants, the carrier did not have a right to rely solely upon the insane person's attendants to keep him from jumping where the carrier's employee knew his condition and had promised to render assistance, and it was a question for the jury whether the carrier's employees were negligent in leaving the vestibule door open.

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

Pace, Campbell & Davis, for appellant.

1. The proof clearly shows that plaintiff "jumped through the open door of the vestibule" and that the door was open when plaintiff jerked loose from Knight and leaped from the train. The proof clearly warrants the conclusion that members of the crew left the door open, and the question of negligence should have been sent to a jury. The conductor and brakemen knew plaintiff was insane when placed on the train, and carriers of passengers must use due care and attention and exercise special care, prudence and foresight for such passenger's safety. 115 Ark. 505; 108 Ill. App. 565; 75 S. W. 713; 92 Ark. 432; 76 Fed. 734; 87 Ark. 335; 96 Minn. 434; 22 L. R. A. (N. S.) 312; 94 S. W. 293; 4 R. C. L., p. 1216, § 637; 135 Mich. 254; 76 Fed. 734. The questions of negligence are for a jury. 84 U. S. 657; 144 *Id.* 408. It was error to direct a verdict for defendant. 92 Ark. 432; 2 Hutch. on Car., par. 911; 94 S. W. 295; 132 Mich. 695.

2. Even if plaintiff's attendants were guilty of the grossest negligence, that does not defeat or impair plaintiff's right to recover for the negligence of appellee. An insane person can not be guilty of contributory negligence, nor can the negligence of his attendants be imputed to him to defeat his right to recover. 75 Ark. 479; 72 *Id.* 1; and cases *supra.*

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

Vestibules are provided with doors for the convenience of passengers to go from one coach to another. 115 Ark. 262. The train employees had the right to assume that the three attendants would properly look after the plaintiff. 59 Ark. 180. The court properly instructed a verdict, as there was no case on the evidence for a jury.

HUMPHREYS, J. Appellant, an insane person, instituted suit, through his guardian, in the Dallas Circuit Court, against appellee, Director General of Railroads, who was in charge of and operating the Chicago, Rock Island & Pacific Railroad from Fordyce to Little Rock,

to recover damages for an injury caused by appellant's jumping from a moving train through a vestibule door, alleged to have been negligently opened, or left open, by appellee's employees.

Appellee filed answer, denying negligence and, by way of further defense, pleading exemption on the ground that he had a right to assume that appellant's attendants would look after and keep him from injuring himself.

The cause was submitted to a jury upon the pleadings and evidence adduced by appellant. At the conclusion of appellant's evidence, in response to a motion by appellee for a peremptory instruction, the court instructed a verdict for appellee, and dismissed appellant's complaint. From the judgment of dismissal, an appeal has been duly prosecuted to this court.

The substance of the evidence most favorable to appellant is as follows: F. M. Pearson, sheriff of Dallas County, took appellant, who was crazy, to appellee's depot at Fordyce for the purpose of sending him to the Hospital for Nervous Diseases at Little Rock. The conductor on the train was requested to hold the train until appellant could be put aboard, which request was granted. Appellant was pretty wild and did not want to go. The sheriff informed the brakeman that appellant was insane, obtained his aid in putting him on the train, and requested that he help the attendants *en route,* which he promised to do as best he could. Appellant was placed in the immediate charge of W. A. Knight, a deputy sheriff; C. D. Mallett, a resident of Fordyce going to Little Rock on business, and J. T. Pittman, father of the appellant. Just after leaving Bunn, appellant expressed a desire for water. W. A. Knight, C. D. Mallett and appellant went to the water tank but found no cup. Mr. Mallett went into the smoker in search of a paper cup and left Mr. Knight and appellant standing at the water tank. There was a swinging door between the coach and vestibule. Mr. Knight was unfamiliar with the arrangement of vestibule coaches and thought the vestibule of this train was open like other

trains he had seen. While waiting for Mr. Mallett to return, appellant jumped through the swinging door, leading into the vestible. As he jumped, Mr. Knight gave the alarm and caught him by the coat, but, fearing he might fall to the ground himself, he released appellant and ran back two or three steps to the first window to see where appellant landed, but before, or by the time, he reached the window, the train had passed the place where appellant had fallen, so he did not see him. About the time appellant jumped, the bell was rung by either the conductor or brakeman with the exclamation, "Who left that door open?" The train proceeded a short distance and backed up to where appellant had fallen. Mr. Knight reached him first, and, upon examination, found appellant's leg was broken. He was placed aboard the train and brought to Little Rock. En route he suffered quite a little. At Benton, his leg was bandaged by a physician. When he reached Little Rock, his leg was set. He remained in bed four or five weeks, his leg being strapped to boards longer than his leg, with a bucket of brick hanging on the end of the board. At the time J. T. Pittman testified, his son was a cripple, his injured leg being two inches shorter than the other. Mr. Mallett and Mr. Pittman both knew that the coach in which they were taking appellant to Little Rock was a vestibule coach, but thought the outside doors were closed when the train was moving.

Appellant's contention is that appellee is responsible for the injury resulting to him because of his negligence in failing to close the vestibule door, through which he jumped from the moving train after leaving Bunn, and that the court erred in taking the question of whether or not appellant was guilty of negligence in that respect, from the jury. Appellee's first answer to the claim is that the law imposed no duty upon him to keep the outside vestibule doors to his coaches closed; his second answer is that there is no evidence in the record that he failed to close the vestibule door through which appellant

jumped to the ground; and his third answer is that his employees had a right to assume that they would look after appellant and keep him from injuring himself.

(1) It is the duty of carriers operating vestibuled trains to exercise the highest degree of care for the safety of their passengers which a prudent and cautious man would exercise, that is reasonably consistent with the practical operation of the train. *St. L., I. M. & S. Ry. Co.* v. *Purifoy,* 99 Ark. 366.

(2) We think the evidence in the case tended to show that the outside vestibule door and coach, in which appellant was riding, was left open after leaving Bunn. It was clearly inferable from the quickness with which appellant landed on the ground, after jumping through the swinging door that opened between the coach and vestibule, that the outside vestibule door was open. Time sufficient, between the jumping and landing, did not elapse for the crazy man to open the outside door. Mr. Knight testified that, before he could run two or three steps and look through the window, the train had moved forward so that he could not see appellant on the ground. The exclamation made by the conductor, or brakeman, who rang the bell, indicated that the door was left open. There being sufficient evidence in the record from which such an inference might be drawn by the jury, the question of whether the employees of appellee negligently failed to close the door became a question to be determined by the jury.

(3) We do not think, under the record in this case, appellee had a right to rely entirely upon the attendants of appellant to keep him from being injured. The employees of appellee had been notified that appellant was crazy, that he was pretty wild and did not want to go to Little Rock. The sheriff had requested the assistance of the brakeman in conducting him to Little Rock, and the brakeman had promised to render every assistance he could. Knowing these facts, it became the duty of the employees of appellee to use the highest degree of dil-

igence which a reasonably prudent man would use, consistent with the proper operation of the train, to prevent appellant from jumping from the moving train and injuring himself. Under the record in this case, it became a question for the jury to say whether appellee could have reasonably anticipated the danger and whether he used the caution and vigilance required of him by the law to prevent the injury.

For the error in peremptorily instructing the jury to return a verdict for appellee, the judgment is reversed and the cause remanded for a new trial.

CHICKASAW COOPERAGE COMPANY *v.* MCGRAW.

Opinion delivered May 17, 1920.

1. MASTER AND SERVANT—EVIDENCE OF CONDITION OF MACHINE AFTER ACCIDENT.—In an action for the death of an employee sustained while operating a ripsaw, where it was an issue whether the ripsaw was provided with a device known as a "divider," which was a part of the machine requiring time and trouble to remove, evidence that there was no divider on the machine two and a half hours after the accident was admissible to show condition at time of accident.
2. EVIDENCE—CONFLICT WITH PHYSICAL FACTS.—In an action for the death of one employed in operating a ripsaw, which at the time lacked a "divider," testimony that the divider served as a guard device *held* not necessarily in conflict with the physical facts.
3. MASTER AND SERVANT—ASSUMED RISK.—Where decedent was inexperienced in the use of a ripsaw, and the dangers of operating it were not explained to him, he did not, by operating the machine for a few hours, as matter of law, assume the risk of operating it without a divider; whether he did assume such risk being a question for the jury.
4. MASTER AND SERVANT — SAFE APPLIANCES — INSTRUCTION.—In an action for the death of one operating a ripsaw, an instruction that it was the master's duty to provide decedent with reasonably safe appliances such as would be provided by ordinarily prudent persons under the same circumstances, *held* not objectionable as making the master a guarantor of the servant's safety.

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

Stayton & Stayton and *A. P. Patton,* for appellant.

1. The motion for continuance should have been granted. 67 Ark. 144.

2. It was error to permit the witness, Gossett, to be asked and answer questions as to the condition of the ripsaw after the accident and as to whether the divider was in the machine at the time. 82 Ark. 561. It was also error to allow plaintiff to prove that appellant repaired the edger after the accident. Such proof is incompetent. 70 Ark. 183; 78 *Id.* 147; 79 *Id.* 388; 108 *Id.* 489.

3. The court erred in giving instructions 1, 2, 3, 4, 5, 6, 7 and 8. 105 Ark. 210; 46 *Id.* 567; 35 *Id.* 602; 44 *Id.* 529; 56 *Id.* 221; 105 *Id.* 434.

4. A verdict based on evidence which conflicts with the physical facts will be set aside. 79 Ark. 621; 14 Enc. of Ev., p. 129; 123 Ark. 436; 84 Ark. 555; 116 *Id.* 60; 79 *Id.* 437; 109 *Id.* 206. See, also, 179 U. S. 658; 90 S. W. 977; 103 Va. 64; 123 Ark. 134.

L. L. Campbell, for appellee.

1. There was no error in the admission of evidence. 4 Labatt on Master and Servant (2 ed.) 4821; 48 Ark. 460; 89 *Id.* 331; 110 *Id.* 194; 118 *Id.* 61. See, also, 95 Ark. 310; 54 *Id.* 25; 75 *Id.* 251; 86 *Id.* 145; 58 *Id.* 125.

2. The instructions were correct. 80 Ark. 260; 59 *Id.* 465; 81 *Id.* 591; 123 *Id.* 119; 98 *Id.* 227; 78 *Id.* 374; 93 *Id.* 564; 78 *Id.* 374; 90 *Id.* 476; *Ib.* 407; 91 *Id.* 102; 92 *Id.* 102; 98 *Id.* 211.

3. The evidence fully sustains the verdict. The deceased followed orders and was operating the machine, and was injured because of the negligence of the defendant.

HUMPHREYS, J. Appellee, administratrix of the estate of J. W. McGraw, deceased, instituted suit in the Jackson Circuit Court, against appellant, a corporation, operating a stave mill at Algoa, Arkansas, for $30,000 damages on account of injury and resulting death of deceased while operating a rip saw in said mill, due to the

alleged negligence of appellant in failing to provide a divider at the rear of said saw. Five thousand dollars of said amount was claimed as damages to the estate, on account of pain and suffering endured by the deceased, and $25,000 was claimed for the benefit of appellee, as widow, and her infant child. The complaint contained other allegations of negligence, but the issue of negligence was narrowed by the evidence to the alleged failure of appellant to provide a divider at the rear of the saw.

Appellant filed an answer, denying all the material allegations of the complaint, and pleading assumed risk and contributory negligence as further defenses.

The cause was submitted to the jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment of $10,000 against appellant for the benefit of the widow and child, and $2,500 for the benefit of the estate. From that judgment an appeal has been duly prosecuted to this court.

Prior to the submission of the cause, appellant filed a motion for a continuance, the overruling of which is urged as ground for reversal. The cause was tried in Newport on September 25. On the 8th day of September, after the issues had been joined and the deposition of Doctor Lutterloh taken, appellee filed an amended complaint, paragraphing the causes of action so as to claim $25,000 damages for the benefit of the widow and child, and $2,500 for the benefit of the estate; and specifically alleging that the negligence consisted in failure to provide a divider at the rear of the saw. A copy of the amended complaint was served upon attorneys for appellant before the trial. The contention is made that the amended complaint set up an additional cause of action on account of pain and suffering, which matter was not touched upon in Doctor Lutterloh's deposition. Damages were claimed in the original complaint for the negligent act of appellant and for the pain and suffering endured by the deceased. The nature of the action was not materially changed in the amended complaint. Certainly, no sur-

prise resulted to appellant on account of the slight change made in the original complaint. The court, therefore, did not abuse its discretion in overruling the motion for continuance.

The facts, pertinent to a determination of the questions involved in this appeal, are as follows: The deceased husband of appellee, J. W. McGraw, twenty-seven years of age and reasonably intelligent, was an employee of appellant in his lifetime, engaged, until the morning of the injury, in operating an equalizer saw at its stave mill. An equalizer saw consists of two circular saws set about thirty-four inches apart on a level table, through which bolts are pushed and ends sawed off crosswise the grain, so as to equalize their length. There was nothing to fly back and hit the operator of the equalizer saw, and the operation thereof was not regarded as dangerous. On May 5, 1919, Tom Rogers, foreman of the mill, ordered J. W. McGraw, who was inexperienced in the operation of a rip saw, to operate it instead of the equalizer saw he had been operating. An accurate description of the rip saw, and its operation, appears in the condensed statement of facts in appellee's brief, which is as follows: "A table of stout timbers was built and securely fastened in such a manner that the top of the table stood at an angle of about forty-five degrees. The highest point being at the front where the operator stood, the top sloping backward. The object of this evidently being to cause the slab or refuse timber to slide off and away from the saw. About the center of the table a groove was cut in which revolved the circular saw some fifteen inches in diameter, and to operate the saw it was necessary for the operator to stand in front or a little to one side of the saw. He would pass the timber through the saw, holding the merchantable part, and the tailings or slabs passing on to the rear end being caught by the man placed there for that purpose, who would remove the slabs from time to time from where they would naturally fall. Two safety devices were usually and ordinarily

provided by persons acting with ordinary care in the operation of such saws, one of these devices consisting of a heavy board securely fastened over the top of the saw, and the other device was a strong and tough metal piece several inches long, commonly called a "divider," securely fastened at the rear of the saw in an upright position and as near to it as possible."

The evidence disclosed that the saw revolved very rapidly toward the operator, and that the cover, or hood, was to keep the heading, or pieces thereof, from being thrown backward with force toward the operator. The evidence is in conflict as to the purposes of the divider. Appellant's evidence tended to show that its only use was to spread the timber being sawed so that it would not pinch the saw and fly up against the hood. Appellee's evidence tended to show that, in addition to preventing the timber from pinching the saw and flying up, the divider also prevented slabs or refuse pieces of heading, left on the table after being sawed off, from coming in contact with the rear teeth of the saw and being hurled backward toward the operator. One witness expressed the usefulness of the divider as a guard by saying that, with a divider properly placed, it was possible, but improbable, that a slab would catch in the teeth of the saw. The saw rig shook when in operation, which jolting process might cause any loose pieces, left on the table, to come in contact with the rear teeth of the saw, unless prevented by the divider from doing so.

Appellee's evidence tended to show that it was dangerous to run a rip saw of this character without a divider, because it served as a guard to prevent slabs from getting into the saw, and from being hurled backward toward the operator; also, that an inexperienced person would know nothing about the danger of operating a rip saw without a divider.

There is also a conflict in the evidence as to whether a divider was in place at the time the injury was inflicted—appellant's witnesses testifying that a divider was in place, and appellee's that it was not.

One of appellee's witnesses, R. H. Gossett, testified that he observed the rip saw at 7 o'clock a. m., and again at 1 o'clock p. m., on the day the casualty occurred; that the rear guard, or divider, was not on it at either time. The appellant objected and saved exceptions to the admission of the evidence as to the condition of the saw at 1 o'clock p. m. about two and a half hours after the injury.

J. W. McGraw had operated the saw about three hours at the time he was injured, being injured at 10:30 a. m. He was standing in front and a little to the side of the machine, feeding it, when a slab was caught in the saw, which had been run through it and hurled backward, striking him in the lower part of the stomach and rupturing the bowels, thus causing peritonitis from which he died late on the night of May 7, 1919, after an operation had been performed on him. During his illness, he suffered great pain.

It is insisted that the court erred in admitting the evidence of Tom P. Snyder, to the effect that, two and a half hours after the accident, the machine was in the same condition as before the accident. A divider is a strong metal piece, several inches long, securely fastened in the rear, near the saw, in an upright position. According to the evidence, it was a necessary stationary part of the machine. It was something that would require time and effort to remove. If it had been a part easily removable, such a piece as could be lifted out without time or trouble, there would be reason in excluding the evidence showing the condition of the machine after the casualty. We think the presence or absence of a stationary part of a machine a short time after a casualty has happened would be evidence from which a reasonable presumption might be drawn as to the condition of the machine at the time of the casualty. This court said, in the case of *Little Rock Railway Co.* v. *Eubanks,* 48 Ark. 460, that, "It is often impracticable to adduce evidence on the condition of the track at the precise moment the casualty occurred. It is enough to prove such a state of facts shortly before or

after as will induce a reasonable presumption that the condition was unchanged." Under this rule, we think the evidence was admissible and the court did not err in admitting it.

It is insisted that the testimony in behalf of appellee, to the effect that the divider served as a guard device to prevent slabs from coming in contact with the saw is contrary to the physical facts, and, therefore, insufficient to sustain the verdict. The argument is made that the divider, being below the saw, loose slabs would have to pass beyond the saw before the divider could intervene between them and the saw, and, having passed beyond the saw, any jolting process would move the slab downward from the saw, instead of upward toward the saw on a floor such as this machine had, which was built at an angle of forty-five degrees. This is correct as to any slab which had entirely passed beyond the saw. Of course, any jolting process would not jolt a slab uphill toward the saw so that a divider would prevent it from coming in contact with the rear teeth thereof. This is not true, however, in reference to slabs which had partially passed the saw. Such slabs could jolt sideways toward the saw in their downward course and be prevented from coming in contact with the rear teeth of the saw by first coming in contact with the divider. It will be remembered the divider was a little thicker or wider than the saw and its proper place as near to the saw as possible. Being very near to, and a little wider than, the saw, it is readily seen how a loose slab jolted by and toward the saw might first strike the divider and be prevented from touching the saw. The testimony in this particular, therefore, did not necessarily conflict with the physical facts.

It is also contended that, if it be assumed that a divider was a necessary safeguard on such a machine, its absence was necessarily apparent to an operator of ordinary intelligence like appellant, and for that reason he assumed the risk incident to operating it without the divider. There would be much in this contention, had the

deceased been experienced in the use or mechanism of the machine. On the contrary, it was shown that the deceased was inexperienced in the use of a rip saw, and there was nothing in the record to show that he had any knowledge of its mechanism. He had never operated such a saw until the morning of the injury, and then only for two and a half hours before the injury occurred. Neither the mechanism of the machine, nor the inherent dangers and hazards incident to operating it, were explained to him. If a divider was not on the machine when deceased began to operate it, as appellant's testimony tended to show, then the deceased could not have assumed the risk incident to the operation without a divider, unless it had been shown he knew a divider was a necessary part of the machine and that its absence entailed additional hazard. The fact that he had been working around this and other mills for quite a while is not conclusive evidence that he had information concerning the necessary parts of a rip saw and the dangers incident to operating it without some part in place. There is positive evidence in the record to the effect that an inexperienced person would know nothing about the danger of operating a rip saw without a divider. The question of assumed risk was clearly one of fact for the jury, under the evidence, and the court did not err in so treating it.

It is insisted that appellee's request No. 2, given by the court, made the appellant a guarantor of the safety of the machine furnished, whereas it was its duty, under the law, to only use reasonable care to furnish a reasonably safe machine. We do not think the instruction susceptible to such a construction. The instruction does say that it was the duty of appellant, through its foreman, to provide the deceased with reasonably safe appliances, but adds that they must be such appliances as would be provided by ordinarily prudent persons under the same circumstances. This clearly indicates that the court meant, and we think the jury must have understood, that reasonable care only should have been used in providing a safe machine.

The objections and exceptions to other instructions are quite numerous and a discussion of them all would add great length to this opinion. Suffice it to say that we have carefully read them and considered them in their application to the evidence in this case and find that they correctly submitted the law governing the relationship of master and servant to the jury. After a careful examination we find no inherent errors in any of the instructions given, and that every phase of the case was covered by the instructions.

No error appearing, the judgment is affirmed.

ROLLINS v. EAST ST. LOUIS COTTON COMPANY.

Opinion delivered May 17, 1920.

1. BAILMENT—LIABILITY OF GRATUITOUS BAILEE.—Where cotton, after being ginned and baled, was left by the owner on the ginner's platform without storage charge or other consideration, the fact that the ginner issued a receipt for the cotton to the owner and agreed to allow it to be covered by a blanket insurance carried by the ginner did not constitute the latter a bailee for hire.
2. BAILMENT—LIABILITY OF GRATUITOUS BAILEE.—A gratuitous bailee is responsible for goods intrusted to him only when they are damaged or lost through his gross negligence.

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

Luna & Bratton, for appellant.

Under the evidence adduced appellee became a bailee for hire and held to the highest degree of care to care for the cotton. This case is controlled largely by 134 Ark. 76. As to the degree of care required, see 3 R. C. L., p. 23. The finding and judgment should be reversed and judgment entered here for appellant. 103 Ark. 15. It was error to direct a verdict for appellee, as there was evidence sufficient to take the case to a jury. 89 Ark. 368; 135 *Id.* 544; 136 *Id.* 133; 3 A. & E. Enc. L. (2 ed.), p. 744.

Block & Kirsch, for appellee.

The court properly instructed a verdict. 134 Ark. 76, was an entirely different case. 101 Ark. 76. See *Strange* v. *Planters Gin Co.,* 142 Ark. 100; 186 S. W. 289. There was n issue for a jury and the court properly directed a verdict.

HUMPHREYS, J. Appellant instituted suit against appellee before a justice of the peace in Greene County, by filing a statement of account against appellee for one bale of cotton weighing 574 pounds, of the value of $166.46. Appellant recovered a judgment before the magistrate for said amount, from which judgment an appeal was prosecuted to the Greene Circuit Court, where the cause was tried *de novo.* At the conclusion of the evidence, the court, on its own motion, peremptorily instructed the jury to return a verdict for appellee. Upon return of the verdict, the court rendered a judgment dismissing the complaint of appellant. From the judgment of dismissal, an appeal has been duly prosecuted to this court.

The evidence disclosed that appellant brought a load of seed cotton to Paragould, in the fall of 1918, to sell. He met Claude Bratcher, who was the manager of appellee's gin in said city and who purchased cotton for appellee, and tried to sell the cotton to him. Not being satisfied with the price, at the instance of Bratcher, he took the cotton to appellee's gin with the understanding that, after being ginned and baled, it would be covered with appellee's blanket insurance and might remain there until the price enhanced or the gin closed down. Chris Shane was in control of the office at the gin, and, after the bale of cotton was ginned and set on the platform, appellant paid for the baling and Chris Shane placed an identification ticket on the bale of cotton and gave appellant a duplicate thereof, which ticket of identification is as follows: "Delivery of bale of cotton bearing number shown on reverse this ticket is hereby accepted, and East St. Louis Cotton Oil Company released from all further re-

sponsibility. Frank Rollins, Owner." On the reverse side of the ticket appeared, "107, Paragould, Ark." Appellant admitted signing the ticket placed on the bale of cotton, but denied signing the one he received; thinks it was signed by Chris Shane. He could read. He put it in his pocket and retained it until he brought this suit. The purpose of the ticket was to identify the cotton, and appellant had a right to come and get his cotton without presenting the ticket to appellant or its agents. There was evidence adduced tending to show that, subsequent to this time, appellant got a sample of the cotton and tried to dispose of it, but could not get his price, and was told by Claude Bratcher that he might leave it there for safe keeping until cotton advanced in price or the gin closed down. On or about the 8th day of January, thereafter, appellant again tried to sell his cotton and was informed that it was not to be found. Search was made for it on the books of the purchasers and shippers of cotton from the gin, without avail. Appellant testified that he did not get it.

It is contended by appellant, under this record, that appellee became a bailee for hire with the right to the exclusive possession of the cotton and must have, on that account, explained the loss thereof before it devolved upon appellant to show that it was lost through appellee's negligence. Appellant insists that the case is ruled by *Phoenix Cotton Oil Co.* v. *Pettus & Buford,* 134 Ark. 176. We think the facts in the instant case fail to bring it within the rule announced in that case. The receipt issued in that case was signed by the manager of the gin company and constituted a contract of bailment, the effect of which was to place the bale of cotton in the exclusive possession of the Phoenix Cotton Oil Company, and to prevent the owners of the cotton from getting it without first presenting the receipt. The rule announced in the case of *Phoenix Cotton Oil Company* v. *Pettus & Buford, supra,* grows out of the fact that a bailee having exclusive possession of property can more easily account for

its disposition than could the bailor. Unless the exclusive possession is in the bailee, it would be no easier for him to account for its loss than for the bailor.

In the instant case, the receipt is quite different and does not constitute a contract. The ginning and baling of the cotton had been paid for and the receipt was one signed by the owner, acknowledging that he had received the cotton from the ginner, and a duplicate of the receipt was attached to the bale of cotton so that the owner might be able to identify it when he sold or hauled it away. Under the evidence in the instant case, the appellant could dispose of it or get it without presenting the receipt to the appellee. The cotton was left on the platform by appellant without paying storage charges, and, for the special benefit of appellant, was covered by the blanket insurance carried by appellee. The mere fact that it was covered by the blanket insurance policy of appellee did not give appellee the exclusive possession or control over it. Under the facts in the case, we think appellee was a gratuitous bailee and not a bailee for hire with exclusive control over, or possession of, the cotton. A gratuitous bailee is only responsible for goods intrusted to him when the goods are damaged or lost through his gross negligence. *Gulledge* v. *Howard*, 23 Ark. 61; *Wear* v. *Gleason*, 52 Ark. 364; *Baker* v. *Bailey*, 103 Ark. 12. The instant case is ruled by *Bertig* v. *Norman*, 101 Ark. 76, and the late case of *Strange* v. *Planters' Gin Co.*, 142 Ark. 100.

No error appearing, the judgment is affirmed.

FIRST NATIONAL BANK OF FORREST CITY *v.* N. R. MCFALL & COMPANY.

Opinion delivered May 17, 1920.

1. BANKS AND BANKING—DAMAGES FOR DISHONORING CHECK.—Refusal of a bank to honor a merchant's check when he had sufficient funds on deposit raises a presumption of substantial injury which is not rebuttable.

2. BANKS AND BANKING—DISHONOR OF CHECK—MITIGATION OF DAMAGES.—Although the presumption that a depositor is substantially damaged by wrongful dishonor of his check is conclusive, it is nevertheless admissible to prove in mitigation of damages that no injury was sustained.

Appeal from St. Francis Circuit Court; *J. M. Jackson,* Judge; affirmed.

R. J. Williams and *Mann, Bussey & Mann*, for appellant.

1. This is the second appeal in this case. 138 Ark. 370. There was no burden on appellant to show that it had sustained substantial damages as the result of wrongfully turning down a merchant's check. When it is shown that a check is wrongfully dishonored, a *prima facie* case is made. The testimony shows that no substantial damages was suffered by plaintiffs by reason of the failure of defendant to pay the checks. In determining the correctness of the instructions when the facts are passed on by the jury, it is only necessary to call attention to what the testimony tends to show, and the instructions should cover such issues as the evidence tended to establish. 76 Ark. 138. The court erred in refusing No. 3 asked by defendant, as also No. 2. The weight of authority is that when a bank fails to pay a check of a nontrader when such party has funds to his credit, there is no presumption of substantial damages. As to merchants and traders, the presumption is that substantial damages have been suffered. 141 N. Y. Supp. 596; 168 *Id.* 387.

2. The damages are excessive. 3 Elliott on Cont., § 2213.

C. W. Norton, for appellees.

1. The instructions given state the law correctly as held by this court on the first appeal. 138 Ark. 370. Instruction No. 2 was erroneous, but if correct it was not requested in time. 19 Ark. 487-490; 115 Ark. 339; 171 S. W. 895-8; Ann. Cases 1913 B. 898; 65 N. W. 1087; 121 Pac. 939; 15 L. R. A. 134; 28 N. E. 917; 7 Ann. Cas.

818; 58 S. W. 263; 65 N. W. 1086; 28 N. E. 917; 5 R. C. L. 549; 17 *Id.* 430; 25 Cyc. 249.

2. The damages are not excessive. 90 Pac. 877; 14 C. B. 595; 8 Mock. 268; L. R. 5 Priv. C. Cases 346; 28 N. E. 918; 58 L. R. A. 956; 80 S. W. 157; 97 N. E. 665.

HUMPHREYS, J. Appellee, a mercantile partnership composed of N. R. McFall and W. A. Scales, instituted suit against appellant, an incorporated bank, in the St. Francis Circuit Court, to recover damages on account of appellant's refusal to pay checks drawn by appellee on checking funds theretofore deposited by it in said bank. This is the second appeal in the case. The first appeal appeared here under the style of *McFall* v. *First National Bank of Forrest City*, and is reported in 138 Ark. 370. The case was reversed on the first appeal and remanded for a new trial because the trial court instructed the jury that it was incumbent upon appellee to prove actual damages to justify a recovery in excess of nominal damages. In reversing the case, this court laid down the rule that merchants' and traders' checks, wrongfully dishonored through mistake or otherwise by the bank upon which drawn, are entitled to recover substantial damages against the bank dishonoring them, without pleading or proof of special injury. In other words, the court announced the doctrine that the law presumed the wrongful dishonor of merchants' and traders' checks substantially damaged their credit, for which they could recover temperate or reasonable damages. This rule became the law of the case and served as the court's guide on the retrial of the cause.

The only difference between the testimony on the former and present appeals is that the present record reflects evidence adduced by appellant, tending to show that the credit of appellee was not injured by the dishonor of the checks.

Upon reversal and remand, the cause was submitted to a jury upon the pleadings, evidence and instructions of the court, conforming to the rule announced in the

former appeal, which resulted in a verdict and judgment for $500 against appellant in favor of appellee. From the judgment an appeal has been duly prosecuted to this court.

It is insisted by appellant that the only effect of the rule announced in the former appeal was to place the burden upon appellant to show that appellee's credit was not injured, in order to exempt it from liability for substantial damages, and that, having made such affirmative showing, it was entitled to an instruction to the effect that the presumption of substantial damages, resulting from the wrongful dishonor of a merchants' or traders' check, could be overcome by evidence showing to the contrary. Two instructions, Nos. 2 and 3, requested by appellant and refused by the court, were to that effect. It is urged that the court committed reversible error in refusing to give them. One reason for the rule allowing a merchant or trader temperate or reasonable damages for the wrongful dishonor of his checks on mere proof of his character of business is because it is almost impossible to prove special injury or damage. It is just as impossible to prove that no injury resulted as to prove it did. For that reason, if no other, the doctrine contended for by appellant is not sound. The wrongful dishonor of a merchants' or traders' check is a slander on his business. The foundation of his business is the credit which is injured *per se* by the dishonor of his paper. So, this character of case is akin to, and comes within, the category of slander suits in which general damages are allowed as a matter of course without proof of special damages. The necessary and natural consequence of the dishonor of a merchants' or traders' check is to substantially damage him, and the conclusive presumption indulged by the law that he is damaged is based upon such necessary or natural result. Conclusive presumptions of law are irrebuttable by proof. The court did not, therefore, err in refusing to give appellant's requests Nos. 2 and 3.

Notwithstanding the law presumes a depositor is substantially damaged by the wrongful dishonor of his check and that he is entitled to temperate damages without proof of special damage, yet it is permissible to make such proof in mitigation of damages. The fact that such proof is admissible in behalf of a merchant or trader whose check had been wrongfully dishonored would suggest the right on the part of the bank dishonoring the check to affirmatively show that no injury to such depositor's credit resulted, in mitigation of damages, but it could only be used in mitigation of damages, because, if the rule were otherwise, the conclusive presumption of substantial damages, indulged by the law, might be rendered nugatory.

No error appearing, the judgment is affirmed.

McCULLOCH, C. J., dissents.

DURBEN v. MONTGOMERY.

Opinion delivered May 17, 1920.

1. APPEAL AND ERROR—FINAL JUDGMENTS.—Appeals lie to the Supreme Court only from final judgments of the circuit and chancery courts.
2. APPEAL AND ERROR—SUFFICIENCY OF JUDGMENT APPEALED FROM.—The sufficiency of a judgment to support an appeal depends upon its substance, and not upon its mere form, and the judgment may be shown inferentially by the language of the entry.
3. APPEAL AND ERROR—FINALITY OF JUDGMENT APPEALED FROM.—In an action on a note, an entry on record reciting the return of the verdict for plaintiff, its acceptance by the court, and the order overruling the motion for a new trial, shows a final determination, from which an appeal will lie.

Appeal from Izard Circuit Court; *J. B. Baker*, Judge; rule granted.

Geo. T. Humphries, H. A. Northcutt and *Oscar E. Ellis*, for appellant.

Elbert Godwin, for appellee.

McCULLOCH, C. J. Appellant was defendant below in this action, which was one instituted by appellee to recover the amount of a promissory note. On the trial of the issue before a jury there was a verdict rendered in favor of appellee, and appellant is attempting to prosecute an appeal to this court. He has presented a transcript, which the clerk of this court has refused to file on the ground that it contains no final judgment. A rule on the clerk is asked to compel him to file the transcript.

The entry on the record of the lower court, which is claimed to be a final judgment as certified by the clerk of that court, reads (omitting the caption) as follows:

"On this day come the parties to this cause in person and by attorney and announce themselves ready for trial. Whereupon, by order of the court, comes a jury of the regular panel for the present term of this court, composed of G. W. Newsom and eleven others, who are duly tried and empaneled as a jury to try this cause, and said jury, after hearing the evidence of witnesses, the instructions of the court and the argument of counsel, retire by order of the court to consider of their verdict, and subsequently return into court here the following verdict, towit: 'We, the jury, find for the plaintiff in the sum of $149.50. G. W. Newsom, Foreman.'

"On this day, the motion for a new trial heretofore filed by the defendants in this cause coming on to be heard upon the oral evidence introduced at the bar of the court, and the court, after hearing the evidence and argument of counsel, is of the opinion that said motion should be overruled.

"It is therefore considered, ordered and adjudged by the court that said motion be and the same is hereby overruled, and to the ruling of the court in overruling the said motion the defendants at the time saved their exceptions and ask that the same be noted of record, which is accordingly done, and the defendants also prayed an appeal to the Supreme Court, which is hereby granted and the

defendants are given ninety days in which to prepare their bill of exceptions."

An appeal will lie to this court only from final judgments of circuit and chancery courts, and the only question presented in this motion is whether or not the entry constituted a final determination of the issue and a judgment against appellant. It will be observed that there was no formal entry of judgment for the recovery of the amount awarded by the verdict of the jury, but the single entry on the record shows that a motion for new trial was filed and that the court entered a judgment overruling the motion and granting an appeal to this court and allowing defendant ninety days in which to file his bill of exceptions.

There was a strict rule at common law with respect to the entry of judgments—the form of the judgment being one of the essentials. That rule has been considerably relaxed and a more liberal one is recognized, that the sufficiency of the judgment depends upon its substance and not upon its mere form. 1 Black on Judgments, § 115; *Melton* v. *St. L., I. M. & S. Ry. Co.*, 99 Ark. 433. Many of the modern authorities, however, still announce the rule that the judgment entry must reflect the express declarations of the court in awarding judgment. Mr. Black states the rule, in the section just quoted, "that the form of the judgment is not very material, provided that in substance it shows distinctly and not inferentially that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated." Our own decisions, however, establish the rule here that the judgment may be shown inferentially by the language of the entry. For instance, after having held in many cases that the sustaining of a demurrer to a complaint without dismissing the complaint, or any further action of the court thereon, the order did not constitute a final judgment, we held that if the entry recited the fact that the plaintiff stood on his demurrer and that the costs of the case were rendered

against him it showed inferentially a final determination of the action, from which an appeal would lie. *Melton* v. *St. L., I. M. & S. Ry. Co., supra; Hall* v. *Waters,* 118 Ark. 427.

The entry in the present case recites the return of the verdict, the acceptance of it by the court and the order overruling the motion for new trial, and the formal entry of judgment would follow as a necessary consequence of the verdict, and the overruling of the motion, the omission to recite a formal judgment being a mere clerical error. The entry, taken as a whole, shows that the cause was finally ended in the circuit court, and an appeal granted to this court after the judgment overruling the motion for a new trial.

We are of the opinion therefore that the entry shows by fair and necessary inference that judgment was rendered and the entry is sufficient to give this court jurisdiction of the cause. The clerk therefore will be directed to file the transcript as of date on which it was presented to him, which was within six months of the rendition of the judgment, and to issue summons thereon as prescribed by statute.

HART, J. (dissenting). In *State* v. *Jones,* 25 Ark. 375, a motion was made to dismiss for want of jurisdiction. The record in the circuit court recites: "The court, being advised of the matters and things arising on the motion to dismiss this case for want of jurisdiction, heretofore filed, doth sustain the motion." The record entry concludes with this recital without any final judgment upon the motion, or otherwise, and this court held it could not take cognizance of the appeal thereon.

In *Reynolds* v. *Craycraft,* 26 Ark. 468, the case was submitted to the court sitting as a jury an agreed statement of facts. The record shows that the finding of the court was for the appellee, but there was no judgment on the finding. The court held that where there is no judgment on the finding there is nothing to appeal from.

We quote from 3 Corpus Juris, p. 600, the following: "Unless allowed by express statutory provision, a writ

of error or appeal will not lie from the verdict of a jury without an entry of judgment thereon, or from the mere finding of facts or conclusions of law by the court not followed by a judgment or decree."

We can not see the fact that the record contains an order overruling the motion for a new trial adds anything to the matter. It is true the judgment need not be technical and formal, but there must be some kind of a judgment actually rendered or made. The effective action of a court is by its decree or judgment and not by its finding of fact or the verdict of the jury.

In *Chatfield* v. *Jarratt,* 108 Ark. 523, it was held that the time for appeal to this court begins to run from the date of the rendition of the judgment and not from the date of the entry thereof. We think that opinion is wrong and should be overruled. The opinion of the court is based upon the reasoning in *Ex parte Morton,* 69 Ark. 48, where the court was dealing with an appeal from the county court to the circuit court. There the court held that the time for taking the appeal ran from the rendition of the judgment and not the entry thereof. The reason given was that it was not absolutely essential under the statute providing for appeals from judgments of the county court to the circuit court that the judgment should be entered of record before an appeal is taken. It was recognized, however, in *Chatfield* v. *Jarratt, supra,* that it is necessary to present to this court a transcript of the judgment or decree appealed from in order to give the court jurisdiction and that this can not be done until the judgment is entered of record. So it will be seen there is a wide difference in the two statutes. If the existence in the record of the final judgment is a jurisdictional fact, without which an appeal can not be entertained by this court, it is manifest that an appeal should not lie unless such a judgment or decree in the court below has been actually entered or made, and appears on the record. 3 C. J. 597.

In Elliott on Appellate Procedure, § 118, the learned author said: "The general rule is that there must be

an entry of judgment before an appeal can be taken, and it must follow that until the judgment is entered the time within which an appeal must be taken does not begin to run. As an appeal taken before an entry of judgment is premature, it may be dismissed on motion. There is some conflict in the adjudged cases, but the decided weight of authority supports the rule we have stated. It seems clear upon principle that the rule stated must be the correct one, for until there is an entry of judgment there is no authentic record evidence of a final disposition of the case, and that there is a final judgment must, as a general rule, appear from the record."

Again in section 119 the learned author said: "The right to appeal, as a general rule, dates from the time that a complete judgment is rendered and recorded. This rule is the true one since as long as there is no final judgment it is within the power of the trial court to change its rulings, and as long as this power exists the case must be within the jurisdiction of the lower court. A case can, as a general rule, only pass from the jurisdiction of the court of original jurisdiction by a final judgment."

This rule is certainly supported by considerations of justice and equity. The time for taking appeals to this court has been fixed by the Legislature at six months. Under our statute our circuit courts and chancery courts meet every six months. It is evident therefore that if the time for taking an appeal dates from the rendition of the judgment strictly without regard to its entry of record, and if this court can not acquire jurisdiction without a copy of the judgment of the court below, it is manifest that oftentimes by the fault of the court below, or its officer, in neglecting to have the judgment entered of record before the court adjounrned, an aggrieved party might lose his right of appeal without fault on his part. We believe that the decision in *Chatfield* v. *Jarratt, supra,* is based on a wrong reasoning and for the reasons given above should be overruled. We are of the opinion that the judgment

should be a matter of record in order to limit the time for appeal.

Because there was no judgment entered of record in the present case, we think the appeal was premature and should not have been granted. Therefore, Judge SMITH and the writer respectfully dissent from the opinion of the court.

WOODALL v. WOODALL.

Opinion delivered May 17, 1920.

1. DIVORCE—CRUELTY.—Where the preponderance of the testimony established that a husband frequently cursed and abused his wife, and on more than one occasion struck her, and on several occasions threatened to kill her, and finally ordered her to leave home, it was error to deny her a divorce.
2. DIVORCE—DISPOSITION OF HOME OWNED BY THE ENTIRETY.—In an action for divorce by a wife where the evidence entitled her to a divorce for cruel treatment, the court did not err in giving her exclusive possession of the home owned by the husband and wife by the entirety.

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

Oscar H. Winn, for appellant.

The chancellor should have entered an order *nunc pro tunc* on the motion making a finality of the case where it was first heard that in order for any suit to be before the court it should be necessary to file a new complaint, as the first one was dismissed and denied by the chancellor. The chancellor erred when he permitted this case to come on before him after having denied a divorce to appellee, and on rehearing over the objections of appellant found the same condition and redenied a divorce to appellee, hence no jurisdiction over the property of appellant and ordered appellant to live apart and turn it over to his wife, although there was no merit in the divorce suit, and there was no credible testimony to

show that the question of property ever came up for the attention of the chancellor until after the divorce sought had twice been denied. The court exceeded its jurisdiction in taking up the property rights question and using it as a wedge to set aside the marriage. If appellee was not entitled to a divorce, she is not entitled to the exclusive use of this property and this home. To deny the husband the right to live in his own home is repugnant to all principles of equity. The decision thwarts justice. If a divorce is granted at all it should be to the husband, and that part of the decree ordering the use of the property to the wife should be reversed and a decree entered here for appellant with directions.

W. D. Jackson and Geo. F. Jones, for appellee.

1. The property rights were equitably and properly settled. The decree is really too favorable to appellant.

2. Appellee should have an absolute divorce, and the property mentioned should be decreed to her. The proof shows that she was entitled to an absolute divorce.

SMITH, J. This is a suit for divorce, in which appellee was the plaintiff. The complaint was filed October 16, 1918, and on that date the court made an order dismissing the complaint on the motion of the plaintiff. It does not appear how the cause got back on the docket, but on October 22, 1918, appellant filed an answer, denying all the allegations of the complaint, and praying its dismissal. Thereafter the cause proceeded regularly to trial, and was finally disposed of after a number of witnesses had testified in open court, and from the decree then rendered both parties have appealed.

In her complaint appellee not only prayed an absolute divorce, but asked an allowance for the support of the three children born to her and appellant. These children were a son eighteen years old, and a daughter sixteen, and another daughter thirteen years old. At the time of the trial the son and the elder daughter had married and become self-supporting, and the court made no allowance for them, but an allowance of $25 per month

was made for the younger daughter. The court denied appellee's prayer for divorce, but gave her the possession of the home. This home was owned by appellee and appellant as tenants by entirety. It appears that after paying for the home appellant encumbered it with a mortgage, securing a sum of money borrowed for the purpose of purchasing an automobile, and that later appellant sold the automobile and converted the proceeds of that sale to his own use.

As to the home, the court decreed that its possession, "which the court finds to be an estate by entirety, which is in no way affected by this decree, is hereby awarded to the plaintiff, for the use and benefit of herself and children, so long as she occupies it as a home," and, further, "that the plaintiff shall pay off the interest due on any loan that may be against said property, and that if she wishes to pay any of the principal of said loan, she may set off such amount against whatever claim defendant may have in said property." These orders, giving appellee possession of the home so long as she occupied it as such, and imposing on her the duty of keeping down the interest on the mortgage, and of discharging it, if she elects so to do, indicate that the court contemplated the necessity or advisability of making other orders in regard to the home at a later date.

The court made no allowance for appellee's support; but no complaint is made against the decree on that account, as appellee prays on her cross-appeal an absolute divorce; and her prayer, so far as the property is concerned, is that the whole title to the home be vested in her.

Upon the question of divorce, we think a decree should have been entered in appellee's favor. Her own testimony, as well as that of the three children, shows mistreatment of appellee for a number of years, which finally became intolerable. Appellant frequently cursed and abused his wife, and on more than one occasion struck her, and on several occasions threatened to kill her, and

finally ordered her to leave home, as he wanted to make room for another woman. A number of witnesses gave testimony substantially corroborating the testimony of appellee and the children, as to appellant's profanity and abuse and mistreatment of appellee. Appellant denied that he had been guilty of misconduct toward his wife or children, and stated that such discord as existed resulted from objection on his part to the freedom of conduct which his wife allowed their daughters, and after leaving his home, without cause, she had removed to an apartment which was of ill-repute because of the conduct of some of the tenants occupying it. There was a denial of all of this testimony and an affirmative showing that no one known to be immoral was accepted as a tenant, or permitted to remain after becoming one, in the apartments to which appellee removed. In addition, appellant offered testimony of witnesses having more or less intimacy with the family to the effect that they did not know of any misconduct or mistreatment of appellee by appellant.

This testimony does not, in our opinion, overcome or explain away the positive affirmative testimony of apparently disinterested witnesses who gave details of specific instances of abuse and threats and actual personal violence.

Appellant is a railroad conductor, and the testimony shows that he earns each month as salary from $150 up, and no complaint is made of inability to pay the monthly allowance of $25 to his youngest child.

It is insisted that because the home is owned by appellant and appellee as tenants by entirety the court can make no order affecting its title, or the possession thereof. Answering this insistence, it may be said that the court has made no order affecting the title. On the contrary, it is expressly recited in the decree that the title is not affected by the decree.

In the case of *Roulston* v. *Hall,* 66 Ark. 305, 308, the court reviewed a decree of divorce rendered in a case in

which one of the parties to that litigation had also been a party. In the decree for divorce (the parties thereto being tenants by entirety) the court had given the wife a one-third interest for life in the husband's half of the property, of which action the court said: "And we suppose that the learned chancellor in that case awarded it to her under section 2517 of Sandels & Hill's Digest (which is now section 2684 of Kirby's Digest), where it is provided that 'in every final judgment for divorce from the bonds of matrimony granted to the wife against the husband, (the wife) shall be entitled to one-third part of the husband's personal property absolutely, and one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been so relinquished by her in legal form.' But the husband, Ben Hall, had not an estate of inheritance in these lots. Where land is conveyed to husband and wife, they do not take by moieties, but both are seized of the entirety—the whole in contradistinction to a moiety or part only." And, after thus stating what the view of the chancellor must have been when the decree for divorce was rendered, disapproved that decree in the following language: "* * * The court erred in giving judgment for appellee for one-half of said property, and for one-third of the other, as during the lifetime of her husband she was only entitled to the rents of one-half, but in case of the death of the husband to the whole." In the later case of *Davies* v. *Johnston*, 124 Ark. 390, the court held that the character of an estate by entirety is not changed by the divorce of the parties.

But it has not been held that, upon a proper showing, the possession of such property, when it constitutes the homestead, may not be awarded the innocent party who has the custody of dependent children. Upon the contrary, as stated in 9 R. C. L., at page 447, "It is generally competent for the court to award the homestead to the innocent party, either absolutely or for a limited

time." Cases extensively annotated are cited in the note to the text quoted. Here the wife has in her own right a joint ownership of the title, with the consequent right of occupancy. The husband has the same right, but because of his fault and misconduct both can not occupy the home. As both can not exercise the right of occupancy, it was not improper for the court to award that right to the spouse not at fault.

We have before us no showing as to the amount or value of appellant's personal property, nor any issue in regard to its division. The issues here presented are disposed of when we announce our conclusions that the allowance of $25 per month for the support of the minor unmarried daughter is not shown to be excessive; and that appellee is entitled to an absolute divorce; and that the court committed no error in awarding to appellee the right of occupancy of the homestead as stated above.

It is, of course, essential that the interest be kept down on the loan secured by the mortgage on the home; but appellee does not complain of the imposition of that burden on her; and no showing is made that she should not have proper credit for any payment made on the principal debt.

Remanded with directions to enter a decree of absolute divorce in favor of the appellee.

CROFTON v. STATE.

Opinion delivered May 24, 1920.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain verdict of murder in the second degree.
2. WITNESS—IMPEACHMENT OF ONE'S OWN WITNESS.—In a murder trial in which accused claimed that the killing was done to save his brother's life, where a State's witness testified that deceased had a knife and struck defendant's brother with it before defendant fired the first shot, the State, being surprised by such testimony, had a right to ask the witness if in testifying before the grand jury he had said anything about deceased having a knife.

3. HOMICIDE—DYING DECLARATIONS.—In a murder trial deceased's dying declarations, made after expressing a belief that he would die, *held* admissible.

Appeal from Howard Circuit Court; *James S. Steel,* Judge; affirmed.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. A close inspection of the record discloses no error in the instructions. The question of the mediate or immediate cause of the death of the deceased was properly covered by instructions Nos. 11 and 14 and the refusal of that asked was not prejudicial.

2. There was no error in the admission of evidence of R. D. Johnson or Georgiana Owens or Ebbie Crofton and the evidence fully sustains the verdict.

McCULLOCH, C. J. Appellant was convicted of murder in the second degree on an indictment charging him with killing Frank Owens on February 20, 1917. The trial jury found defendant guilty of the crime charged in the indictment and fixed his punishment at five years in the State penitentiary. An appeal was duly prosecuted to this court, but there has been no appearance of counsel in his behalf.

There were very numerous exceptions saved with respect to rulings of the court in admitting testimony offered by the State, and also with respect to giving and refusing instructions.

Appellant and Frank Owens were both young negro men and the shooting occurred when they, with other negroes, were returning from a singing school at Tollett, in Howard County, on the night of February 20, 1917. Owens and Ebbie Crofton, a brother of appellant, quarreled about their attentions to a girl and became engaged in a fight, and while so engaged appellant ran up and began firing at Owens with a pistol. According to the testimony adduced by the State, appellant ran up to the place where Owens and Ebbie Crofton were scuffling and fired one shot at Owens and Owens ran away

and appellant fired at him two or three times as he ran. One of the shots took effect in Owens' back and pierced his body through and through, coming out in front near the nipple of one of his breasts.

There is some conflict in the testimony as to the row between Owens and Ebbie Crofton and its progress up to the time appellant came up and fired the first shot. There was evidence to the effect that Owens was the aggressor in the difficulty, and that he had a knife in his hand and was endeavoring to use it on Ebbie Crofton. Appellant testified that they were returning from the singing school and walking through a certain pasture when he was told that his brother, Ebbie, and Frank Owens were engaged in a fight, that Hence Burk, one of his companions, handed him a pistol and that he ran up to the scene of the fight, and, seeing his brother down on his all-fours and Owens astride of him, he fired the pistol one time at Owens. He testified that, after firing the first shot, Burk took the pistol and fired several times at Owens as he ran away. He testified that he was about thirty yards behind his brother and Owens when they were engaged in the fight and that he heard his brother cry out asking some one to "take him off. He is killing me."

The evidence was sufficient to sustain the verdict. That adduced by the State was sufficient to show that appellant's brother was not in great bodily harm at the time and that appellant ran up to the scene of the fight and fired once at Owens while the fight was going on and again fired at him two or three times as he ran away. The jury could, under the testimony, have found appellant guilty of a lower degree of homicide, but the evidence was sufficient to warrant a conviction of murder in the second degree as charged in the indictment.

The assignments of error are, as before stated, very numerous, and it is unnecessary to discuss them all. The instructions of the court were full and complete and seem to have followed the usual form of instructions

in such cases. We have not been able to discover in our examination of the transcript any error in the rulings of the court in regard to the giving and refusing of instructions.

One of the rulings assigned as error is in permitting the State to ask one of its witnesses, R. D. Johnson, concerning his statement before the grand jury. Johnson was introduced as a witness and testified that he was present when the fight occurred between Frank Owens and Ebbie Crofton, and he stated that Owens had a knife and struck Ebbie on the head with it. He further testified that Owens ran off down the hill and that appellant fired at him two or three times as he ran away. The prosecuting attorney was permitted, over the objections of appellant's counsel, to ask concerning his statements before the grand jury. He was asked if, in his testimony before the grand jury, in detailing the circumstances of the fight whether he had said anything about Owens having a knife. The witness admitted that he had made no reference to a knife in his testimony before the grand jury. The State had the right, on being surprised at the testimony of its own witness, to show contrary statements before the grand jury for the purpose of breaking down the damaging testimony of the witness and impeaching his credibility. This is so where a party gives damaging testimony to the side which introduced him on the witness stand. *Doran* v. *State,* 141 Ark. 442. That was the case here. While the testimony of the witness was favorable to the State's contention in many respects, he made the damaging statement that Frank Owens had a knife at the time and was using it on Ebbie Crofton at the time appellant ran up and fired the first shot.

Another assignment of error is in respect to the ruling of the court in allowing Georgiana Owens, the mother of Frank Owens, to testify as to the dying declarations of Owens. Owens lived about four months after he was shot and died from the effects of the wound, and at times he was hopeful of recovery, but afterward entirely

despaired of all hope and expressed his belief that he would die. His mother testified to certain statements made to her by deceased after he expressed to her his belief that he would die. We are of the opinion that, taking her testimony as a whole, there was enough to show that the statements were made at the approach of death and under the belief that death was impending. The testimony falls within rules of evidence often announced by this court. *Evans* v. *State,* 58 Ark. 47.

We are unable to discover any prejudicial error in the record, and the judgment must therefore be affirmed. It is so ordered.

BAILEY & COMPANY *v.* LOVELESS.

Opinion delivered May 24, 1920.

APPEAL AND ERROR—MATTERS CONSIDERED.—Where, on appeal, there no reference to a motion for new trial, either in the abstract or the brief of appellant, and the abstract does not show that exceptions were saved to the giving of a certain instruction, such instruction can not be considered.

Appeal from Woodruff Circuit Court, Southern District; *J. M. Jackson,* Judge; affirmed.

Jonas F. Dyson, for appellant.

The court erred in giving instruction No. 1 for the State, as the testimony is conclusive that the order was destroyed by the appellees. Act No. 81, Acts 1913, § 137; 126 Ark. 257.

McCULLOCH, C. J. Appellants instituted this action below against appellees to recover the amount of a draft drawn on the latter by one Saxton, payable to appellants, it being alleged that appellees received the draft into their possession and thereafter wilfully destroyed it without paying same. Liability of appellees is asserted under section 137 of the Negotiable Instruments Law (Act No. 81, 1913), which provides that "if the drawee destroys a bill he will be deemed to have accepted the same." The case has been here before on appeal. *Bailey & Co.* v. *Southwestern Veneer Co.,* 126 Ark. 257.

It appears from the testimony as abstracted that there was an issue in the case as to whether appellees' agent destroyed the draft, and, if so, whether it was done wilfully or merely by accident. Appellants undertook to prove by admissions of appellees' agent that he deliberately threw the draft in the wastebasket and burned it; but the proof adduced by appellee tended to show that the draft was not intentionally destroyed, but merely that it could not be found at the time and that if it was destroyed at all it was done by accident.

The sole ground urged here for reversal of the cause is that the court erred in giving an instruction at the request of appellees on the subject of burden of proof. There is no reference to a motion for new trial either in the abstract or the brief of appellant. Neither does the abstract show that exceptions were saved to the giving of the instruction. These omissions are fatal to appellants' contention. The rules of this court require an abstract of the record and in the absence of a recital in the abstract showing that exceptions were properly saved at the time to the alleged erroneous rulings of the court and brought forward in the motion for new trial we must assume that no such exceptions were saved. The judgment must therefore be affirmed.

MONETTE ROAD IMPROVEMENT DISTRICT v. DUDLEY.

Opinion delivered May 24, 1920.

1. PROHIBITION—PROCEEDINGS WITHOUT JURISDICTION.—Where it appears that an inferior court is about to proceed in a matter over which it is entirely without jurisdiction under any state of facts which may be shown to exist, then the superior court exercising supervisory control over the inferior court may prevent such unauthorized proceedings by the issuance of a writ of prohibition.
2. PROHIBITION—WHERE REMEDY LIES.—The writ of prohibition lies where an inferior court is proceeding in a matter beyond its jurisdiction and where the remedy by appeal, though available, is inadequate.

3. PROHIBITION—NECESSITY OF OBJECTION TO JURISDICTION.—Objection in the inferior court to its exercise of jurisdiction is not a jurisdictional fact upon which the power to issue the writ of prohibition depends, but is discretionary and is not necessary where it would obviously be futile and would result in unnecessary or hurtful delay.

4. HIGHWAYS—FUNCTIONS OF ASSESSMENT OFFICERS.—The function of the board of assessors of a road improvement district in assessing benefits, and of the board of commissioners in adjusting them, is not judicial in the ordinary sense, but is in the nature of a legislative power; and their acts are not subject to review on certiorari.

5. COURTS—JURISDICTION OF CIRCUIT COURTS TO GRANT INJUNCTIONS. Under Const., art. 7, § 15, authorizing the establishment of courts of chancery, the exercise of the power of creating chancery courts by the Legislature swept away the circuit court's jurisdiction to award injunctive relief.

6. HIGHWAYS—REVIEW OF ASSESSMENTS ON CERTIORARI.—Since Road Laws, 1919, vol. 1, p. 105, creating the Monette Road Improvement District, provides for no review of assessments by the circuit court on appeal, but, on the contrary, provides exclusively for relief in the chancery court, there is no authority for review in the circuit court on certiorari.

Original application for prohibition to Craighead Circuit Court, Lake City District; *R. H. Dudley,* Judge; writ awarded.

A. P. Patton and *Rose, Hemingway, Cantrell & Loughborough,* for petitioner.

The writ of certiorari is restricted to reviewing a judicial or *quasi* judicial act, and injunction or some other remedy would be available to correct an error in the performance of a legislative, executive or administrative act; and, since the assessment of benefits is a legislative or administrative act, the circuit court was without jurisdiction to correct any error as to assessments for local improvements or cancel a contract under the rulings of our courts. 105 Ark. 65; 134 Ark. 121; 93 *Id.* 336-342; 94 *Id.* 239; 104 *Id.* 21; 62 *Id.* 196; 109 *Id.* 106; 126 *Id.* 125. See, also, *Mo.-Pac. Ry. Co.* v. *Conway Co. Bridge Dist.,* 142 Ark. 1.

Sloan & Sloan, also for petitioner.

1. The act of 1873 does not confer jurisdiction upon the circuit court to grant injunctive relief, and the court was without jurisdiction. 83 Ark. 54-61; Kirby's Digest, § 3966; 93 Ark. 336-41; 94 *Id.* 235; 104 *Id.* 16; 33 *Id.* 690; 74 *Id.* 421. If it was the intention of the act of 1873 to confer injunctive jurisdiction upon a law court, the act was repealed by the act creating a separate chancery court. Acts 1903, p. 314; 57 Ark. 528; 44 *Id.* 377; 80 *Id.* 145-9; 116 *Id.* 490; 95 *Id.* 618; 109 *Id.* 250; 73 S. W. 368-372; 6 A. & Eng. Enc. Law (2 ed.), p. 1048; 12 C. J. 816; 76 Ark. 184-191.

2. The circuit court has no jurisdiction of the alleged certiorari proceedings. Spelling on Inj., etc., §§ 1955-6; 2026; 43 A. & C. 682 (N. J.); 35 Ark. 95; 97 N. Y. 37; 96 Ark. 251-263. See, also, 17 Standard Enc. Pro. 797-8. No cause of action furnishing jurisdiction to the circuit court for certiorari was stated in the complaint, and the cause should have been transferred to chancery as prayed.

J. F. Gautney and *Lamb & Frierson,* for respondent.

1. The writ of prohibition should not issue. 73 Ark. 66; 88 *Id.* 153. It is a writ of discretion and not of right, and never issues when there is any other remedy. 22 R. C. L. 5. In this case there is another remedy by appearing in court and appealing if the decision is adverse. 124 Ark. 238; 96 *Id.* 332; 101 *Id.* 106; 33 *Id.* 161; 66 *Id.* 211; 77 *Id.* 140; 74 *Id.* 217; 33 *Id.* 191; High on Extr. Legal Rem., §§ 770-1; 74 Ark. 217; 56 *Id.* 511; 115 *Id.* 317.

2. Certiorari does not lie. 16 C. J. 126, § 75; 40 Ark. 507. It does not lie to correct errors or irregularities and can not be used as a substitute for appeal, save where the right of appeal is lost without fault of petitioner, and lies to correct a lower tribunal only when it proceeds illegally and there is no other method of arresting action. 37 Ark. 318; 17 *Id.* 580; 25 *Id.* 476; 30 *Id.* 148; 39 *Id.* 399; 43 *Id.* 33; *Ib.* 341; 44 *Id.* 509; 47 *Id.* 511; 51 *Id.* 281; 101 *Id.* 522; 96 *Id.* 344; 61 *Id.* 605; 61 *Id.* 287;

131 *Id.* 211; 98 *Id.* 343; 70 *Id.* 71. A finding of fact by the circuit court will not be reviewed on certiorari. 45 *Id.* 94; 73 *Id.* 604.

3. The complaint showed jurisdiction in the circuit court and the order rendered was within its jurisdiction. Kirby's Digest, §§ 1315-1318-19. A board acting as in this case necessarily assumes judicial functions and is subject to certiorari. 11 C. J., pp. 121-2, par. 68; 62 Ark. 196-201; 70 *Id.* 568; 60 N. E. 187; 109 Ark. 100; 126 *Id.* 125. *Certiorari* lies to quash a void assessment and levy. The jurisdiction of the circuit judge to issue the writ of certiorari is unquestioned. 37 N. W. 809; 51 L. R. A. 111; 20 L. R. A. (N. S.) 946. Circuit courts have exclusive jurisdiction of all matters not vested in other courts by our Constitution. Art. 7, § 11; Kirby's Dig., §§ 1304-5. The jurisdiction of the circuit court was not ousted by subsequent legislation. 11 C. J., § 578; 98 Ark. 63; 30 *Id.* 568; 1 Pom., Eq. Jur. (4 ed.), § 279; 116 Ark. 490. The Legislature can not enlarge the jurisdiction of our chancery courts. 80 Ark. 145; 95 *Id.* 618; 116 *Id.* 490; 115 *Id.* 437. See, also, 111 Ark. 144; 66 *Id.* 201. The circuit court had jurisdiction because of an "illegal exaction." Kirby's Digest, § 3966; Const., art. 16, § 13; 33 Ark. 436-441.

4. The assessment is void and should be quashed by certiorari. Page & Jones on Spec. Assmt., § 568; 1 *Id.* 783. The property is not properly described upon the assessment books and is invalid. 2 Page & Jones on Spec. Assmts., § 886, p. 1505 *et seq.*, p. 1524. The mutilation by the commissioners of the assessments since filing same as a public record vitiates the assessment. 2 Page & Jones, Spec. Assmts., §§ 886, 909; 74 N. E. 726-729.

5. Neither prohibition nor certiorari will lie. Authorities *supra,* and 112 Ark. 437; 80 *Id.* 411; 84 *Id.* 329.

McCULLOCH, C. J. Monette Road Improvement District is, as its name implies, a road improvement district formed for the purpose of improving certain roads,

and was created by a special statute enacted by the General Assembly of 1919 (Act No. 58, Acts 1919, Regular Session, volume 1, page 105).

Application is made to this court on behalf of said district for a writ of prohibition directed to the Honorable R. H. Dudley as judge of the second division of the circuit court of the Second Judicial Circuit to prevent the circuit court of Craighead County, Lake City District, from hearing and determining a certain proceeding brought up to that court on certiorari, issued by said judge, and returnable to said circuit court, involving the validity of the acts of the commissioners of said district in assessing benefits and in attempting to construct the improvement.

It is alleged in the petition filed here that Alex McDonald and certain other persons filed their complaint in said circuit court, praying for a writ of certiorari directed to the commissioners of said district to bring up the assessment of benefits made by the commissioners and to quash the same, and to enjoin the commissioners of the district from proceeding with the construction; that the circuit court is entirely without jurisdiction in the premises and that the petitioners appeared in court and moved to dismiss the proceedings for want of jurisdiction, but that the court overruled said motion and proceeded to issue a writ of certiorari as prayed for by the plaintiffs in that cause, and made it returnable at the next term of that court, and that the judge also issued a restraining order to prevent the petitioner and the commissioners of the district from proceeding with the work of improvement. A copy of the complaint in the proceedings below and the other pleadings are exhibited with the petition.

The circuit judge appears here by counsel and files a response in which he admits that he has issued the writ of certiorari, as alleged, returnable to the circuit court, but denies that the writ was heard or issued by the court or that the petitioner herein had appeared before the court for the purpose of objecting to the issuance

and hearing of the writ, and alleges, on the contrary, that the petition for a writ of certiorari was presented to the circuit judge at chambers in vacation and was heard by him, and that the writ of certiorari and also the temporary injunction were issued by him in vacation, returnable to the circuit court to be heard by that court in term time. The judge also alleges in his response that the matters and things set forth in the complaint in the proceedings below are within the jurisdiction of the circuit court, and he denies that he exceeded his jurisdiction in granting the certiorari and injunction.

The first question which arises for our decision is whether or not prohibition is the appropriate remedy and is available to the petitioner under the circumstances of this case. The facts, when reduced to the simplest form, as bearing on this particular question are that the plaintiffs in the action instituted in the circuit court appeared before the circuit judge in vacation for the purpose of procuring the issuance of a writ of certiorari to bring up the proceedings of the board of commissioners of the improvement district, and to obtain an injunction to restrain further proceedings by the commissioners of the district until the cause could be heard in the circuit court; that the commissioners, as the representatives of the district, appeared by counsel before the circuit judge at the hearing and objected to the exercise of jurisdiction by the court, and that a writ of certiorari and also of temporary injunction was issued by the judge over the protest of the petitioner.

The scope of the writ of prohibition is too well known to be in doubt. In the recent case of *Ferguson* v. *Martineau,* 115 Ark. 317, this court quoted with approval the following statement of the law from a well-known text-writer on the subject: "The writ of prohibition is that process by which a superior court prevents an inferior court or tribunal from usurping or exercising jurisdiction with which it has not been vested by law." Spelling on Injunctions and Extraordinary

Remedies, § 1716; Shortt on Information, Mandamus and Prohibition, p. 436.

The last named text-writer, at the place indicated, laid down the rule as follows: "The broad governing principle is that a prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or matter before it; or where, in the progress of a cause within its jurisdiction, some point arises for decision which the inferior court is incompetent to determine. But a prohibition will not lie where the inferior court has jurisdiction to deal with the cause and with all matters necessarily arising therein, however erroneous its decision may be upon any point."

In the case of *Finley* v. *Moose,* 74 Ark. 217, we stated the same rule with reference to the office of the writ of prohibition, with the following qualification: "If the existence or non-existence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine, a prohibition will not be granted, though the superior court may be of the opinion that the questions of fact have been wrongly determined by the court below, and that their correct determination would have ousted the jurisdiction."

So it is thus settled that where it appears that an inferior court is about to proceed in a matter over which it is entirely without jurisdiction under any state of facts which may be shown to exist, then the superior court exercising supervisory control over the inferior court may prevent such unauthorized proceedings by the issuance of a writ of prohibition. The essential thing is, that it must be shown that the inferior court is about to proceed beyond its jurisdiction, and that fact is said to be the jurisdictional one upon which the right of the supervising court to issue the writ of prohibition depends.

It is contended by counsel for the respondent that the remedy by prohibition not being an absolute one, but discretionary, the writ should be denied where there is a remedy by appeal or otherwise, even though the

court sought to be restrained was about to proceed beyond its jurisdiction. They cite in support of their contention the case of *Weaver* v. *Leatherman,* 66 Ark. 211. This contention is based upon a misconception of the effect of the ruling in the case just cited. If the absence of the right of appeal was essential to the issuance of a writ of prohibition, then that remedy would be entirely unavailable in any case, for under our Constitution the right of appeal is granted in all judicial proceedings. The true test is, as stated in the case already cited, whether or not the court is proceeding beyond its jurisdiction; and when that state of facts is shown to exist, the remedy by prohibition is the appropriate one. A litigant is not bound to submit to the exercise of jurisdiction not authorized by law, even though he has the right of appeal after the exercise of the jurisdiction has been consummated and has resulted in a judgment from which he can appeal. The remedy by appeal is afforded from an unjust judgment, whether it be void or merely erroneous (*Pritchett* v. *Road Improvement District,* 142 Ark. 509); but the remedy by prohibition is afforded as a protection against a wrongful attempt to exercise jurisdiction unauthorized by law. The two remedies are independent and one may be invoked where the other can not be, and prohibition may be invoked under circumstances where the remedy by appeal is available though inadequate.

Again it is urged by counsel for respondent that this is an attempt to control the action of the circuit judge, and they invoke the doctrine that the remedy by prohibition is available only to prevent the exercise of jurisdiction by a court and not by a judge. In the case of *Reese* v. *Steel,* 73 Ark. 66, we expressly left undecided the question whether or not prohibition was the appropriate remedy against judicial or quasi-judicial action of a judge in vacation, and whether or not the remedy was confined to the control of judicial action by a court. Nor is that question involved in the present case. The action of the circuit judge has, in the present case, completely accomplished its purpose in the issuance of the

writ, and the present effort of the petitioner is to control the action of the circuit court and to prevent it from proceeding in a matter alleged to be entirely beyond its jurisdiction. It is true that in the petition filed here it is alleged that the court issued the writ and is about to hear and determine it and that the court also issued an injunction, and it is shown by the respondent that this allegation is not true with respect to the issuance of the two writs; but the facts, as shown by the petition and the response thereto, are that the writ of certiorari is returnable to the circuit court and that that court is about to proceed to an adjudication of the matters and things involved in that controversy. Now this entitles the petitioner to the remedy prayed for here, unless other grounds appear for the denial of the remedy.

The response raises the question of the right of the petitioner to this remedy without first appearing before the circuit court and objecting to the exercise of jurisdiction. It is conceded that the petitioner appeared before the circuit judge and made objection to the exercise of jurisdiction, and that the judge overruled the objection. It appears from the exhibits to the pleadings here that the circuit judge made a written order expressing his opinion that the circuit court had jurisdiction to entertain the proceedings, and in his response here the learned judge adheres to his conclusion that the circuit court has jurisdiction of the cause. But it is insisted that the petitioner must first appear before the court itself and make the protest there in term time, notwithstanding the ineffectual protest before the judge who granted the writ and who is the presiding judge of that court. This court in many decisions has adhered to the rule that as a matter of practice a writ of prohibition will not be issued, unless objection to the exercise of jurisdiction is made to the court in which the proceedings are pending. *Reese* v. *Steel, supra.*

The court has never had occasion to state the exceptions to that rule, or to declare whether or not there are in fact any exceptions. It has been decided here,

however, that the form of the exception is immaterial, and that any sort of plea to the jurisdiction of the court will justify the issuance of a writ of prohibition. *State ex rel. Butler* v. *Williams,* 48 Ark. 227.

In Ruling Case Law, volume 27, the following is stated to be the rule of procedure established by the authorities: "As a general rule, a writ of prohibition will not be issued to an inferior court unless the attention of the court whose proceedings it is sought to arrest has been called to the alleged lack of jurisdiction, the foundation of the rule being the respect and consideration due to the lower court and the expediency of preventing unnecessary litigation. This requirement is made by rule of court in some jurisdictions. The objection in the lower court can not be said to be jurisdictional, and the higher court may and will proceed without such objection in proper cases. The rule is one of discretion only, and is not in any sense rigid or arbitrary. Thus no objection in the court sought to be prohibited need be made where the proceeding is *ex parte,* and there was no opportunity to object; where the applicant was prevented by artifice or fraud from making objection; where the lack of jurisdiction is apparent on the face of the proceedings; where the intention of the inferior court to act beyond its jurisdiction is made apparent in any way and it is obvious from the whole proceedings that such an application would be futile; or where the necessary delay would be highly injurious to the interests of the applicant. The matter of judicial courtesy should yield to the substantial personal rights of litigants, such as a sacrifice to their liberty." Numerous authorities are cited in support of the rules thus stated.

Particular attention is called to that part of the foregoing statement of the law to the effect that the objection to the exercise of jurisdiction by the lower court is not a jurisdictional fact upon which the power to issue a writ of prohibition depends, but is merely a rule of discretion. This, we think, is the correct view of the

matter and it will necessarily follow, under this rule, that where it is obvious that an objection made to the court itself would be futile and would result in unnecessary or hurtful delay this ought to and does form an exception to the general rule of discretion that, before a writ of prohibition can be asked for, objection to the exercise of that jurisdiction must be made to the court. This exception is well sustained by the authorities. See case note to *St. Marys* v. *Woods,* 21 Am. & Eng. Ann. Cas., p. 168; *Charleston* v. *Littlepage* (W. Va.), 51 L. R. A. (N. S.) 353; *State ex rel.* v. *Alloe,* 151 Mo. 1; *State ex rel.* v. *Bright,* 224 Mo. 514; *Havemeyer* v. *Superior Court,* 84 Cal. 397.

In the case of the *State ex. rel.* v. *Bright, supra,* the Supreme Court of Missouri, after having noticed the fact that it was not shown that any exceptions had been made to the lower court, said that the appearance of the judge in that court joining with the parties to the litigation in affirming the right of the court to proceed with the case rendered it unnecessary for the petitioner to appear before the court for the purpose of challenging the jurisdiction. This rule was, in effect, applied by our court in the case of *Russell* v. *Jacoway,* 33 Ark. 191. In that case an election contest over the removal of the county seat was involved, and the circuit judge granted in vacation a writ of certiorari to bring up the proceedings in the county court for review and the adverse parties appeared before the circuit judge and opposed the application for want of jurisdiction of the subject-matter. It was not shown that there was any objection made in the circuit court, but this court granted the writ of prohibition and vacated the writ issued by the circuit judge. We think that this rule is founded on sound reason, for it only affects the discretion of the court and is at most only a rule of practice. Why then should the petitioner be required to go before the circuit court to make an objection to the exercise of jurisdiction where it is morally certain that the objection would be unavailing? Since the circuit judge has delib-

erately overruled an objection to the jurisdiction and comes into this court now maintaining that the court over which he presides and before which this cause will come on for hearing, unless restrained, has jurisdiction of the subject-matter, there is no ground for assuming that he will change his mind and sustain the objection to the jurisdiction when the circuit court convenes. Our conclusion therefore is that the petitioners are entitled to a writ of prohibition, if as a matter of fact the circuit court is about to proceed beyond its jurisdiction, and that is the next question to which we will address ourselves.

The statute creating the district contains a provision in section 14 that the "construction cost of the improvements of the road herein called for, not including interest on borrowed money, shall not exceed in cost thirty per cent. of the values of all lands and real estate and real property in the district, as shown by the last county assessment," and the question was brought to this court for decision, whether or not this applied to the last county assessment preceding the passage of the statute or to any county assessment made prior to the assessment of benefits, and we decided that it applied to the assessment preceding the passage of the statute. *Watson* v. *Boydstun,* 141 Ark. 184. It was shown in that case that the cost of the construction would exceed thirty per cent. of the values of lands according to the county assessment, and the General Assembly at the special session in January, 1920, enacted an amendatory statute raising the limitation to forty per cent. of the assessed value of the property, instead of thirty per cent., and amending the statute creating the district in other respects. The statute, as a whole, describes the boundaries of the district, the route of the roads to be improved, names the commissioners and the authority to construct the improvement, to borrow money and collect assessments on the benefits accruing to the lands, and provides for a board of assessors to value the anticipated benefits, and the filing of the list of assessments with the county clerk

and the publication of notice of the time and place of the meeting of the commissioners for the purpose of hearing complaints against said assessments.

Section 13 provides that "any party who may have complained in writing of any of said assessments of benefits or damages, and who feels aggrieved by the action of the commissioners after the hearing herein provided for; any other person whomsoever who may have any objections to any assessment of benefits or damages, or to any other proceedings under this act or action of the commissioners, shall file his complaint thereof in the chancery court having jurisdiction within ten days after the hearing by the commissioners herein provided for, and any party not complaining within that time shall be deemed to have waived any objections that he may have to any of said assessment of benefits or damages, and shall not be heard to complain in law or equity thereafter."

The complaint in the proceedings sought to be prohibited alleges, in substance, that the assessment of benefits had been made and filed with the county clerk and notice thereof given, and that all of the plaintiffs in that proceeding had appeared before the board of commissioners herein named and objected to the alleged assessments on the ground that no valid assessment had been made as provided by the statute; that the assessment list was "a mere jumble of words and figures and to a great extent meaningless," and that it is unintelligible. It is further alleged that the plans adopted by the commissioners contemplate two sets of improvements, one a drainage system and the other the construction of the roads, which would require two separate assessments. Various other matters are alleged in the way of threatened proceedings by the board of commissioners not authorized by the statute. The prayer of the complaint was that the plans adopted by the commissioners and the assessment list be brought to the circuit court on certiorari, and that on final hearing the same should be quashed. The prayer of the complaint was also that the

contract for the construction of the improvement and the sale of bonds be enjoined.

It is manifest therefore from the language of the complaint that injunctive relief is sought against the proceedings undertaken by the commissioners of the district, and relief against the assessment list alleged to be inaccurate and unintelligible is sought. The injunction granted by the judge in vacation was temporary and appears to have been intended only as an incident to the relief sought in the complaint to preserve the *status quo* until the same could be finally heard. If the court had jurisdiction to hear and determine the cause on the facts stated and grant the relief sought, it could temporarily stay proceedings by injunction as an incident to the exercise of its jurisdiction. The real question in the case is whether or not the circuit court had jurisdiction to grant the relief sought in the complaint.

The functions of the board of assessors in assessing benefits and the board of commissioners in adjusting them on complaint of the property owners is not judicial in the ordinary sense, but it is in the nature of a legislative power. *Pine Bluff Water & Light Co.* v. *Pine Bluff,* 62 Ark. 196; *Mo. Pac. Ry. Co.* v. *Izard County Highway Improvement District,* 143 Ark. 261.

Boards created as special tribunals for certain purposes may, and sometimes do, act in a judicial or *quasi*-judicial capacity, and when so acting their proceedings may be reviewed on certiorari (*State ex rel.* v. *Railroad Commission,* 109 Ark. 100; *Hall* v. *Bledsoe,* 126 Ark. 125), but in the matter now before us the commissioners do not act in such capacity. The acts of the commissioners not being of a judicial or *quasi*-judicial nature, they are not subject to review on certiorari, which is limited to review of judicial or *quasi*-judicial proceedings. *Pine Bluff Water & Light Co.* v. *City of Pine Bluff, supra; State ex rel.* v. *Railroad Commission,* 109 Ark. 106. Injunctive relief is purely a matter of equitable jurisdiction, which, under the Constitution of this State, falls within the jurisdiction of separate chancery courts as

now established. Article 7, section 15, of the Constitution provides that "until the General Assembly shall deem it expedient to establish courts of chancery the circuit courts shall have jurisdiction in matters of equity." We are of the opinion that the power of the Legislature in establishing separate chancery courts therefore swept away the jurisdiction of the circuit court in matters exclusively cognizable in courts of equity.

Counsel for respondents rely upon the statute (Kirby's Digest, section 3966), which provides that "the judge of the circuit court may grant injunctions and restraining orders in all cases of illegal or unauthorized taxes and assessments by county, city or other local tribunals, boards or officers." This statute, however, antedated the adoption of the Constitution of 1874 and the establishment of separate chancery courts pursuant thereto, and it is not effective now, for the purpose of retaining in the circuit court matters exclusively cognizable in equity, for the jurisdiction transferred to courts of chancery in the establishment thereof was such jurisdiction as the courts of chancery properly exercise at the time of the adoption of the Constitution. *German National Bank* v. *Moore,* 116 Ark. 490. This transfer of equity jurisdiction to separate chancery courts was complete and left no vestige of that jurisdiction in the circuit courts. Such was the interpretation given by this court in the case of *Merwin* v. *Fussell,* 93 Ark. 336, where we said: "And under these provisions of the Constitution and the statute a citizen and taxpayer has the right to obtain from a court of equity an injunction against the collection of an illegal or unauthorized tax." See also *Moody* v. *Lowrimore,* 74 Ark. 421; *Harrison* v. *Norton,* 104 Ark. 16.

The framers of the statute creating this improvement district might have provided, as has been done in many similar statutes, for appeals from the board of commissioners to the county court and thence to the circuit court, which would have given the circuit court the

jurisdiction to review the assessments. But that was not done in the framing of this statute, which provides for proceedings in a court of equity, to be begun within a specified time. It clearly falls legitimately within the ordinary equity jurisdiction, because the assessments constitute a lien on real estate. We are of the opinion, therefore, that since the statute provides for no review of assessments by the circuit court on appeal, and, on the contrary, provides exclusively for relief in the chancery court, there is no authority for review by the circuit court on certiorari.

Counsel also rely on the decision in *Pritchett* v. *Road Improvement District, supra,* as sustaining their contention, but in that case it was void orders and judgments of the county court which were reviewed by the circuit court on certiorari.

In the case of *Merchants' Bank* v. *Fitzgerald*, 61 Ark. 607, Mr. Justice BATTLE, speaking for the court, concisely defined the office of the writ of certiorari, as follows: "(1) Where the tribunal to which it is issued has exceeded its jurisdiction; (2) where the party applying for it had the right to appeal, but lost it through no fault of his own; and (3) in cases where it has superintending control over a tribunal which has proceeded illegally, and no other mode has been provided for directly reviewing its proceedings."

This being true, the circuit court has no jurisdiction over the subject-matter set forth in the complaint filed in the proceedings below. The court being without jurisdiction, prohibition is the appropriate remedy to stop further proceedings. The writ of prohibition is therefore awarded in accordance with the prayer of the petitioner to prevent the circuit court from further proceeding in the matters under consideration.

WOOD, J. (dissenting). The authorities are practically unanimous in holding that the high prerogative writ and extraordinary remedy of prohibition "is to be

used with great caution and forbearance, for the furtherance of justice and to secure order and regularity in judicial proceedings, and should be issued only in cases of extreme necessity." 22 R. C. L., p. 5, § 4, and cases there cited.

There is no necessity, as we see it, for the issuance of the writ in this case; and besides the issuance at this juncture is wholly premature. The circuit court has had no opportunity to determine whether it had jurisdiction of the subject-matter set forth in the complaint of McDonald *et al.* Every court has the power to determine *in limine* whether it has the jurisdiction over the subject-matter of the controversies brought before it. To deprive the circuit court in advance of the opportunity and right to decide whether it will entertain jurisdiction is tantamount to an assumption of original jurisdiction by this court, which is contrary to art. 7, § 4, of the Constitution.

It has been the doctrine of this court since 1842 that no prohibition lies from this court to an inferior court until a suggestion of its want of jurisdiction, properly verified, has first been presented to the inferior court. There has been no deviation from this rule until the present case. *Ex parte Williams,* 4 Ark. 537; *Ex parte Blackburn,* 5 Ark. 21; *Ex parte Meechan,* 12 Ark. 70; *Ex parte Little Rock,* 26 Ark. 52; *State ex rel. Butler* v. *Williams,* 48 Ark. 227; *Reese* v. *Steel,* 73 Ark. 66.

In *Ex parte Williams, supra,* this court said: "The rule was, at common law, that no prohibition lay to an inferior court, in a cause arising out of their jurisdiction, until that matter had been pleaded in the inferior court and the plea refused. It must appear, in the suggestion (to the Supreme Court) that the plea was verified and tendered in person during the sitting of the inferior court." The rule is announced in the same language in all the cases.

This doctrine, we believe, is in accord with the great weight of authority. In an exhaustive note to *State* v. *Superior Court,* 111 Am. St. Rep. 925-965, Judge Freeman says: "Whether any special rule of court has been promulgated on this subject or not, undoubtedly, the practice generally prevailing in the United States is not to take any action until it appears that the subordinate tribunal has in some appropriate method had its attention called to its supposed absence or excess of jurisdiction, and has, nevertheless, indicated its purpose to proceed, or it in some other manner sufficiently appears that an application to that court must prove unavailing."

Among the numerous cases cited by the eminent author and annotator in support of the text are cases from our own court. Further on in the note to the case the exception recognized in the majority opinion is referred to, and some cases from other courts are cited to support it, but none from Arkansas.

Of course, the opinion of even as learned a law writer as Judge Freeman as to the effect of our former decisions is not binding on this court. But certainly his opinion is entitled to the utmost respect. If he is correct, and we believe he is, in classifying our cases in line with those holding that the writ of prohibition will not lie unless the inferior court has first had its attention directed to the matter, and if indeed such has been the established rule of practice in this State for three-fourths of a century, and if it is in accord with the practice generally prevailing in the United States, then why change the rule, or engraft upon it an exception which virtually nullifies it? *Stare decisis* should preclude any departure or innovation here. "Without '*stare decisis,*' it would be difficult, if not impossible, to build up and preserve any valuable system of jurisprudence." *Ex parte Hunt,* 10 Ark. 284.

"Controversies should not be opened every time a new judge takes his seat." *Coates* v. *State,* 50 Ark. 333.

"It is better to let matters of practice remain settled than to disturb them." *Miller* v. *Fraley,* 21 Ark. 38.

"Public policy requires that decisions of courts of last resort which have been followed and acted upon shall be adhered to, unless great injury and injustice would result." *Rhea* v. *State,* 104 Ark. 162.

The case of *Russell* v. *Jacoway,* 33 Ark. 191, is not in conflict with the other decisions of this court. In that case the issue we have here was not raised. There was no suggestion in the Supreme Court to the effect that no objection had first been made in the inferior court to the exercise of jurisdiction and that the circuit court had not been given an opportunity to determine that question. On the contrary, the opinion in *Russell* v. *Jacoway, supra,* shows that the Supreme Court disposes of the case on the theory that the plea objecting to the jurisdiction of the inferior court had been first properly presented to that court and refused. The court said: "For the circuit court to assume to determine in the first instance," etc. Again, "But by the circuit court's assumption of jurisdiction in the case all further proceedings of the county court have been prevented," etc.

But the majority of the court, while recognizing the rule as above announced by the former decisions of this court, nevertheless hold that there is an exception to the rule where the circuit judge, before whom the cause must be heard when the court subsequently convenes, has in vacation overruled an objection to his jurisdiction to proceed in the matter then pending before him and which must be heard by the court later, and, where as in this case, in this formal response to the application for writ of prohibition he still maintains that the circuit court has jurisditcion. This holding is not correct, for the reason that the circuit judge in vacation and the circuit court are entirely different functionaries. The orders when made by the circuit judge in vacation are not final, but subject to review and change by the circuit court it-

self when it subsequently convenes, whereas the orders of the circuit court, when final, are subjct to review and correction by the Supreme Court.

Application was made to the circuit judge in vacation for writ of certiorari to bring up and to quash the assessment of benefits made by the commissioners and to restrain them from further proceeding with the improvement. Conceiving that he had jurisdiction to issue the writ of certiorari reviewable by the circuit court and, in the meantime, to issue a restraining order, the circuit judge proceeded to exercise such jurisdiction. He issued the writ of certiorari in April returnable to the ensuing September term of the court and in the meantime restrained further proceedings by the commissioners of the district. Now, who can say that the circuit court when it convened at the September term would not, upon a plea to its jurisdiction, after a consideration of such plea, have held that it had no jurisdiction of the matters presented in the application for certiorari? Who can say that the circuit court, after a careful consideration, would not have quashed the writ issued by the judge in vacation? Who can say that the circuit court would not have refused to quash the assessments of benefits made by the commissioners and that the court would have interfered in any manner with the further progress of the work of the improvement district? What prophetic ken has this court of what would be the decision of the circuit court of Craighead County several months in advance of the time when that decision was to be rendered? Who has the omniscience to foretell that the circuit court, although presided over by the same judge, would not entertain different views and decide that it had no jurisdiction?

To show the inaccuracy of the position of the majority and the unsoundness of its logic, let us suppose that before the September term of the court convenes, the Hon. R. H. Dudley, the respondent herein, and the judge who issued the writ of certiorari and the temporary restraining order, dies, or that he is unavoidably detained

by illness or other causes, all of which contingencies are contemplated by art. 7, § 21, of our Constitution. Suppose that under this constitutional provision a different judge has been elected to preside over the court and that such judge entertains entirely different views from his predecessor and that his views are in harmony with the appellant's contention herein, could it then be said that the circuit court had had an opportunity to decide the issue of its jurisdiction and had decided that issue adversely to appellant's contention? Could it then be said that there was any excuse, much less necessity, for the writ of prohibition? Could it then be decided by this court that the lower court had determined that it had jurisdiction when in fact no opportunity had been given that court to pass upon the question, and when, if the matter had been presented to it, it would itself have decided that it had no jurisdiction?

It occurs to us that the only answer to the above questions demonstrates the fallacy of engrafting the exception, now proposed and adopted by the majority, upon the rule heretofore announced and so long adhered to by this court. A rule of practice that would not stand the test and apply to any and all cases that might arise under art. 7, § 21, of our Constitution, is unsound (besides being unconstitutional), and should not be approved by this court.

The rule announced in *Ex parte Williams, supra,* is a sound one. It preserves the proper consideration deference for the opinions and judgment of the inferior tribunal.

Under the so-called exception no allowance is made for a possible, or even probable, change of viewpoint upon the part of the judge himself who reviews in term time his own vacation orders, and no consideration is given to the eventualities of art. 7, § 21, of the Constitution. This is manifestly unjust and unfair to the inferior tribunal which should at least be given the opportunity to first decide upon the question of whether it has

jurisdiction to proceed. We are convinced that there is no exception to the rule in this State and that the majority opinion, therefore, results in overruling the cases heretofore mentioned; and that the issuance of the writ, under the circumstances here detailed, is an exercise of original jurisdiction by this court not contemplated by our Constitution.

For the above reasons Mr. Justice HART and I dissent from that part of the opinion which holds that the writ of prohibition will lie.

RELIANCE LIFE INSURANCE COMPANY v. HARDY.

Opinion delivered May 24, 1920.

1. CONTINUANCE — ILLNESS OF COUNSEL — DISCRETION OF COURT.—A motion to postpone trial on account of illness of defendant's leading counsel is addressed to the discretion of the trial court.
2. CONTINUANCE — DISCRETION OF COURT.—Where defendant knew that its leading counsel had been sick for several months, and should have anticipated that the services of other counsel might be necessary, it was not an abuse of discretion to refuse to postpone the trial on account of the illness of such leading counsel.
3. INSURANCE—FORFEITURE FOR NONPAYMENT OF PREMIUM.—Where a life insurance company on the last day of grace for the payment of a premium on a policy had in its hands sufficient funds belonging to insured as a benefit payable to him under another policy, and not otherwise appropriated by insured, it can not not claim a forfeiture of the former policy, as it was its duty to appropriate such funds to prevent a forfeiture.

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

Milton B. Rose, for appellant.

1. At the request of the owner the premiums on the life policy were made payable quarterly instead of annually, and the policy was made payable to the wife (appellee). *No such change was made in the health policy.* The *onus* of establishing the payment of premiums due under the terms of the policy was on the plaintiff, and the evidence shows that the policy had lapsed. It was error

prejudicial to refuse the postponement of the case. 2 Ark. 33; 10 *Id.* 527.

2. The court erred in permitting the introduction in evidence of the policy, 97345-H, as it was not sued on and was irrelevant and immaterial.

3. It was fatal error to give the peremptory instruction for plaintiff. 100 Ark. 71; 105 *Id.* 25. There is no evidence in the record to sustain the action of the trial judge. The proof showed that the policy had lapsed by reason of the failure to pay the quarterly premium due October 3. The burden was on plaintiff to show that deceased, Hardy, applied for reinstatement of his policy on November 10; that he remitted with his application $19.88; that he executed a health certificate reciting only the sickness in August, 1917, and that the company refused to reinstate the policy and returned the remittance within one week and that Hardy cashed the check sent to him. 83 Ark. 575; 75 *Id.* 25. All premiums were payable at the home office or to an agent of the company upon delivery of a receipt signed by the president or secretary of the company and countersigned by such agent. No such receipt is shown to have been given. The defendant's motion for a peremptory instruction should have been given.

Moore & Vineyard and *Fink & Dinning,* for appellee.

1. There was no error in refusing the postponement of the trial, as there was no abuse of discretion on the showing made.

2. The court properly instructed a verdict, as the evidence shows that the premium was paid and the policy never lapsed. 111 Ark. 514; 68 *Id.* 505. See, also, 192 Ill. App. 69; 133 Iowa 379; 106 N. W. 947; 156 Iowa 201; 200 S. W. 320; 129 *Id.* 303; 133 N. W. 793; 180 Pa. 360; 163 Ky. 364; 125 Ark. 372; 111 *Id.* 514.

WOOD, J. On July 3, 1916, the appellant issued to Eno D. Hardy two policies of insurance. One was a

life policy and the other a health policy. They were separate instruments and separate contracts, but between the same parties. The health policy was issued for a period of twelve months and was made payable to the insured, and was not assignable, except by the written consent of the company. The life policy was payable to the executors, administrators, assigns, or beneficiaries of the insured. The annual premium on the health policy was $19.50. The annual premium on the life policy was $56.58. On August 9, 1917, at the request of the insured the premiums on the life policy were made payable quarterly instead of annually, and the beneficiary was changed to the insured's wife, Velma Hales Hardy, the appellee.

August 18, 1917, Eno D. Hardy contracted fistula and was confined on account thereof ten days, which entitled him to sick benefits under his health policy in the sum of $20. The claim for this sick benefit was sent in to the company, according to the testimony of the appellee, "some time in July or August." "She was not sure about the date." At any rate there was a delay in paying this claim until November 10, when the company sent Hardy, by letter, check for $20, which he received November 14, 1917, and signed receipt to the company for the amount thereof, dated November 10, 1917. On the same day Hardy applied to the company to reinstate his policies, remitting to appellant, with his application, the sum of $19.88. This application was declined by appellant on November 17, 1917. Appellant on that day returned to Hardy the amount of his remittance, which he accepted.

The quarterly premium due on October 3, 1917, on the life policy was the sum of $19.88. Under the terms of the policy, if this quarterly premium was not paid one month after the same became due, the policy lapsed. If paid on the 3d of October or one month thereafter, then the policy did not lapse, but continued in force until the next quarterly payment, which was due January 3, 1918.

Hardy, the insured, died on the 20th of December, 1917. The appellee instituted this action on the life policy, which was in the sum of $3,000.

The appellant denied liability on the ground that, at the time of Hardy's death, the policy had lapsed, because of the nonpayment of the premium, which in order to keep the policy in force should have been paid on or before November 3, 1917.

The case was called for trial on October 30, 1919. Messrs. Bevens & Mundt had been retained the day before to assist Milton B. Rose, leading attorney for appellant, in the trial of the cause. Appellant, through its assistant counsel, asked for a postponement of the trial until a later day of the term, assigning as a reason that they had not had sufficient time to acquaint themselves with the facts and law of the case and that Milton B. Rose was sick and unable to attend. The court overruled the motion.

The above were the issues and facts developed at the hearing upon which both parties asked for a peremptory instruction. The court granted the prayer of the appellee and instructed the jury to return a verdict in the sum of $3,337.60. Judgment was rendered for the appellee in that sum, from which is this appeal.

Appellant contends that the court erred in overruling its motion for a postponement to a later day in the term on account of the illness of its leading counsel, Milton B. Rose. The certificate of the physician attached to the motion shows that Rose had been ill all the summer. The issue had been made up for more than eighteen months at the time the motion for a postponement was filed. The continued illness of Rose during the summer before the day set for the trial of the cause should have caused the appellant to anticipate that the services of other counsel might be necessary at the trial, and proper diligence on its part would have resulted in the employment of such additional counsel in time for them to have prepared for the trial of the case when the same was called. At least the motion was addressed to

the discretion of the trial court, and we do not discover any abuse of discretion in overruling the motion.

The appellant contends that the undisputed evidence shows that the policy upon which this action was based lapsed and was forfeited on account of the failure of the insured to pay the premium due October 3, 1917, on or before November 3, 1917, the latter date being the last day of grace for the payment of the premium.

Appellant's contention can not be sustained for the reason that the undisputed evidence shows that on November 3, 1917, it had the sum of $20 in its hands belonging to Hardy, which sum exceeded the amount that was then due the appellant for the premium on the policy in suit. It is of no consequence that this fund accrued to Hardy under the provisions of a different policy from that in suit. The policies were issued on the same day and were between the same parties; but, even if that were not true, and if the appellant had in its possession funds belonging to Hardy derived from any source whatsoever, it was the duty of the appellant, in the absence of instructions from Hardy that he desired the use of the funds for some other purpose, to appropriate the same for the payment of his premium when it became due in order thereby to prevent forfeiture of the policy.

The undisputed evidence shows that Hardy was sick in August, 1917, and that his claim for $20 sick benefits which had accrued under his health policy had been sent to the company long prior to October 3, 1917, when the premium was due. Yet the appellant delayed sending him the amount of the sick benefit until after November 3, 1917. If Hardy, after making claim for sick benefit had directed the appellant that he desired the use of this amount for some other purpose than the payment of the premium on his life policy, then appellant would not have been warranted in appropriating the funds in its hands for the payment of the premium. But in the absence of such direction appellant could not hold on to the funds of Hardy until the time for the payment of

the premium had expired and then declare a forfeiture for the nonpayment of such premium. Since the payment of the premium was for Hardy's benefit, the presumption is that he would have consented thereto. But that matter is not left to presumption, for the undisputed proof here is that he desired to pay his premium and to continue his policy.

Hardy, on November 10, 1917, applied for reinstatement and remitted $19.88. On that date he had not yet received the $20 sick benefit, which reached him on the 14th, and, of course, he could not know whether the company had allowed his claim for sick benefit and whether it had applied same for the payment of his premium. At the time Hardy receipted the company for the sick benefit fund, the company had not returned to him the $19.88, which he had remitted to it. This remittance was not returned to Hardy until the 17th. So there was no interval from October 3, 1917, until November 14th, when the company did not have money in its hands of Hardy's more than sufficient to have paid his premium.

The appellant having kept in its hands money of the appellee until after time for the payment of Hardy's premium expired will not be heard to say, in the absence of affirmative evidence to the contrary, that it had no right to use this money to pay the premium and thus prevent a forfeiture of Hardy's policy. In other words, the effect of the undisputed evidence is to show that the premium was paid.

The trial court was correct in so holding and in granting the prayer of appellee for a peremptory instruction in her favor. Although there is some difference in the facts, the case is ruled by the doctrine announced and the principles applied in *Union Central Life Ins. Co.* v. *Caldwell,* 68 Ark. 505, where we said: "The doctrine does not arise out of the peculiar facts of any particular case. It does not depend upon contract, custom, or course of dealing for its existence and potency. It has its origin in that fundamental principle of justice which will compel one who has funds in his hands be-

longing to another, which may be used, to use such funds, if at all, for the benefit, and not to the injury, of the owner; for his consent to the one and dissent to the other, will be presumed. * * * These principles are founded upon reason and common fairness and honesty, and they will have application wherever it becomes necessary to prevent a forfeiture, which is favored neither at law nor in equity.'' See also *Nat. Ins. Co.* v. *Mooney,* 111 Ark. 514; *Mutual Life Ins. Co.* v. *Henley,* 125 Ark. 372.

The judgment is correct, and is therefore affirmed.

BREASHEARS v. ARNETT.

Opinion delivered May 24, 1920.

1. MUNICIPAL CORPORATIONS—AUTOMOBILE ACCIDENT—QUESTION FOR JURY.—Where, in an action for injuries to a pedestrian struck by an automobile, there was evidence that the driver was exceeding reasonable speed and sounded no warning before striking plaintiff, who was crossing in the middle of the block, the questions of negligence and contributory negligence were issues of fact for the jury.
2. DAMAGES — PERMANENT INJURIES.—Where the evidence showed that plaintiff, on being struck by an automobile, was knocked unconscious, and did not get out of bed for two weeks; that both her knees, and elbows and right side were badly bruised; that some of her injuries were permanent, and that she was unable to do work as before, a judgment of $1,250 damages is not excessive.

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

Geo. E. Floyd, for appellant.

1. Plaintiff, as a reasonable person, must have known it was extremely hazardous to cross the street at the time and in the manner she did and as the evidence shows. The doctrine of contributory negligence is well established by our authorities. It was prejudicial error to refuse instruction No. 4, asked by defendant, also Nos. 3 and 21. The evidence fully and clearly proves contributory negligence.

2. The damages are excessive. At most plaintiff was only entitled to nominal damages.

Chambers & Wilson and *Heartsill Ragon,* for appellee.

1. Three grounds of negligence were alleged by appellee: (1) appellant was running his car at an unusual rate of speed; (2) he did not have it under proper control, and (3) he sounded no warning.

2. There is no error in the instructions given or refused. 61 Ark. 381; 62 *Id.* 118; 78 Ark. 426; 84 *Id.* 241; 102 *Id.* 499; 88 *Id.* 524; 91 *Id.* 388; 81 *Id.* 187; 79 *Id.* 378.

3. The verdict is not excessive. The testimony would have warranted a much larger verdict.

WOOD, J. The appellee and her escort, Jack Walker, and Miss Eunice Holman and her escort, E. A. Mathis, all attended a moving picture show in the town of Plainview, Yell County, Arkansas, on the night of May 4, 1918. After the show was over appellee and her companion started across the street to a drug store for cold drinks. The street was eighty feet wide and there were about 150 people on the street at the time and a number of automobiles. Appellee and her companions were crossing at about the middle of the block. There were public crossings, but there were no car lines on the street and the people went across the street anywhere. Coming out of the picture show the people went straight across the street.

Appellee and Walker were within about ten feet of the curb on the opposite side of the street from the theatre and going toward the drug store when the appellant, who was driving a Ford occupied by himself and several young ladies, ran upon the appellee and Walker. Walker saw that appellee was in direct track of the car and tried to shove her out of the way, but failed. Appellant struck the appellee causing personal injuries for which she brought this action against the appellant to recover damages.

Appellee alleged that the appellant was negligent in running his car at an unusual rate of speed; that he did not have his car under proper control and that he did not sound any alarm warning appellee of the approach of his car.

Appellant denied the allegations of the complaint as to negligence and set up the defense of contributory negligence.

The appellee and her companions testified that the car was being driven by appellant at a greater speed than cars are ordinarily run upon the roads or streets. Appellant testified that he supposed he was going about ten miles per hour. Several witnesses testified on behalf of the appellant to the same effect.

Walker weighed 193 pounds and by the impact of the car he was thrown above the windshield. After the appellant hit appellee and Walker, he stopped the car in about seventy-five feet. Appellant did not sound any alarm before he struck the appellee.

Appellee was twenty years of age and in perfect health. She did general farm and domestic work. Since her injury she has not had strength and health and could not do work as before. When in health she had strength above the ordinary and made as good "a hand as you could get on the farm." Appellee was knocked unconscious by the blow and remained so for some time thereafter. She did not get out of bed for two weeks, and it was four weeks before she could get around. Her left knee, right side, chest, both elbows and knees and right hip were badly bruised. She was also injured in her breast. Whenever she walked any distance, her knee would swell and was painful.

The physician who attended the appellee testified, that there were several scratched places and bruised spots too numerous to mention over her body; that the principal wounds were injury to the knee and a rib that was loose from its cartilage on the right side, which in the process of healing caused a knot on her breast. In the process of healing, from the inflammation, the

knee cap had been thrown out, the fibers and tendons were enlarged, which left a thickened condition around the knee joint and that it was impossible for him to tell how long an injury of this character would last. Some of them get well while others are permanent injuries for a lifetime. The general rule is that a majority of them are permanent.

There was a jury trial resulting in a verdict and judgment in favor of the appellee in the sum of $1,250. From that judgment is this appeal.

All of the instructions given by the court were not abstracted either by the appellant or the appellee but the instructions that were set forth in the brief of counsel show that the issues of negligence and contributory negligence were submitted under correct declarations of law. The issues of negligence and contributory negligence were issues of fact under the evidence for the jury.

In view of the character of the injuries sustained by the appellee as shown by the evidence it can not be said that the amount of the verdict and judgment is excessive. There is no prejudicial error.

The judgment is correct, and is therefore affirmed.

LAVENDER v. FINCH.

Opinion delivered May 24, 1920.

1. SALES—SPECIFIC ATTACHMENT.—The statutory remedy authorized by Kirby's Digest, §§ 4966-7, in favor of a vendor of chattels, to enforce payment of the purchase money, is not a lien, and can not be enforced where the property has passed into the hands of purchasers for value, even though they may have had notice before their purchase that the purchase money had not been paid.
2. TRIAL—INSTRUCTION—APPLICABILITY TO EVIDENCE.—Where undisputed evidence showed that the timber attached by the vendor had not been paid for, an instruction that if the jury found the timber was paid for plaintiff could not recover was properly refused.
3. PLEADING—EVIDENCE ON POINT NOT IN ISSUE.—Where there was no issue as to the amount of consideration of a deed, the grantee will not be permitted to explain how such consideration was arrived at.

Appeal from Cleburne Circuit Court; *J. M. Shinn,* Judge; reversed in part affirmed in part.

Lee & Moore, for appellants.

The lumber and timber when severed from the soil was personalty and the lumber he purchased from Lavender in good faith and appellee had no lien. 91 Ark. 218; 76 *Id.* 273; 136 Ark. 190. The court erred in its instructions. 194 S. W. 95. They are in conflict and irreconcilable. 74 Ark. 437; 76 *Id.* 224; 88 *Id.* 550; 95 *Id.* 377; 104 *Id.* 67; 110 *Id.* 197.

M. M. Lavender, pro se.

1. The court erred in refusing to permit Lavender to testify in explanation of the contract and its apparent ambiguity of consideration. 93 Ark. 191; 128 *Id.* 73; 90 *Id.* 426; 99 *Id.* 223; 129 *Id.* 513.

2. The contract or deed was drawn at the instance of Finch (appellee), and should be construed most strongly against him and the court erred in refusing instruction No. 4, asked by Lavender. 73 Ark. 342; 84 *Id.* 431; 90 *Id.* 88. See, also, 97 *Id.* 522; 105 *Id.* 518; 112 *Id.* 1; 115 *Id.* 176.

Geo. J. Crump, for appellee.

1. The case should be affirmed as to Lavender on his own testimony.

2. The case was fairly submitted to a jury and the law was properly given and the verdict is conclusive. *Farmers Mut. Ins. Co.* v. *Hodges,* 142 Ark. 577.

WOOD, J. Carl Finch executed a timber deed to M. M. Lavender, conveying to him all the timber except cedar upon 320 acres of land described in the deed situated in Cleburne County, Arkansas. The consideration was $6,000, $1,600 cash and the balance of $4,400 to be paid in semi-monthly payments of $450 beginning from the date when the timber operations on the land were started. Lavender was to have two years from the date of the deed for cutting and removing the timber. The

conveyance was subject to a lien on the timber in favor of C. L. Moore for $750. The instrument contains the following provision:

"The payments of $450 semi-monthly are computed on basis of manufacture of 150,000 feet of lumber per month. In the event that said M. M. Lavender should fail to manufacture said amount the monthly payments shall be reduced in proportion to the number of feet of lumber manufactured. In the event that more than 150,000 feet of lumber is manufactured monthly then in that event the semi-monthly payments are to be increased in proportion to the amount so manufactured. The above conditions shall be of natural origin and not of wilful neglect or negligence.

"Lien is hereby retained upon the timber hereinafter mentioned to secure the residue of said above-mentioned deferred payments."

The appellee instituted this action against M. M. Lavender, H. K. Wellborn, and James Walls, doing business as the Holly Grove Lumber Company, hereafter for convenience called company. He set up the timber deed and alleged that the sum of $2,740 was due him thereunder; that the timber was sold to the company. He alleged that he had a specific lien on 100,000 feet of lumber in the possession of the company for the sum due him under the timber deed. He prayed for a specific attachment of the lumber for the balance due him.

Appellant Lavender answered, denying that he was a partner in the company. He alleged that the company was composed of H. K. Wellborn, J. B. Wellborn and J. A. Walls; that he had no interest in the company. He admitted the execution of the timber deed and denied that the company knew anything about it. He alleged that they had no interest under the timber deed. Denied that the timber was purchased by him for the company. Alleged that it was purchased for himself. He denied that he was due the appellee any sum and by way of cross action he set up that the appellee had represented that there were at least 1,000,000 feet of merchantable timber

on the land described in the timber deed, that these representations were designedly made to induce Lavender to purchase the timber; that he relied upon them; that such representations were false and were known to be false by the appellee at the time they were made.

Lavender alleged that there were only 470,652 feet of merchantable timber and that he had more than paid the price of such timber in accordance with the terms of the timber deed. He stated that the payments required under the timber deed would amount to $2,823.93 and that he had paid appellee the sum of $3,097.47. He denied the allegations of appellee's petition for specific attachment. Alleged that the 100,000 feet of lumber was the property of the company; that he in good faith had sold the lumber to the company. He prayed that the writ of attachment be dissolved and for such other relief as he might be entitled to have.

The company answered, denying that Lavender was a member of the company and denied the allegations of appellee's complaint as to it. It alleged substantially the same facts as were set forth in the separate answer of Lavender and denied the allegations of appellee's petition for specific attachment. It alleged that the lumber attached was purchased by it from Lavender and that the attachment was wrongfully issued. It set up that by reason thereof it had been damaged in the sum of $3,000, for which it prayed judgment.

The appellee answered the cross-complaint of Lavender and the company and denied specifically their allegations and prayed that they be dismissed and that he have judgment as asked in his original complaint.

The appellee testified that he executed the timber deed to Lavender; that Lavender told him that he was in the employ of the company; that he was its agent or partner; that he was letting the company have the timber that was cut from appellee's land; that the company handled it exclusively; that in discussing the trade Lavender asked appellee about the amount of the timber and appellee told him that it had been estimated at

1,250,000 feet. Appellee was not present when the estimate was made, but that was his information. Before the trade was consummated appellee and Lavender agreed upon the price of the timber. Lavender went upon the land and made an estimate of the timber and came back and bought the timber of the appellee. Appellee did not represent to Lavender that the tract of land carried 1,000,000 feet of timber or more. Appellee was not an experienced lumber man but Lavender was. They went back and forth across the land and Lavender estimated it by the trees and that is the basis upon which he bought it. Appellee was selling the timber for $6,000 on the tract of land consisting of 320 acres. He sold it as a lump trade, and Lavender thought that there was ample timber there to justify him in buying same and paying the sum of $6,000 for it.

Appellee further testified that Lavender had paid him under his contract $2,222.47, leaving a balance due him of approximately $2,937.50, including a lien on the property at Harrison, which appellee took in part payment of the purchase money.

W. R. Casey testified that he was an attorney, and that he was employed by the appellee to institute suit against Lavender; that the day before the suit was instituted he heard the conversation between the appellee and Lavender, in which Lavender admitted that he owed appellee on the contract the difference between the payments, a statement of which he exhibited, and $6,000, the consideration named in the timber deed. He stated that he was sorry that he had not been able to pay, but the timber had not turned out as he had expected it to turn out. In the conversation Lavender told them that the timber was bought for the company; that he was acting merely as its agent; that he received a salary and some little commission; that was the reason that witness included the company as party defendant in the suit. Lavender said that most of the lumber attached came off of the land and belonged to the company. Upon that statement witness attached the lumber.

Lavender testified that he had bought the timber from appellee as evidenced by the timber deed; that he had cut and removed all the timber from the land embraced in that deed; that there were 470,272 feet; that he had paid appellee for this timber under the contract; that he did not owe him anything but in fact had overpaid him. He denied the conversation testified to by witness Casey. He stated that there was no one interested with him in the purchase of the timber from appellee. He denied that he had ever told or indicated to any one that he was the agent of the company. He stated that he told appellee and Casey that he was employed on a salary of $50 per month and a commission of fifty cents per thousand to buy and handle lumber for them. His contract with the company was in writing. The company was in no sense interested in the purchase of the timber from appellee. He and appellee made an estimate of the timber before the deed was executed. Appellee stated that he was sure that there was 1,000,000 feet. Witness thought there would be something like 1,000,000 feet and told appellee that he could afford to purchase at $6 per thousand if there were 1,000,000 feet and a contract was entered upon under the assumption that there was 1,000,000 feet. Witness made the payments as the contract provided. When the lumber was cut and brought to witness, he sold it to the company. It paid for it and witness paid appellee. Witness was never at any time a partner in the company, in this timber deal or any other matter. The company did not authorize witness to buy any timber for it. Witness was only authorized to buy lumber for the company. Witness did not want the attachment brought against the company as they did not have a thing in the world to do with the deal; that is the reason witness asked appellee and Casey not to attach. Witness did not know exactly how much they attached, but there must have been 150,000 feet. The company got the lumber and shipped it away.

There was testimony corroborating the testimony of Lavender as to the amount of the timber.

Toney Lewis testified that his firm, the Lewis Brothers, contracted with Lavender to cut the timber on the land in controversy and it proceeded to cut all the commercial timber on the tract; that Lavender paid for same with checks on Heber Springs bank.

H. K. Wellborn testified that the company was composed of himself, Walls and B. G. Wellborn; that Lavender was not a member of the firm and had never at any time been the agent of the company. The company bought a portion of the pine timber that came from appellee's land and paid for all the lumber it bought from Lavender; that the lumber that was attached was not all the lumber the company had bought and paid for. It paid Lavender $7,291.31 for the lumber. The company had nothing to do with the purchase of the tract of timber from the appellee. Did not know anything about it and was not interested in it; that the lumber attached was paid for by the company before the attachment was issued and some of the lumber came from other parties. The company hired Lavender at $50 per month and gave him a commission on lumber bought. The company also gave him a commission on lumber sold, the same as they gave other people. The company put a $1,000 in the Bank of Heber Springs with the understanding that when a load of lumber came to town Lavender was to buy it and give a check. The company told Lavender what he could pay for the lumber and the $1,000 was placed in the bank for him to buy lumber with. If he did not have a statement at the bank showing the number of feet and from whom purchased the bank would not pay the check. The jury returned the following verdict:

"We, the jury, find for the plaintiff against the defendant M. M. Lavender in the sum of $2,740 and sustain the attachment herein on the lumber."

The court rendered judgment against Lavender in favor of the appellee for that sum and sustained the attachment. The court also rendered judgment against

the company and its bondsmen. From that judgment is this appeal.

The appellant company asked the court to instruct the jury in substance that if the company purchased the lumber from Lavender and paid him for the same before the issuance of the writ of attachment, their verdict should be for the company, even though Lavender may not have paid the appellee for the timber, and even though the company had actual notice that the purchase money had not been paid by Lavender.

The court erred in refusing to grant this prayer for instruction. Appellee asked and obtained specific attachment of the timber under the provisions of chapter 101 of Kirby's Digest. In *Neil* v. *Cone,* 76 Ark. 273, we held: "The statutory remedy authorized by Kirby's Digest, sections 4966-7, in favor of a vendor of chattels, to enforce payment of the purchase money, is not a lien, and can not be enforced where the property has passed into the hands of purchasers for value, even though they may have had notice before their purchase that the purchase money had not been paid." See also *McComb* v. *Judsonia State Bank,* 91 Ark. 218.

The appellee caused the attachment to be issued on the theory that Lavender was a partner in the company or that he was the agent of the company to purchase the timber of the appellee. The court instructed the jury that the undisputed evidence showed that Lavender was not a partner in the company. There was testimony tending to prove that he was not the agent of the company for the purchase of the timber. There was evidence to warrant the finding and therefore a submission of the issue to the jury as to whether or not the company purchased the timber direct from Lavender. Therefore, the above prayer for instruction should have been granted.

The appellant company also asked the court to instruct the jury that if they found that the timber attached was fully paid for by Lavender in the manner

set forth in the timber deed the appellee could not recover as against the company.

As we construe the timber deed, the undisputed evidence shows that the timber had not been paid for by Lavender. Therefore, there was no testimony to warrant the submission of that issue to the jury, and the court did not err in refusing to grant such prayer.

The company urges that there was a conflict in some of the instructions given by the court, which we find to be the case, but we deem it unnecessary to discuss these for the reason that the court is not likely to repeat this error on rehearing.

Appellant Lavender contends that by the terms of the timber deed he was to pay appellee $6 per thousand for all commercial timber except the cedar on the 320 acres of land described in the deed and that the court erred in refusing to permit him to testify in explanation of the timber deed as to how the consideration of $6,000 was arrived at, but we do not find in the abstract of appellant where the court refused to permit testimony to this effect to be introduced by Lavender. According to the abstract, no ruling of the court was elicited on that issue.

Moreover, the appellee alleged that the sum of $6,000 was to be paid for the timber. Appellant Lavender does not deny that such was the consideration, but on the contrary he expressly admits that "he was induced to purchase said timber at and for the sum of $6,000." There was, therefore, no issue as to the amount of the consideration that Lavender was to pay for the timber. Even if Lavender had offered the testimony as above contended by him, the court would not have erred in excluding the same and thus restricting the parties to the issue raised by the pleadings.

The appellant Lavender, while admitting that he was to pay $6,000 for the timber, alleged that this consideration was agreed upon on account of the false representations of the appellee to the effect that there were 1,000,000 feet of timber in the tract. But there was no testimony

to warrant the court in submitting an issue of deceit and fraud to the jury. Under the undisputed evidence the court would have been justified in instructing the jury to return a verdict in favor of the appellee on this issue.

There was no error in the rulings of the court on the issues between the appellee and appellant Lavender. There was evidence to sustain the verdict as to appellant Lavender. The judgment as to him is, therefore, correct and it will be affirmed.

As to the appellant company, the judgment will be reversed and the cause, for the error indicated, will be remanded for a new trial.

DERMOTT v. STINSON.

Opinion delivered May 24, 1920.

1. ADVERSE POSSESSION—EVIDENCE.—In a suit by a property owner to enjoin a city from opening an alleged common, evidence *held* to show that the title to such common was in dispute, that the common was enclosed in separate inclosures by the owners of abutting lots, that the character of these inclosures was such as to give to the members of the city council notice that such owners claimed adversely.
2. ADVERSE POSSESSION—CONTINUITY.—A so-called contract whereby a city recognized that an abutting owner was in adverse possession of a portion of a common claimed by the city, and agreed that, if the abutting owner should ever be divested of such portion of the common, the city would repay him all sums expended in the construction of a sidewalk along the street *held* not a recognition by such abutting owner of title in the city to the land in controversy.
3. ADVERSE POSSESSION—TITLE.—Where an abutting owner held possession of a portion of a common adversely, openly and continuously for the statutory period, he acquired title by adverse possession.
4. ADVERSE POSSESSION—ESTOPPEL.—Where an abutting owner acquired title to a portion of an alleged common by adverse possession, the fact that the city agreed with him that if he should ever be divested thereof the city would repay to him all sums expended in constructing a sidewalk and that the city did refund such sums to him did not estop him from asserting such title by adverse possession.

Appeal from Chicot Chancery Court; *N. B. Scott*, Special Chancellor; affirmed.

D. Dudley Crenshaw, for appellants.

1. Chancery cases on appeal are tried *de novo*. 197 S. W. 1160; 188 *Id.* 1160; 125 Ark. 364; 93 *Id.* 394; 79 *Id.* 577; 99 *Id.* 218; 125 S. W. 422; 96 *Id.* 134; 138 *Id.* 978. The findings of the chancellor are persuasive only. 2 R. C. L., pp. 203-4.

2. The findings of the chancellor are clearly against the preponderance of the evidence and the decree should be reversed. 34 Ark. 212.

3. Where lands are occupied permissively and the use and occupation is not manifestly inconsistent with the right of the grantor, notice of hostility of the claim must in some way be brought home to the grantee before the statute of limitations will begin to run. 85 Ark. 520; 69 *Id.* 562; 58 *Id.* 142; 65 S. W. 1048; 23 *Id.* 876; 1 Am. & Eng. Enc. Law (2 ed.), 818-19; 25 Atl. 802; 9 N. E. 269-273. The owners of land on a platted street had notice of the dedication of the street and are presumed to have knowledge of the city's legal right to open the street in its own time. 115 S. W. 371. See, also, 48 S. W. 807. What is true of streets is true also of commons. 3 Dillon, Mun. Corp. (5 ed.), §§ 1102-1160.

4. The burden was on appellee to show that no common existed. 77 Ark. 177; 90 S. W. 1003. The common undoubtedly existed. It was dedicated to the public, which was not revocable. 90 S. W. 1003; 97 *Id.* 1034; 109 *Id.* 541; 115 *Id.* 379; 121 *Id.* 395; 184 *Id.* 449; 204 *Id.* 607; 9 A. & E. Enc. Law (2 ed.), 57-59; 8 R. C. L. 894-896. Appellee is estopped to deny the dedication.

5. The doctrine of *laches* does not apply here. 67 Ark. 320; 55 S. W. 16; 109 *Id.* 541.

6. Appellee does not come into equity with clean hands. 76 N. Y. 108; 32 Am. Rep. 286; 10 R. C. L. 389-390.

Streett & Burnside, for appellee.

Appellee's right to relief is based upon title by open, notorious and adverse possession for more than thirty-five years, and the relief prayed for was properly granted and the findings are fully sustained by the testimony. 80 Ark. 578; 111 *Id.* 197; 80 *Id.* 444; 118 *Id.* 10; 34 *Id.* 598; 66 *Id.* 26. Appellee was not estopped. 73 Ark. 110. Appellants' occupancy of the land was not inconsistent with appellee's rights. 114 Ark. 384.

Appellant is guilty of *laches.* 83 Ark. 385.

WOOD, J. The city of Dermott, through its council, passed a resolution to open a certain common within the city limits.

The appellee instituted this action against the appellants to enjoin the opening of the common. He alleged that he is the owner of lots 3 and 4 of the original hamlet of Dermott, as platted by S. A. Duke, March 30, 1882, which plat was duly recorded in Chicot County. He alleged that he occupied these lots with an additional strip contiguous thereto as his homestead, and that he and his predecessors in title had been in the continuous, open and adverse possession of same for more than thirty-five years, claiming to own same. He alleged that the strip of land which adjoined his lots is a part of what was designated in the plat filed by Duke as a common; that about the year 1883, by common consent of the owners of the lots adjoining upon said common, the same was inclosed by the respective owners, thus extending their holdings the width of each of their said lots west to the public road, which afterward was incorporated into and became a part of the main street of the city of Dermott; that until July 8, 1918, no legal steps had ever been taken to question the appellee's title or right to possession of said tract. But on the above date the city of Dermott caused notice to be served upon the appellee to vacate the property and appellants are now threatening to enter upon and tear down the fence and commit other acts of waste and trespass to the irreparable damage of

the appellee. Appellee prayed that the appellants be enjoined and that his title to the tract of land be quieted.

The appellants answered and denied the allegations of the appellee's complaint and pleaded that the appellee was estopped by an instrument which he and S. A. Duke, the original owner and dedicator of the lands then constituting the hamlet, now the city of Dermott, and others signed on March 30, 1882, and which was duly recorded on March 13, 1883. In that instrument it was recited among other things that the original plat filed by Duke was a correct plat of the hamlet of Dermott; that the streets, alleys, and commons as designated on that plat shall forever be common property for the use and benefit of the owners of property in Dermott and the public generally; that the streets, alleys, and commons should never be occupied or used for any other purpose except by the unanimous consent of every owner of real estate in the hamlet.

The appellee testified that he is the owner of lots 3 and 4 in block 4 of the original hamlet of Dermott abutting on the strip of land in controversy; that he had been in the possession of these lots since March 25, 1882, at which time he purchased the same from S. A. Duke and obtained a warranty deed, which he introduced; that he had been in possession of the strip of land in controversy immediately west of his lots and between them and Main street of the city of Dermott since his acquisition of title to the lots mentioned; that he and other parties joined with Duke, the original owner of the lots, in the deed and plat of original dedication to the hamlet of Dermott; that the fence at that date was where it is now; that a short time after this instrument was signed by him and others, the signers thereof agreed to abrogate the deed of dedication and continue their fences out to the boundary of the public road as it then existed; that at the time of dedication and continuously thereafter the strip of land in controversy has remained inclosed; that the strip of property has been inclosed and held as a part of his property ever since that date; that no attempt had

been made by the city to oust him from the possession of the strip in controversy until the summer of 1918; that he used the front of his place, the strip in controversy, for a pasture; that January 10, 1910, he accepted a so-called contract from the town of Dermott, which is as follows:

"This contract, made and entered into by and between the incorporated town of Dermott and H. C. Stinson, witnesseth:

"Whereas, the said H. C. Stinson has caused to be constructed along the west boundary line of that part of the common lying in front and west of lots 3 and 4 in block 4 in the original town of Dermott, owned by him, concrete sidewalk and has paid for the same.

"The said town of Dermott hereby agrees to and with the said H. C. Stinson that in the event the said H. C. Stinson should ever be divested of that part of the said common lying west of said lot by any act or consent of said town, then in that event it will repay to said H. C. Stinson any and all sums of money expended in the construction of sidewalk, without interest.

"And the said H. C. Stinson hereby agrees on his part that he will maintain said sidewalk and a reasonably good looking fence along said western boundary of said common where same is situated in front or west of his lots 3 and 4 in block 4."

Appellee testified with reference to this contract that when he signed the agreement about the sidewalk he did not recognize the town's right to the property; that he knew the town claimed it and he claimed it; that he took the money back as a condition of his surrender of the contract; that he thought as long as the town had used his money six or seven years he might use the money himself; that he received notice from the town to move his fence back but did not remember whether it was before or after he accepted the money; that he did not move the fence when he accepted the money or when he received notice to move same; that he got out the injunction because he did not intend to give it up; that the

north end of the common is occupied by a brick building and so far as he can tell is standing where the original building stood in 1882 and 1883; that no portion of the common has been open to the public since 1883 and the city has not since that time until the matter of the sidewalks came up in 1910 sought to eject any of the owners from the strip of land dedicated as the common.

R. A. Buckner testified that he came to Dermott in 1884, and that at that time the common was occupied out to the street, and he knew nothing of its existence for several years; that the appellee and other owners of lots abutting the strip in controversy were then and have since been in possession of same; that it was inclosed and had been occupied since 1884; that appellee claimed the common as his property; that he had never heard the title or right to possession of the common called in question until five or six years ago when witness was employed as town attorney; at that time some of the council wished to take it, others did not; at that time appellee claimed the common abutting his lots as his own and witness believed other property owners did likewise; that at the time the question of building the sidewalks was up before the council appellee claimed the property and talked to witness about making defense if the city ever attempted to assert title to the property. Different individuals, among them members of the city council, had talked about whether they ought to take possession of the common or not, but there was never any action taken by the council.

Other witnesses testified substantially corroborating the testimony of the above witnesses. One of the witnesses stated that so far as he knew no owner of property in that plat had ever recognized the right of the public in that land; that he had known the property since 1900; that when the town required the property owners, along the strip in controversy, to put down sidewalks there was a question raised at the time as to the right of the town to require that sidewalks be put down. Witness asked whether if the property owners should put it down

themselves if they could put it back on the line. The city authorities assured witness that there was no danger of the property owners losing their property, but for their protection the city would give them a ninety-nine-year lease. The town did not claim the title to the land when it offered them the ninety-nine-year lease. Witness only wanted it to settle any dispute that there might be as to the title.

Witness J. T. Crenshaw testified for the appellants that he had been a resident of Dermott since 1881; that he had been connected with the city government at various times as alderman, mayor and recorder since it was incorporated. The strip in controversy was dedicated to the hamlet of Dermott by Major Duke, who wanted to put out trees on it. Dermott was a small place then and no one took any interest in it. While witness was a member of the council and had charge of the city business "the common was recognized as belonging to the town, but the people along there recognized it as belonging to them." There were two opinions about it.

Witness did not know that the property owners claimed the common as their own. The people there had fenced it and lived there and were using it. The common was always recognized as city property. Witness could not say whether the owners of the lots abutting the common ever recognized it as city property or not. They recognized it as their own property and had it fenced in. There has always been a dispute about it. The city took active steps last year toward the assertion of its rights when they made one Belser move his house up when they found it to be on the parkway. Witness could think of no other assertion of right by the city.

Other witnesses, some of them owners of lots abutting the common, testified that they did not claim the common and that in conversation with other abutting owners the right of the city to the common was recognized.

Witness Rayborn had lived in Dermott since 1880, during which time he had held all of the offices of the

city except treasurer. During his administration there were so many discussions concerning the common that he could not name any certain time only when the sidewalk was built; that while he was in office the town authorities were never notified that any of the owners of property abutting the common claimed the property in front of their lots as their own, but they all recognized that the town owned it; that he was mayor a long time, the last time in 1913; that in 1918 the appellee said to witness, "This is where Delaney run the line between our property and the city property. He run it a little too close to my house, a little over the line, because the line is where the cedar trees are in front of where Petticord used to live, because Petticord set those cedar trees on the line."

Witness further testified that the abutting owners all had good fences on their lines and did not present claim to any of the city property until after the death of Duke; that while witness was connected with the council there was no action taken by the city to open the common "because there was an agreement for the people to move when they were dissatisfied and wanted the common opened."

W. D. Trotter testified that he had lived in the community since 1874; that the common since the city was incorporated had been generally regarded as public property; that he had never heard of a controversy about the property until the one came up with Belser; that that part of the common had been inclosed all the time witness had resided in Dermott.

The above are substantially the facts upon which the trial court found that the appellee had been in open, continuous and adverse possession for more than thirty-five years of the strip of land designated as the common, that appellee was not estopped from setting up title by limitation, and that he had acquired title to the property.

The court thereupon entered a decree perpetually enjoining the appellants from interfering with the appellee's possession. From that decree is this appeal.

The undisputed testimony shows that in 1882 S. A. Duke, the original owner of the land in controversy, owned a farm in Chicot County, Arkansas; that he platted a part of the same into blocks and lots with streets and alleys and a strip of land designated as the public common, of which the land in controversy is a part; that he designated the lands thus platted as the hamlet of Dermott; that on March 25, 1882, he sold lots 3 and 4, block 4, of the hamlet of Dermott to the appellee. Of the lands thus platted he had sold other lots to A. E. Petticord and C. P. Freeman. On March 30, 1882, all of the then property owners of the lands which had been platted by Duke as the hamlet of Dermott signed the instrument set out in the statement, dedicating the streets, alleys and common to the public of the hamlet of Dermott. That instrument recites that the common thus donated by Duke should never be "occupied, inclosed or used for any other purpose except by the unanimous consent of every owner of real estate in the said hamlet."

The appellee testified that a very short time after the plat was made and the instrument above mentioned was signed by him, the then owners of the property agreed among themselves to abrogate that contract and continue their fences out to the boundary of the public road as it then existed. He states that the parties interested at that time agreed to take what was designated as the common into their lots and hold them as a part of their property. All the other original signers of the instrument are dead. This testimony of the appellee is undisputed.

The testimony of the appellee is positive to the effect that there had never been a time since he took possession of the strip of land that it had not been inclosed and held by him as a part of his property. The evidence is undisputed that the possession of the strip known as the common was taken and held by the owners of the abutting lots, and a preponderance of the evidence shows that these abutting property owners were holding the common adversely to the city of Dermott. All except one of

the owners of lots abutting the strip designated as the common testified corroborating the testimony of the appellee, that they went into the possession and were holding as their own, and adversely to the city, the part of the strip abutting their lots, and the width of each lot to the public road which is now Main street of the city of Dermott.

The testimony of the appellee that the strip designated as the common was held adversely by the abutting lot owners is corroborated by witnesses who, it occurs to us, were in the best situation to know the facts and who gave the most direct and specific testimony concerning the adverse claim. For instance, J. T. Crenshaw, one of the oldest residents of the town and who had been officially connected with the city government ever since it became an incorporated town, testified that "the common was recognized as belonging to the town but the people along there recognized it as belonging to them." His testimony thus shows that so far as the city was concerned it claimed the property as its own, but so far as the property owners were concerned they were claiming it as their own property.

Likewise, the testimony of Rayborn, who was an old resident and had held all the offices of the city except treasurer, shows that there had been discussions concerning the common in the city council so many times during his administration that he could not name any certain time.

The testimony of these witnesses proves clearly that so far as the city was concerned it did not recognize that the abutting property owners had any title to the common, but it also as clearly shows that the matter was in dispute. It clearly shows that the city fathers must have known the circumstances and have known that the abutting lots owners were holding and claiming to own the property, and yet took no steps to oust them from possession, and to open the common to the public until notice was served upon them in 1918 to remove their fences.

The testimony shows that the so-called common was not inclosed by the property owners by one common fence, but that each had the part claimed by him in a separate inclosure extending his lot its entire width to Main street of the city of Dermott. The character of these inclosures and holdings was such as to give notice to the members of the city council that the owners of abutting lots were claiming the strip designated as the common adversely.

The instrument of January 10, 1910, between the appellee and the city, designated as a "contract," concerning the building of sidewalks is not, as we construe it, a recognition by the appellee of title in the city of Dermott to the land in controversy. On the contrary, this instrument appears to us to be rather a recognition by the city of Dermott that the appellee was the owner and had a right to the possession of the property.

We conclude, therefore, that appellee's occupancy of the land from 1883 to 1918, when he was given notice to remove his fence, was of such a character as to be entirely inconsistent with the idea of mere permissible possession by the city of Dermott. A preponderance of the evidence, on the contrary, shows that it was adverse, open and continuous for the statutory period and that he, therefore, acquired title by adverse possession. *Gee* v. *Hatley,* 114 Ark. 384. The trial court was correct in so holding.

We are also convinced that, after having acquired such title, appellee was not estopped by accepting from the city of Dermott the amount that had been expended in the construction of the sidewalk and surrendering the contract concerning same. If we are correct in our view that appellee had acquired title by adverse possession, then appellee's contract with Dermott concerning the sidewalk would not operate to divest him of the title and invest title in the city. Such was not the purport, nor the effect, of that "*contract.*" *Hudson* v. *Stillwell,* 80 Ark. 575-8; see also *Broad* v. *Batty,* 73 Ark. 110; *Shirey*

v. *Whitlow,* 80 Ark. 444; *Turquette* v. *McMurain,* 110 Ark. 197; *Hutt* v. *Smith,* 118 Ark. 10.

The decree is correct. Affirmed.

PUMPHREY v. FURLOW.

Opinion delivered May 24, 1920.

1. PARTNERSHIP—EVIDENCE.—Evidence *held* insufficient to establish a partnership between plaintiff and defendant in the purchase of land; there being no agreement to buy the land for the purpose of resale, and to share equally in the expenses and profits.
2. TRUSTS—RESULTING TRUST.—Where plaintiff alleged that defendant agreed to purchase land at not exceeding $25 per acre and to sell part of it to him at the price paid, and it appeared that defendant purchased the land for $15 an acre and subsequently sold part of it to plaintiff for $25 an acre, no resulting trust arose in plaintiff's favor.
3. JOINT ADVENTURE—EVIDENCE.—In a suit to recover an excessive payment alleged to have been fraudulently procured by defendant, based on an alleged contract whereby defendant was to let plaintiff have certain land at what it cost defendant, evidence *held* to support a judgment for defendant.

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

STATEMENT OF FACTS.

W. I. Pumphrey brought this suit in equity against Nathan Furlow to recover the sum of $1,044.32 which he alleges he was fraudulently induced to overpay the defendant for the purchase price of a tract of land and to have said amount declared a lien on the land.

The defendant filed an answer denying all the material allegations of the complaint.

According to the testimony of W. I. Pumphrey, he was a negro sixty-four years of age and had lived in Little River County, Arkansas, for thirty-one years, during which time he had been farming and teaching school. He lived near the defendant, Furlow, and had known him since the latter's boyhood. Furlow was a white man and Pumphrey had the utmost confidence in him. In the summer of 1917, Pumphrey made an oral agreement

with the defendant to buy a tract of land containing 174.71 acres. He went to see the defendant and asked him what the land could be bought for. The defendant stated that he did not know the price, and, after some discussion about the land, agreed with Pumphrey that they would buy it together. Because Pumphrey was a negro, Furlow concluded the negotiations for the land with the owner, who lived at another place in Arkansas. It was agreed between the parties that Furlow should buy the land for any price he could get it for up to $25 per acre. Furlow was to take the contract in his own name and subsequently to let Pumphrey have part of the land at what Furlow had agreed to pay for it. Furlow reported to Pumphrey that he had to pay the $25 an acre for the land, when as a matter of fact he had bought it for $15 an acre. A survey was made of the land and it was agreed between them that Pumphrey should take 101.71 acres at $25 an acre. A written contract between the parties was entered into to that effect. It was understood that the defendant should keep the remainder of the land. Each party entered into possession of his part of the land. Furlow bought the land on a credit and the amount allotted to Pumphrey at $25 an acre paid the whole purchase price, except a small amount which Furlow paid in the beginning. Pumphrey paid for the land with two bank checks given Furlow during the fall of 1917. At the time the bank cashier offered to lend Furlow the money with which to pay for his part of the land and they acted like they were fixing up a mortgage. Again Pumphrey stated that Furlow promised to sell his part of the land to him for just what it cost him.

Austin Hall, another negro who had lived on Furlow's place for about eight years, was a witness for the plaintiff. According to his testimony he had known both parties about twenty-five years and had worked for the defendant for about eight years. In the latter part of the summer of that year, he heard a conversation between the plaintiff and defendant about the purchase of some land near them. The defendant first asked the

plaintiff to go and see the owners about the purchase of the land. The plaintiff suggested that he was a negro and that it would be better for the defendant to go and make the purchase. The defendant said he was satisfied they could get it for $25 an acre; but that he would get it as cheap as he could. The plaintiff agreed that he would pay as much as $25 an acre for a part of the land. We quote from the record a part of the testimony of the witness, A. Hall, as follows:

"Q. Then you understand that they were partners in buying the land and Furlow had authority to act for both?

A. Yes, sir.

Q. Did you hear Pumphrey explain that in terms of that character that he would intrust him with handling the deal?

A. Yes, sir.

Q. They were both to pay the same price per acre for the land, was that the way?

A. Well, that has kinder slipped my memory. I know of the partnership and that is about all I remember.

W. I. Pumphrey: That is why you were called in the conversation. He said 'I will let you have the land for the same price I pay for it.'

Q. Do you remember any other discussion as to what the land would cost, that each of them was to pay the same price for it?

A. Yes, sir.

Q. And that was why you were called?

A. Yes, sir; I said he was all right. We have been working together for eight years and I said I believe you are all right myself.

Q. That is what you were called for as a witness when they were discussing that and you vouched for both of them?

A. Yes, sir."

The defendant, Furlow, was a witness for himself. He denied that he agreed to buy the land as cheap as

he could and sell part of it to Pumphrey. According to his testimony he was on a contract for the purchase of the land on September 10, 1917. After he had made the contract for the purchase of the land he had it surveyed and on October 6, 1917, he entered into a written contract to sell Pumphrey 101.71 acres for the price of $25 an acre. According to Furlow's testimony Pumphrey urged him to buy the land and told him that he would pay him as much as $25 per acre for one hundred acres of it. Pumphrey wanted Furlow to buy the land because he thought he could make a better trade for it. Furlow never agreed to let Pumphrey have any part of the land for what he paid for it. It was understood between them that Pumphrey was to give him $25 for the land. Furlow bought it for $15 an acre and made the trade entirely on his own account. Subsequently when he found out that Pumphrey was dissatisfied with the trade, he offered to take it off of his hands and to pay him a good profit. The lands began to rise in value shortly after Furlow purchased them.

E. C. Payne, the cashier of the bank through which Pumphrey paid for the land denied that he and Furlow acted as if they were fixing up a mortgage on the land to secure Furlow's part of the purchase money. He stated positively that there was no effort on his part to do anything of that kind and that he could not recall any conversation which tended to show that fact. He admitted that Furlow had suggested to him that he did not want Pumphrey to know what he had paid for the land.

J. E. Davis testified that he bought some timber from Pumphrey off of the part of the land which Furlow sold to Pumphrey. He said that Pumphrey told him that he did not know what trade Furlow had made for the purchase of the land.

Other testimony will be stated or referred to in the opinion.

The chancellor found the issues in favor of the defendant and dismissed the plaintiff's complaint for want of equity. The plaintiff has appealed.

A. D. Dulaney, A. P. Steel and *John J. Dulaney,* for appellant.

1. Plaintiff and defendant entered into a partnership agreement to buy the entire tract of land. A partnership relation existed by operation of law. 107 Ark. 369; 20 R. C. L. 1072; 80 Ark. 29. The intention of the parties governs the question of partnership. 87 Ark. 412; 74 *Id.* 437; 44 *Id.* 423; 93 *Id.* 526.

2. The preponderance of the evidence shows that defendant agreed to sell the plaintiff a portion of the land at the cost price per acre.

3. Defendant was guilty of fraudulent misrepresentation and deceit from beginning to end of the transaction. Fraud was clearly shown.

4. A resulting trust arose in plaintiff's favor. 101 Ark. 456; 19 *Id.* 48; 20 *Id.* 272. It may be proved by parol. 40 *Id.* 62. See, also, 92 *Id.* 55; 114 *Id.* 139.

5. The finding of the chancellor was against the clear preponderance of the testimony. 102 Ark. 383; 75 *Id.* 72.

S. C. Reynolds, for appellee.

1. There was no partnership. 32 Cyc. 362; 80 Ark. 25; 145 U. S. 611; 8 H. L. C. 306; 24 W. Va. 441; 40 Am. Rep. 252; 30 Cyc. 366 and notes, 367, notes. Shumaker on Partnership (2 ed.) 25; 82 Mo. 385; 76 N. Y. 344; 80 Mo. 350; 30 Cyc. 366 and notes.

2. The evidence sustains the finding of the chancellor and the burden was on appellant. No fraud or deceit was shown. There might have been a misunderstanding as to the price of the land, but the decree is right and is sustained by the law the evidence. 4 Ark. 251; 17 *Id.* 78; 13 C. J. 263.

HART, J. (after stating the facts). Counsel for the plaintiff first insists that a partnership existed between the plaintiff and defendant with regard to the lands. There is nothing in the testimony to establish this fact. It was a mere conclusion on plaintiff's part suggested

by the question asked him. The testimony of the parties to this suit shows conclusively that no partnership existed between them. According to Pumphrey's own testimony Furlow was to buy the land and was to let him have a part of it at the price he paid for it. There was no agreement to hold the land and sell it and share the profits and losses arising from the transaction. There was no community of interest whatever between them. In order to constitute a partnership, it is necessary that there should be something more than a joint ownership of the property. There was no agreement to buy the lands for the purpose of resale, sharing equally in the expenses and profits as was the case in *Beebe* v. *Olentine,* 97 Ark. 390. Hence they were not partners in fact nor in law.

Again it was contended by counsel for the plaintiff that under the facts a resale trust arose in favor of the plaintiff. We can not agree with counsel in this contention. In *Red Bud Realty Co.* v. *South,* 96 Ark. 281, it was held that a resulting trust did not arise where a trustee purchased property solely upon his own credit and subsequently paid for it with trust funds. In order to constitute a resulting trust, the purchase money must be paid by another, or secured by another at the same time, or previously to the purchase and must be a part of that transaction. The trust must arise by virtue of the purchase and as none was created at that time, none can arise afterward. In order to create a resulting trust in favor of one who pays the purchase money for property bought in the name of another the payment must be contemporary with the trust and not afterward. Hence according to Pumphrey's own testimony the purchase money was paid by him sometime after the contract of purchase was made. Hence no resulting trust arose in his favor.

Finally it is insisted that Pumphrey and Furlow entered into an oral agreement whereby the latter was to buy the tract of land and let the former have a part of it at the price originally paid for it; and that this con-

tract was executed by Furlow purchasing the land and at a later date entering into a written contract with Pumphrey to sell him a part of it at $25 per acre, when in truth and in fact Furlow had bought it for $15 per acre. Even if it be held that this entitled Pumphrey to an abatement of the purchase price, it can not be said that the decree of the chancellor should be reversed; nor can it be said that the finding of the chancellor in favor of the defendant is against the preponderance of the evidence. The testimony of the parties to this suit is in direct and irreconcilable conflict. Pumphrey stated in positive terms that it was understood between him and Furlow that Furlow should buy the land and let him have a part of it at the original purchase price. On the other hand, Furlow is equally positive that no such agreement was made between him and Pumphrey. He stated that Pumphrey agreed to give him as much as $25 an acre for a part of the land in order to induce him to go and make a trade for the land. He admits that he bought the land for $15 an acre, but denies in most positive terms that he agreed to let Pumphrey have a part of it at that price. According to his testimony, it was understood in advance that Pumphrey was to pay him $25 an acre for the land and that Pumphrey actually agreed to pay that price at the time their written contract was executed.

It is insisted by counsel for the plaintiff that the plaintiff's testimony is strongly corroborated by the witness A. Hall. We do not think so. In the first place, Hall admitted that he did not like Furlow, and when his whole testimony is examined in the record, it shows that he simply answered yes to direct questions propounded to him. On cross-examination he showed that he did not know much about the matter, or at least did not understand it. He admitted that the transaction had slipped his memory.

Again, it is insisted that the testimony of the plaintiff is corroborated by the cashier of the bank, because he admitted that Furlow had told him that he did not

want Pumphrey to know what he had paid for the land. This does not tend to corroborate the plaintiff's testimony. It may be that Furlow did not want Pumphrey to know what he gave for the land for fear that Pumphrey would not carry out his agreement to purchase a part of it for $25 an acre. It will be remembered that their agreement in the beginning was a verbal one. Then too, according to Pumphrey, when he paid for his part of the land, the cashier of the bank and Furlow acted as if they were drawing up a mortgage in favor of the bank for Furlow's part of the purchase money. Both the cashier of the bank and Furlow denied that anything of this kind occurred.

Again it is contended that the fact that Furlow withheld his contract from the record tended to corroborate the testimony of Pumphrey. We do not think so. There is nothing to indicate that it was withheld for that purpose. On the other hand, as soon as Pumphrey asked for the contract, it was delivered to him.

The evidence of Furlow is corroborated to a certain extent by that of Davis, who bought some timber from Pumphrey on the part of the land allotted to him. Davis said that at the time he bought the timber Pumphrey told him that he did not know what Furlow had paid for the land. This tends to corroborate the testimony of Furlow.

It follows that the decree will be affirmed.

WOOD, J., dissents, holding with appellant on the last proposition, towit: that appellant and appellee entered into an oral agreement whereby appellee was to buy the tract of land, and let appellant have a portion of it at the same price that appellee paid for it per acre. The finding of the trial court on this issue is clearly against the preponderance of the evidence.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. SPARKS.

Opinion delivered May 24, 1920.

1. APPEAL AND ERROR—VERDICT SUPPORTED BY SUBSTANTIAL EVIDENCE.—While it is the duty of the trial court to set aside a verdict which in its opinion is contrary to the weight of the evidence, such verdict will be upheld on appeal if there is any substantial evidence to support it.
2. MASTER AND SERVANT—NEGLIGENCE OF MASTER—EVIDENCE.—In an action by a track laborer for personal injuries evidence that such injuries were caused by the negligence of the master's foreman in striking a cleaver held by plaintiff and causing a rail to fall on plaintiff's ankle *held* sufficient to sustain a finding for plaintiff.
3. MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT—ASSUMED RISK.—The Federal Employers' Liability Act having expressly eliminated the defense of assumption of risks in certain specified cases, the intent of Congress is plain that in all other cases such assumption shall have its former effect in an action by the injured employee.
4. MASTER AND SERVANT—ASSUMED RISK.—While a servant assumes the risk of all dangers incident to the employment, and from the manner in which he knowingly sees and observes that the work is being done, a track laborer did not, as a matter of law, assume the risk of the foreman's negligence in striking a cleaver held by the laborer and causing a rail to fall on his foot.
5. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE.—Under the Federal Employers' Liability Act, where the causal negligence is attributable partly to the master and partly to the injured servant, the latter shall not recover full damages, but only diminished sum bearing the same relation to the full damages that the negligence attributable to the master bears to the negligence attributable to both.
6. APPEAL AND ERROR—INSTRUCTION—GENERAL OBJECTION.—A general objection to a lengthy instruction is insufficient to call attention to a particular part of the instruction.
7. TRIAL—MODIFICATION OF INSTRUCTION.—Where plaintiff, a track laborer, injured when a rail turned over on his foot, claimed that his foreman caused the injury by striking a cleaver, and defendant claimed that plaintiff struck the cleaver, it was not error, where defendant requested an instruction to find for itself if the laborer struck the cleaver, to insert "negligently" before the word "struck."
8. APPEAL AND ERROR—REVIEW OF EVIDENCE.—In testing the sufficiency of the evidence to support the verdict, the court must view the facts in the light most favorable to appellee.

9. MASTER AND SERVANT—INSTRUCTION.—In an action by a servant based on the Federal Employers' Liability Act, providing that contributory negligence shall not bar a recovery, but that the damages shall be diminished in proportion to the amount of negligence attributable to such employee, an instruction that if the servant and master were both guilty of negligence damages should be diminished in proportion to the amount of negilgence attributable to the servant as the proximate cause of the injury was not erroneous when construed with another instruction to the effect that if the master and servant were both negligent the damages should be diminished in proportion to the amount of the servant's negligence.

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

STATEMENT OF FACTS.

C. C. Sparks brought this suit against the Kansas City Southern Railway Company and Walker D. Hines, Director General of Railroads, under the Federal Employers' Liability Act to recover for personal injuries sustained by him while engaged in the work of track repairing. At the time Sparks was injured, with other servants of the railroad company, he was engaged in taking up old rails from the track and laying new rails. During the progress of the work it became necessary to make a connection to let a train over. The rails were fastened together with fish plates, or angle bars. In order to make the connection it was necessary to disconnect the old rails and to connect the old rail with the new rail. In order to disconnect the old rails they cut the bolts out of the joints where they were fastened with the angle bar.

According to the testimony of the plaintiff, Sparks, he had a hammer and J. W. Ross, the foreman, had the cleaver. Ross was holding the cleaver and the plaintiff would hit it and cut the nuts off of the bolts. The plaintiff then knocked the bolts out of the rail. He then hit the angle bar two or three times with the hammer, but it was rusty and would not come loose. Ross, who was standing on the outside of the track, then took the hammer and hit the outside angle bar a lick or two and it

then became loose. The cleaver was lying there and the plaintiff picked it up. He put the cleaver in between the angle bar and the rail to prize the angle bar loose. He could not prize it loose. Ross then struck the cleaver with the hammer. This knocked the angle bar loose. The rail then rolled over striking the plaintiff's left ankle and foot and injured it severely.

According to the testimony of J. W. Ross he did not use the hammer. He was holding the cleaver and the plaintiff was striking with the hammer. There was a certain place to stand where there was no danger of getting hurt. He had instructed plaintiff where to stand so that he would not get injured. The plaintiff did not stand in the place designated. It seemed to be wrong handed for the plaintiff and he shifted his position. If plaintiff had stood where the witness told him to stand the angle bar would not have hit him. Other facts will be stated or referred to in the opinion.

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

James B. McDonough, for appellant.

1. The verdict is aginst the weight of the evidence and should be set aside. 126 Ark. 427; 133 *Id.* 166; *Ib.* 45.

2. Plaintiff assumed the risk as a matter of law and can not recover. 233 U. S. 492; 238 *Id.* 510; 240 *Id.* 466; 241 *Id.* 313, 476; 245 *Id.* 445. The undisputed facts show that there was danger and that plaintiff knew of it. 79 Ark. 608; 118 *Id.* 304; 171 Pac. 1; 207 S. W. 543, 554; 174 Pac. 1139; 175 *Id.* 105; 204 S. W. 961; 96 S. E. 253; 210 S. W. 1049; 95 S. E. 925; 201 S. W. 357; 166 N. W. 735; 102 Atl. 661. See, also, as to assumption of risk under the Federal act. 188 S. W. 817; 197 *Id.* 464; 241 U. S. 229; 91 S. E. 898; 92 *Id.* 973; 241 U. S. 237; 159 N. W. 543; 179 S. W. 422; 91 S. E. 52; 189 S. W. 25; 188 *Id.* 880; 194 *Id.* 558; 155 N. W. 208; 93 S. E. 321; 165 Pac. 96.

3. The court erred in giving instruction No. 1 for plaintiff. 110 Ark. 188. The issue was not raised by the pleadings. 85 *Id.* 322; 87 *Id.* 243; 89 *Id.* 147; 96 *Id.* 206;

82 *Id.* 47. It submits also a conflicting theory as to negligence.

4. The court erred also in giving instruction No. 2 for plaintiff. It does not correctly state the measure of damages under the Federal act. 229 U. S. 114.

5. Instruction No. 5 was also erroneous. Cases *supra.*

6. The argument of plaintiff's counsel for plaintiff was misleading and prejudicial. 80 Ark. 292.

7. It was error to refuse instruction No. 2 for defendant. 80 Ark. 147; 77 *Id.* 201. The court also erred in refusing the other instructions requested by defendant. 74 Ark. 468; 64 *Id.* 332; 82 *Id.* 76; 104 *Id.* 59; 110 *Id.* 567. The instructions were confusing and do not correctly declare the Federal law.

Norwood & Alley, for appellee.

1. The verdict is not against the weight of the evidence. The authorities cited by appellant are really aganist his contention. 126 Ark. 437; 47 *Id.* 562.

2. The verdict is sustained by a clear preponderance of the evidence. Kirby's Digest, § 6140; 94 Ark. 365; 29 *Id.* 330; 59 *Id.* 215; 62 *Id.* 434.

3. Plaintiff did not assume the risk. 134 Ark. 136; 4 Labatt on Master and S. (2 ed.), p. 3965.

4. There was no error in the instructions, but where the verdict and judgment are right they should not be disturbed on the facts for mere errors in the instructions. 89 Ark. 154; 54 *Id.* 236; 133 *Id.* 28; 131 *Id.* 547.

HART, J. (after stating the facts). It is earnestly insisted by counsel for the defendant that the judgment should be reversed because the verdict of the jury is contrary to the weight of the evidence. In making this contention counsel has not taken into consideration the distinction between the rules which govern trial courts and this court with respect to setting aside verdicts. It is the duty of the trial court to set aside a verdict which it is of the opinion is contrary to the weight of the evi-

dence, but this court has repeatedly held, that where the trial court has overruled a motion for a new trial based upon the insufficiency of the evidence, and where there is any substantial evidence to support it, the verdict of the trial court will be upheld on appeal. *St. L. S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428.

In the present case the trial court overruled the motion for a new trial, and his ruling in that respect was tantamount to a finding that the verdict was not against the preponderance of the evidence. There is nothing to indicate that he acted arbitrarily in making such finding, and no remarks of the trial court appear in the record to bring the present case within the rule announced in *Twist* v. *Mullinix,* 126 Ark. 427, as insisted by counsel for the defendant.

This brings us to a consideration of the question of whether there was any evidence legally sufficient to support the verdict.

According to the testimony of the plaintiff, he was holding the cleaver between the angle bar and the rail trying to pry them apart when the defendant's foreman suddenly struck the cleaver with a sledge hammer, knocking the angle bar and rail apart so that the rail fell on his foot and severely injured him.

The court instructed the jury that if it should find from a preponderance of the evidence that the cleaver was placed at the end of the angle bar and that the foreman negligently struck the cleaver with the sledge hammer, thereby injuring the plaintiff, and if it should further find that the plaintiff at the time was exercising ordinary care, the verdict should be for the plaintiff. No objection is made to this instruction.

The evidence, if believed by the jury, was sufficient to warrant the jury in finding for him, but it is earnestly insisted that the court should have told the jury, as a matter of law, that the plaintiff assumed the risk. This action was brought under the Federal Employers' Liability Act.

In the case of *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492, the court held that, the Federal Employers' Liability Act having expressly eliminated the defense of assumption of risk in certain specified cases, the intent of Congress is plain that in all other cases such assumption shall have its former effect as a bar to an action by the injured employee.

According to the plaintiff's testimony, the foreman suddenly struck the cleaver with the sledge hammer, thereby causing the injury. The work was not so obviously dangerous that an ordinarily prudent person under the circumstances would not have engaged in it. The servant assumes the risks of all dangers that are incident to the employment, and he can not recover for injuries which result to him therefrom. He also assumes the risk of injury from the manner in which he knowingly sees and observes that the work is being done. It can not be said, however, that, under the undisputed proof as declared by the record, plaintiff's injury resulted from one of the risks incident to his employment, or that the danger was so obvious and imminent that no ordinarily prudent person under the circumstances would have engaged in the work. It is also insisted that the court erred in giving instruction No. 1. It is as follows:

"If you find in this case that the foreman, J. W. Ross, placed the cleaver in the crack between the angle bar and the rail and that the plaintiff, with due care for his own safety, struck the cleaver with a hammer and this lick caused the rail and angle bar to spring loose and injure the plaintiff, if you so find from the evidence, and you further find from the evidence in this connection that the foreman Ross instructed or directed the plaintiff to strike the cleaver, and at the time that he, Ross, knew where the plaintiff was standing, and by the use ordinary care on his part might or could have known, that the plaintiff was standing in a place of danger, then it was the duty of the foreman to apprise the plaintiff of the fact that he was in a dangerous place, and if you

find he failed to do this, but directed the plaintiff to strike the cleaver, and the plaintiff did so, and was not negligent in obeying said instructions, and you find this act of the said foreman was a negligent act on his part, and this negligence was the cause of the injury, then, in that event, if you so find, you will not diminish the amount of plaintiff's recovery, in case he does recover, on account of the fact that he struck the cleaver and that this lick caused the rail to spring over and against the plaintiff, unless you further find that the foreman and plaintiff were both negligent, and in that event you will diminish plaintiff's recovery of damages in proportion to the amount of his negligence, in case you find damages in his favor."

According to the testimony of the plaintiff, the foreman struck the cleaver at the time the plaintiff was injured. On the other hand, according to the testimony of the foreman, he did not strike the cleaver at that time. He said that he instructed the plaintiff where to stand, and that the plaintiff was using the hammer at the time he was injured. The foreman was present and working with the plaintiff. He knew the position the plaintiff assumed in doing the work. It is true he said that he had instructed the plaintiff where to stand while using the hammer. The jury might have inferred, however, from the foreman's testimony that he knew the plaintiff was in a dangerous place and that he again apprised him of his danger in using the hammer at the place where he was standing. This instruction and No. 2 immediately following it deals with the question of the reduction of damages under the Federal Employers' Liability Act.

Instruction No. 2 is as follows:

"You are instructed that if you find by a preponderance of the evidence that the plaintiff was injured, as alleged, while in such employ of the defendant, and that the proximate cause of his injury was the negligence of the defendant, or its employees, at the time, your verdict will be for the plaintiff. On the other hand, if you find from the evidence that the plaintiff and defendant were

both negligent, and that the negligence of both the plaintiff and defendant caused the injury, you will diminish the damages found in favor of the plaintiff in case you find damages in his favor in proportion to the amount of negligence you find attributable to plaintiff as the proximate cause of the injury."

The Federal statute provides that the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by a jury in proportion to the amount of negligence attributable to such employee.

The Supreme Court of the United States has held that where the casual negligence is attributable partly to the master and partly to the injured servant, the latter shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the master bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportionate part of the damages corresponding to the employee's contribution to the total negligence. *Seaboard Air Line Railway* v. *Tilghman,* 237 U. S. 499.

This principle was given by the trial court, and it was the evident purpose to advise the jury as prescribed by the statute in their determination of the amount of damages.

The instructions complained of are too lengthy and are somewhat involved.

Counsel for the defendant only saved a general exception to the instructions. If he had any objection to a particular part as misleading, he should have called the court's special attention to that part, so that the court might modify or explain the words used. Not having done so, he is not now in an attitude to complain.

Counsel for the defendant also asks for a reversal of the judgment because the court modified instruction No. 2 asked by it by adding the word "negligently" between the words, "himself and strike the cleaver." The instruction as asked by the defendant is as follows:

"Plaintiff alleges in the first paragraph of his complaint that he was in the employ of the Director General of Railroads on the 17th day of February, 1919, and was working in an extra gang, and was at the time engaged in removing the steel rails, which steel rails were to be replaced with new steel rails. He further alleges that while engaged in this service under the instructions of the foreman in charge of the work he received great and permanent injuries because of the negligence of the foreman. He alleges that he had placed an iron cleaver at the end of an angle bar and that J. W. Ross, foreman of the gang, struck the cleaver with a sledge hammer and thereby caused the injury to the plaintiff. If the jury find from the evidence that the plaintiff himself struck the cleaver and that the foreman did not strike the cleaver, the jury will find for the defendant."

The court was right in inserting the word "negligently." The instruction as asked by the defendant was peremptory in its nature and exempted the defendant from liability if the plaintiff himself struck the cleaver regardless of whether his act in so doing was negligent or not. Other instructions asked by the defendant bear this same vice, and if given would have been, in effect, a peremptory instruction to find for the defendant. Therefore, the court did not err in refusing to give them.

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

OPINION ON REHEARING.

HART, J. It is earnestly insisted by counsel for appellant that the court erred in not holding as a matter of law that appellee assumed the risk, and in support of his contention states that the court has misunderstood the facts.

It is well settled that in testing the sufficiency of the evidence to support the verdict the court must view the facts in the light most favorable to appellee.

Counsel for appellant in making his contention that the court misunderstood the facts only takes into consideration the evidence adduced in behalf of appellant.

He does not take into consideration at all the fact that appellee's own testimony flatly contradicts the testimony of the witnesses for appellant. It will be remembered that appellant's foreman testified that he did not strike the cleaver at all at the time appellee was injured. He says that he was holding the cleaver and that appellee was striking with the hammer; that he told appellee where to stand in order to keep from being hurt in the event the rail flew back after the angle bar was removed from it; that the appellee was hurt by reason of quickly stepping from a place of safety to a place of danger before he could be notified not to do this by the foreman.

On the other hand, this testimony of the foreman and that of other witnesses who corroborated his testimony is flatly contradicted by the testimony of appellee himself. It will be remembered that the foreman and his crew were engaged in removing an old rail from the track at the time appellee was injured. We quote from the record of appellee's testimony the following:

"Q. Now, what were you doing to the rail?

"A. Disconnecting it at the joint.

"Q. Now, go ahead in your own way and explain to the jury how you did that?

"A. I had the hammer at the time, and Mr. Ross had the cleaver, and he was holding it and cut the nuts off of the bolts. I just knocked the bolts out of the rail that was holding the angle bars. I hit the angle bar two or three times with the hammer, and it wouldn't come loose. Mr. Ross says, 'Let me have the hammer.' He was standing on the outside of the track. After I struck two or three licks with the hammer myself, then I gave him the hammer, and he hit the outside angle bar a lick or two, and it came loose. The cleaver was lying there, and I picked it up and, like the rail was there, I was standing sort of in here, and they connected there, and this inside angle bar was still fastened. The cleaver was lying there, and I picked it up and twisted it, and I jumped back in

there, and as I did that Mr. Ross raised the hammer and hit the cleaver.

"Q. What happened then?

"A. The rail sprung the angle bar out, and the rail caught me just a little above the ankle."

Continuing, appellee stated that the angle bar was between twenty-eight and thirty-six inches long, and that there would be half of that distance projecting beyond the end of the rail; that the angle bar attached to the rail was what struck his leg, and that he did not know that the angle bar was fastened to the rail.

Continuing, appellee said: "I picked up the cleaver and, using it myself, I struck that way in between the angle bar and flange of the rail. I twisted it and the cleaver jumped out and then I stuck it back in there again at the same place, and at the time I done that Mr. Ross was standing outside the rail with the hammer in his hand and he raised the hammer and struck the cleaver on the head and drove it in between the angle bar and flange of the rail. That sprung the angle bar out from the rail, and then the rail jumped across and caught me.

"Q. When you were working with the cleaver in the crack there yourself was you trying to ease it loose or get it loose without a sudden lick that would spring it?

"A. That couldn't hardly be, only I stuck the cleaver in there with the intention after I got it in there and sprung it out the angle bar would come out and it would leave the rail loose.

"Q. You thought it would drop loose from both rails, did you?

"A. I had an idea it would. I didn't know it was fastened on the other end of the rail.

"Q. You didn't know it was fastened to the rail that did spring over?

"A. No, sir; I did not.

"Q. I will ask you when the lick was struck if it sprang over suddenly before you could get away from it?

"A. It did."

The witness described the cleaver as a tool with a handle in it. One end is broad like a chisel, and the other is blunt like a hammer. The cleaver proper was something like six or eight inches long, and the handle was about two feet long. The sledge hammer that was used in striking the cleaver weighed at least twelve pounds. Again, appellee stated that he was working on the inside of the rail and the foreman on the outside at the time he was injured. He said that he was trying to prize the angle bar loose with the cleaver at the time he was injured, and did not know that the foreman was going to hit the cleaver; that he was beyond the reach of the rail, and the angle bar stuck out far enough to hit him when the rail flew back; that he did not know that. He expected the angle bar to drop down when he prized it loose from the rail and did not know that the foreman was going to strike the cleaver until after he had done so. Thus it will be seen that appellee's testimony is in irreconcilable conflict with the testimony of the witnesses for appellant.

According to the testimony of appellee, he thought he could prize the angle bar loose from the rail with the cleaver or chisel and when he had done so the angle bar would drop down to the ground. He stood in a position where he could be out of the reach of the rail itself when it sprung back. He did not know that the foreman was going to strike the cleaver with the sledge hammer. The formean struck the cleaver suddenly with the sledge hammer and thereby caused one end of the angle bar to become loose. The other end adhered to the rail, striking appellant on the ankle before he could get out of reach of the angle bar. The act of the foreman in striking the cleaver suddenly with the sledge hammer without warning to appellee was the proximate cause of the injury. Therefore, appellee's own testimony made a case for the jury, and the court did not err in submitting the question of assumption of risk to the jury. In this view of the matter, it is not necessary to set out in detail the

testimony of appellant; for it is readily apparent that the witnesses for appellant were contradicted by the testimony of appellee himself.

Again, counsel criticises the opinion of the court for saying in the original opinion that no objection was made to the instruction of the trial court on the question of negligence. Counsel points out that he made objections to the action of the trial court in giving it. What the court meant to say was that counsel did not argue in his brief that the instruction on the question of negligence was erroneous. We do not understand counsel to contend that the instruction given by the court on the question of negligence was erroneous. It is perfectly apparent, however, that if there is testimony sufficient to warrant the submission of the question to the jury, there is no error in the form of the instruction. It plainly submits to the jury appellee's theory of the case and makes the negligence of appellant depend upon the truth of appellee's testimony.

Again, counsel criticises the opinion of the court with regard to the instructions given on the measure of damages. Counsel insist that the court erred in saying that he did not make specific objections to these instructions. If it be assumed that his objections to the instructions amounted to a specific objection to them, still we do not think that the action of the court in giving the instructions was reversible error.

The Federal statute is that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be determined by the jury in proportion to the amount of negligence attributable to such employee." The two instructions on the measure of damages set out in our original opinion should be read together. In the latter part of instruction two, the court told the jury that, if it should find from the evidence that the plaintiff and defendant were both guilty of negligence which caused the injury, the damages found in favor of the plaintiff should be

diminished in proportion to the amount of negligence attributable to the plaintiff as the proximate cause of the injury. The idea meant to be conveyed was that if the plaintiff had contributed to his own injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. We think the court had reference to the rule of proportion specified in the statute, and that the instructions, when read together, gave the jury the correct principle of law with reference to the exoneration of the carrier, and made it liable only for a proportionate part of the damages corresponding to the amount of the negilgence attributable to the employee. *Norfolk & Western Ry. Co.* v. *Earnest*, 229 U. S. 114. Therefore, there was no prejudicial error in giving the instruction.

We have examined the record and find no prejudicial error in it. Therefore the motion for rehearing will be denied.

BLACKFORD v. GIBSON.

Opinion delivered May 24, 1920.

1. APPEAL AND ERROR—BRINGING UP THE EVIDENCE.—Where a cause was heard upon oral testimony which is not brought into the record except upon the certificate of a stenographer that the testimony which he had transcribed contained all the oral evidence introduced in the suit, such certificate will not be considered, and it will be presumed that every question of fact essential under the pleadings to sustain the decree was established by the oral testimony not properly brought into the record.
2. HIGHWAYS—ROAD DISTRICT—INSUFFICIENCY OF DESCRIPTION.—Acts 1920, No. 104, attempting to create Ozark Trail Road Improvement District No. 2, *held* void for insufficiency of description of the road.

Appeal from Craighead Chancery Court, Western District; *E. L. Westbrook*, Special Judge; affirmed.

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellants to enjoin them from proceeding further in the con-

struction of a road under Act No. 104 of the General Assembly of the State of Arkansas, approved February 7, 1920, entitled an Act to Create the Ozark Trail Road Improvement District No. 2.

The court granted the prayer of the plaintiffs and enjoined the commissioners from taking any further steps tending to carry out the provisions of said act and from incurring any obligations as commissioners of the district, or from attempting to fix any charge upon the land of the district either by assessment, levy or for preliminary expenses. The case is here on appeal.

T. A. Turner and *Rose, Hemingway, Cantrell & Loughborough,* for appellants.

1. This court has no power to inquire into the question as to whether act 104, Acts 1920, was secured by fraudulent practices. 72 Ark. 201.

2. The act was constitutionally passed. 40 Ark. 200; 51 *Id.* 566.

3. The Legislature committed clerical errors in describing the road, but the errors are typographical and obvious and trivial. The act was not void for these errors. 130 Ark. 70; 120 *Id.* 230; 214 S. W. 56.

4. The Legislature had authority to make appropriations to pay for the preparation of bills presented to it for passage. 134 Ark. 328-332; 10 Barb. (N. Y.), 481; 2 A. R. L. 1212 and note.

5. The act was duly passed. 216 S. W. 500-2. The mistake is obvious and the intention of the Legislature should prevail. 34 Ark. 263-9; 136 Ark. 524 is conclusive of this. 93 *Id.* 168. See, also, 11 Ark. 44; 28 *Id.* 203; 40 *Id.* 431; 80 *Id.* 150; 86 *Id.* 518; 94 *Id.* 422; 106 *Id.* 517; 109 *Id.* 556; 212 S. W. 90.

6. The provisions for attorney's fees were valid. 2 R. C. L. 1042; 129 Ark. 542-8. Any unconstitutional part of the act should be stricken out and the balance of the act should stand. 37 Ark. 356; 81 *Id.* 519; 212 U. S.

322. The route of the road is definitely fixed and mere obvious errors should be corrected.

Lamb & Frierson, for appellees.

1. There is no bill of exceptions in the record and the decree should be affirmed. 127 Ark. 274; 192 S. W. 218; 109 Ark. 1-4; 159 S. W. 35-6; 159 S. W. 35.

2. The act is void on account of the fraud perpetrated in its passage. 30 Am. Dec. 360; 9 So. 776; 44 *Id.* 536.

3. The bill was not read in full, and the act is void. 40 Ark. 207; 44 *Id.* 536, 550.

4. The journal entries do not show that the rules were suspended. Const., art. 5, §§ 2 and 22; 19 Ark. 250.

5. The bill is absolutely void, even if its *passage* is held valid, for errors and irregularities in the description of the road. It is indefinite and uncertain. The road runs out of the territory to be taxed when the district does not include intervening lands, and is absolutely void. 214 S. W. 56; 130 Ark. 70; 113 *Id.* 566; 120 *Id.* 230; 105 *Id.* 380. Other roads may be improved within the district. 89 Ark. 513; 118 *Id.* 119, 294. See, also, 118 Ark. 294.

6. The act is unconstitutional and void as infringing the jurisdiction of the county courts in laying out public roads. 91 Ark. 274; 92 *Id.* 93 and cases *supra.* The attempt to tax personalty is invalid. 129 Ark. 542.

7. There is no limit to the amount of tax to be levied in the district. 213 S. W. 755. No separate assessment for the ditch is provided for in the act.

8. The constitutional and unconstitutional parts of the act are so interwoven that the invalid parts can not be stricken out under our law.

HART, J. (after stating the facts). It is first insisted that the decree must be affirmed because there is no bill of exceptions in the record. The bill recites that the case was heard before the chancellor upon the complaint, the affidavits of certain designated persons, the

demurrer and answer of the defendants, and the oral evidence of certain persons named in the decree. There is no bill of exceptions contained in the record.

It is true there is a certificate of a stenographer that certain testimony which he has transcribed contains all the oral evidence introduced in the cause, but there is nothing to indicate that the parties agreed that the oral testimony should be reduced to writing and filed as evidence in the case, or that the court ordered it so filed. The certificate of the stenographer that his transcribed notes contained all the oral testimony that was introduced in the cause avails nothing. It was the duty of the parties to present their bill of exceptions to the chancellor for his approval, or to have had the testimony brought into the record by some of the familiar methods of bringing such testimony before this court. While chancery causes are heard *de novo* in this court, they are tried upon the same record as was made in the chancery court. The presumption in cases like this is that the missing evidence sustains the decree of the chancellor. We must assume that every question of fact essential under the pleadings to sustain the decree is established by the oral testimony which is not properly brought into the record. *State use, etc.* v. *Leatherwood,* 127 Ark. 274, and cases cited. Neither was section 19 of the Practice Act of 1915 complied with. Acts of 1915, p. 1081.

Again it is insisted that the decree should be upheld because the road described in the act creating the district is not an established public road and a part of it lies without the proposed district.

On the other hand, counsel for the defendants base their right to a reversal of the decree on the ground that the Legislature committed a clerical error in describing the road.

Counsel concede that, when tested by the description of the road according to the government survey, the district is void, but they claim that the road is sufficiently

described by known monuments, and that these should control over the government survey.

It is contended that the testimony omitted from the record would have shown that the description according to the government survey would have fitted another public road as well as the one in question, and that it would have also shown that there were no known monuments that would have established the road attempted to be improved.

Section 3 of the act contains the description of the road. It is very lengthy and need not be set out herein. According to the description as there set out, the district is void.

It is the duty of courts to ascertain the meaning of an act from the language used by the Legislature. The description of the proposed road according to the government survey is totally at variance with that according to the courses and distances described in the act. There is nothing to indicate which one the Legislature intended to adopt, and the chancery court was correct in holding that the act was void because of the legislative mistake in describing the road to be improved. *Jones* v. *Lawson*, 143 Ark. 83.

It follows that the decree will be affirmed.

HINES v. GUNNELLS.

Opinion delivered May 24, 1920.

RAILROADS—AUTOMOBILE ACCIDENT—QUESTION FOR JURY.—In an action for damages to an automobile struck by a train, evidence that the accident occurred at a short curve, that other tracks were blocked with cars, that plaintiff slowed down his car and looked and listened, that the locomotive engine was not working steam, but rolled into the station under its own momentum, and that no whistle was blown nor bell rung, *held* to make a case for the jury.

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

Daniel Upthegrove, J. R. Turney and *Gaughan & Sifford,* for appellant.

1. A verdict for defendant should have been instructed for defendant on its plea of contributory negligence. 136 Ark. 249; 137 *Id.* 13. It is the duty of every traveler approaching a railroad crossing to *look and listen* for trains, and, if necessary, he must stop. 83 Ark. 62 and cases *supra.* It was error to give plaintiff's instruction No. 5. 78 Ark. 55.

2. There was no negligence on the part of defendant. The verdict in this case does not establish negligence of the company, nor determine that plaintiffs were not guilty of contributory negligence, and the evidence is entirely in favor of the defendant.

McKay & Smith, for appellees.

It would not have been proper under the evidence to instruct a verdict for defendant, as a case was made for the jury. The facts here are very similar to those in 97 Ark. 405. The questions of negligence and contributory negligence were properly submitted to the jury, and there was no error in the instructions. 122 Ark. 611; 101 *Id.* 315, 424; 104 *Id.* 38; 142 S. W. 499, 527; 148 *Id.* 278.

SMITH, J. Separate suits were filed against the appellant railroad company by appellees J. F. Gunnells and P. N. Bustion. The complaints were identical, each one claiming a separate personal injury, and, in addition, Gunnells claimed damages to his automobile on account of a collision between the auto in which they were riding and a locomotive on the line of appellant's railroad. The jury returned the following verdict: "We, the jury, find for the plaintiff J. F. Gunnells and assess his damages sustained to his automobile in the sum of $134; and as to the other issues we find for the defendant."

This verdict conclusively shows that the jury found nothing on account of personal injury for either plain-

tiff, although the testimony shows that each sustained a slight injury, for which compensation might have been allowed. Judgment was pronounced upon this verdict, and the railroad company has appealed.

The instructions requested by the railroad company would, if given, have directed a verdict in its favor, as they in effect told the jury it was the duty of the occupants of the car to have stopped the car before driving over the tracks. The court refused instructions to that effect and, over appellant's objection, gave an instruction numbered 5 reading as follows:

"You are instructed that the plaintiff, in attempting to pass over defendant's track at the crossing, is only required to do what a man of ordinary care would do under similar circumstances to avoid any probable or possible danger from a passing train, and, if need be, stop as well as look and listen. If you find from the evidence in this case that the plaintiff in approaching the track at the crossing slowed up his automobile, looked and listened and did not hear the approaching train and did not hear any whistle blowing and any bell ringing, and that he could not see the approach of the train on account of the obstruction between him and the train, and you further find that this was all that a man of ordinary care would do under similar circumstances, then it will be your duty to find that the plaintiff is not guilty of contributory negligence, notwithstanding you find that the plaintiff did not bring his automobile to a full stop."

The testimony developed the following facts: The main line of the railroad runs east and west through the town of McNeil, and a number of tracks are situated south of the main track. There is a sharp curve in the main track to the north on the west side of the town at about the point where the whistle is usually blown for the station. On the morning the accident occurred all the tracks south of the main track were blocked with cars for some distance west of the crossing. Appellees were going north, and when they reached the crossing,

which is of considerable width on account of the number of tracks, they slowed down the car, put it in low gear, and looked and listened and continued to look and listen for a train and, not hearing one, drove on over the crossing without seeing the engine until they were within about five or six feet of it and too close to avoid the collision. The engineer admitted that the engine was not working steam but that the train rolled into the station under its own momentum; and according to the testimony offered on appellee's behalf the whistle was not blown nor was the bell rung. The failure to blow the whistle or ring the bell constituted the negligence complained of, and the jury's verdict has resolved in appellee's favor the conflict in the testimony on that question.

We think the testimony recited made a case for the jury. In other words, we are unable to say as a matter of law that appellees should have stopped their car before crossing the tracks. Indeed, appellees insist that if they had stopped the car they could not have seen the train or its smoke, as very little smoke was escaping, and that it was making no noise which they could have heard, and that if they had stopped the car and had gotten out and walked up to the main track and looked in both directions, the train could have reached the crossing in the time it would have taken them to have gone back to the car and made it to the main track. Of course, one of the occupants of the car might have flagged it across the tracks; but the jury had the right to say whether due care on appellees' part imposed that duty. Appellee owned the car and was driving it. The instructions set out above told the jury that it was appellees' duty to do what men of ordinary care would have done under the circumstances; and we can not say their conduct fell below that standard.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Stacks*, 97 Ark. 410, substantially the same contention was made as is presented here, and it was there said:

"The evidence for appellee shows that neither the whistle was sounded nor the bell rung for the crossing; and while the omission of the engineer to give these statutory signals did not relieve appellee of the duty of looking and listening for the approach of trains, yet they are warnings which he had a right to rely on in determining whether a train was drawing near. According to appellee's own testimony, his view of an approaching train from the east was obstructed by box cars, both on the south and middle tracks. In such case, while the traveler must not relax his endeavor to see approaching trains, yet necessarily he relies to a great degree upon his sense of hearing to discover the approach of a train, and in doing this he listens not only for the noise made by the running of the train but for the signals which the engineer is required to give by ringing the bell or sounding the whistle for the crossing. Appellees' testimony tends to show that he was in possession of all his faculties and continually exercised them during his passage over the crossing. The testimony adduced by him shows that the headlight was dim, and on that account its rays did not warn him. It is admitted that the steam had been shut off, and that the train was drifting or gliding in, and on this account the jury might have inferred that the train came in with little noise, and no smoke escaping to give warning of its approach; that it had rounded the curve before appellee came upon the crossing, and that for this reason he could not see it on account of the box cars obstructing his view. If he could have seen it after it passed the curve, the jury might have found that it would have done no good for him to have stopped his wagon between the south and middle tracks to have tried to look between the box cars on those tracks."

The doctrine of that case was reiterated in the recent case of *Billingsley* v. *St. L. & S. F. R. Co.,* 136 Ark. 1.

No error appearing, the judgment is affirmed.

WALTON v. COMMISSIONERS OF LIGHT IMPROVEMENT DISTRICT NO. 1 OF BENTON.

Opinion delivered May 24, 1920.

1. MUNICIPAL CORPORATIONS — LIGHTING PLANT — IMPROVEMENT DISTRICT.—In determining whether the requisite majority has been obtained by those who petition for the establishment of an improvement district for the purchase of an electric lighting plant, under Kirby's Digest, § 5717, the value of real property of railroad companies within the district must be considered.
2. SAME—IMPROVEMENT DISTRICT—AUTHORITY TO SIGN PETITION.—Where a petition for establishing an improvement district for the purchase of an electric lighting plant, under Kirby's Digest, § 5717, was signed by certain corporations by their secretary and treasurer, the presumption that they were authorized to do so was overcome by undisputed testimony of such officers that no such authority had been conferred upon them.
3. SAME — IMPROVEMENT DISTRICT — PRESUMPTION OF OWNERSHIP.—Upon the question whether the necessary majority in value has been signed to a petition for a municipal improvement district, a presumption of ownership is indulged in favor of persons in possession of or who pay taxes on land to which they have no title of record, but such presumption is *prima facie* only, and may be overcome by evidence.
4. SAME—PRESUMPTION OF OWNERSHIP—WHEN OVERCOME.—Evidence *held* to overcome *prima facie* presumption of ownership of lands by signers of an improvement petition who were in possession thereof or who paid taxes thereon without having title of record.

Appeal from Saline Chancery Court; *J. P. Henderson,* Chancellor; reversed.

Mehaffy, Donham & Mehaffy, for appellant.

1. The district has no right to purchase the light plant. In view of the allegations in the complaint and the admissions and allegations in the answer, the purchase of the light plant was not abandoned; there is no evidence that the purpose was abandoned.

2. The improvement district can do nothing unless given authority by the Constitution or statute. Art. 9, § 27, Const. The purchase of a light plant is not making an improvement of a public nature and there is no statute

authorizing it. 55 Ark. 148. The ordinance was void. 113 Ark. 593; 94 *Id.* 380; 71 *Id.* 4; 79 *Id.* 229; 71 *Id.* 17; 52 *Id.* 107; 114 *Id.* 366; 117 *Id.* 93.

3. An improvement district can not be formed to furnish power. Const., art. 19, § 27; *Ib.* art. 22, § 2; 115 Ark. 194. Supplying the city of Benton with electric power and the formation of an improvement district is not permitted by law. One can not be taxed for the purpose of promoting the private interests of another.

3. A majority in value of the owners of real property in the district did not sign the petition as required by law. 111 Ark. 314. The assessments made by the State Tax Commission should be construed as a part of the total assessment. 127 Ark. 418; 131 *Id.* 129.

N. A. McDaniel, for appellees.

The petitions show for themselves and that a majority in value duly signed them and the chancellor so found. If the petitions signed by the corporations by their officers are considered as they should be, as no one not a member of the corporation can complain that there was no resolution authorizing the signatures.

SMITH, J. This suit questions the validity of an improvement district in the city of Benton organized for the purpose of purchasing an electric light plant from a company which had allowed its franchise, obtained from that city, to forfeit. Several questions are raised which we find it unnecessary to decide, as, in our opinion, the petition of the property owners does not contain a majority in value as required by the Constitution.

The court below found otherwise and prepared an elaborate opinion discussing the various issues raised in the case. But in this opinion the court held that the value of the railroad property lying in the city should be excluded. But, in connection with this finding, the court also found that, if it was in error in excluding the railroad property, the petition did not have a majority

in value; and there appears to be no doubt that such is the case.

The statute provides that, "in ascertaining whether the petition for improvement of any kind is signed by a majority of the owners in value of the real property in the district adjoining the property to be affected, the council shall take and be governed by the valuation placed upon the property as shown by the last county assessment on file in the county clerk's office. Women, married or single, may sign the petition; guardians may sign for their wards, and executors or administrators may sign for the estates represented by them." Section 5717, Kirby's Digest.

In regard to the assessment of railroads for general taxation purposes the statute provides that "the buildings and sidetracks of railroads shall be assessed as real estate, and each building or sidetrack shall be assessed in the incorporated town or district where located. Main track shall also be assessed as real estate, and it shall be apportioned for assessment and taxation between the several towns and school districts through which the railroads run according to the actual mileage in each town and district" (Sec. 14, Act 251, Acts 1911, p. 244), and that rolling stock, materials and stores shall be assessed as personal property, and that assessment distributed in the same manner. This assessment of railroad property is made by the State Tax Commission, and was properly made for the year in question, and the official certificate of the Commission showing the railroad assessment in the city of Benton was furnished to and filed with the clerk of the county court. In extending this assessment on the tax books, the clerk did not separate the real estate from the personal property, but extended the entire assessment on the personal tax book. He stated, however, that the assessment roll sent him by the Tax Commission did show the length of the main track and the value thereof, the length of the sidetracks and the value thereof, and the value of the buildings, in the city of Benton, and his explanation of his failure to

extend these assessments properly was that he did not know what part of the assessment to extend as personal property nor what part as real estate and he had, therefore, extended it all as personal property on the personal tax book. But, as appears from the statute quoted, the buildings, main track and sidetracks are assessed as real estate, and the clerk's lack of knowledge of this provision of the statute did not alter the character of the property. The case presented is not one where there has been a failure to assess the railroad property, for it was assessed, and properly so; and it will be observed that the statute does not require the determination of the question of the value of the property in the proposed district to be made from an inspection of the tax books, but the statute is that "the council shall take and be governed by the valuation placed upon the property as shown by the last county assessment on file in the county clerk's office."

The assessment of the railroad properties was on file in the clerk's office, and the railroad was no doubt required to pay the taxes levied on that assessment.

Had the railroad company desired this improvement and, by proper authorization, had signed the petition for it, we think, without question, it would have been proper for the value of its property, as shown by the last county assessment on file in the county clerk's office, to be taken into account, because, within the meaning of the statute, the assessment made by the Tax Commission is a part of the county assessment. And if this be true, it must also be true that the value of the railroad property should be taken into account in determining whether the requisite majority in value had been obtained by those who petitioned for the establishment of the improvement district. It follows, therefore, that the necessary majority has not been obtained, and the decree of the court will, therefore, be reversed, and the cause remanded with directions to enjoin the commissioners of the proposed district from further proceeding as prayed in the complaint.

SMITH, J. (on rehearing). Upon the petition for rehearing it is urged that the petition for the organization of the improvement district contained a majority in value of the property, even though the railroad assessment is included. Such appears to be the case, if we include in the sum total of the assessed values of the petitioners the property of certain petitioners who had no record title to the property assessed to them, and also the property of certain corporations. If either is excluded, the petition does not contain the necessary majority; if both are included, the petition does contain the necessary majority.

The general manager, who was also secretary and treasurer of the Owosso Manufacturing Company, testified that he signed the name of that corporation to the petition, but that there had been no resolution or other action of the board of directors authorizing him to do so. The secretaries of two other corporations who had signed the names of the corporation to the petition gave substantially the same testimony.

The names of these corporations were signed by the officers who would have signed the petition had authority in fact existed for that action. In such case it is proper to presume that authority for such signatures had been conferred, for, as we said in the case of *Malvern* v. *Nunn,* 127 Ark. 418, the board of directors possesses the authority to authorize the signing of the corporate name to such petitions, and the secretary is one of the executive officers who might perform that function. But that presumption is overcome here by the affirmative and undisputed testimony of these officers themselves that no authority to sign had been conferred upon them.

A presumption of ownership is also to be indulged in favor of persons in possession of, or who pay taxes on, lands to which they have no title of record; and it is urged that this presumption should be treated as conclusive, in as much as they might be owners under a will or by descent cast; and this court has held in the case of *Malvern* v. *Nunn, supra,* that such owners have the right to petition for the creation of improvement districts.

We think, however, that this presumption is only *prima facie.* And we are also of opinion that this *prima facie* presumption has been overcome by the testimony on the subject. Judge W. H. Evans testified that he had been a resident of Benton for many years, and had been judge of the circuit court for twelve years; that prior to that service he had been clerk of the circuit court and *ex-officio* recorder for six years, and that he owned a set of abstract books, and had been engaged in the abtract business. He testified that he checked over the petition and spent from two to three hours per day for eight or ten days in a diligent search to ascertain the source of title of the petitioners now under conideration, and that the petitioners had no deeds of record to the lands assessed to them. Many land owners negligently fail to have their deeds recorded, and such, no doubt, is the case here, but in the case of *Malvern* v. *Nunn, supra,* we said: "Deeds of record in the recorder's office in the county at the time the council passes on the question is the criterion, in so far as the property represented by instruments subject to record is concerned." Under the showing made, the names of these petitioners were properly excluded.

The petition for rehearing will be overruled, as, upon a reconsideration of the record in the case, it appears that a majority in value of the property owners have not petitioned for the improvement.

PATTON *v.* TAYLOR.

Opinion delivered May 24, 1920.

1. EQUITY—JURISDICTION TO CANCEL DEED.—Equity has jurisdiction to cancel a void deed given by a curator of an insane person, expunge it from the record and restore possession of the land, since the remedy at law, either by motion to vacate the orders and judgments of the probate court or by *certiorari* to quash same, would not have reached the cancellation of the deed or the expunging of same from the record.

2. INSANE PERSONS—INQUIRY AS TO SANITY OF LITIGANT.—When a party not under guardianship develops evidences of insanity, the court should inquire into his mental condition for purposes of the particular suit in order to protect his interests by the appointment of a guardian or next friend to prosecute or defend for him.
3. INSANE PERSONS—POWER TO SUE AND BE SUED.—An insane person not under guardianship may sue and be sued the same as a sane person.
4. APPEAL AND ERROR — OBJECTION NOT RAISED BELOW.—Where no question as to plaintiff's sanity was raised in the trial court, her suit will not be dismissed on appeal upon the ground of her insanity.
5. INSANE PERSONS — JURISDICTION TO SELL PROPERTY OF NONRESIDENT INSANE.—Under Acts 1905, p. 198, limiting jurisdiction of the probate court over the property of nonresident insane persons to authority to order the duly appointed guardian, or his agent under power of attorney, in the State of his residence, to sell such property and receive the proceeds therefor upon the execution of a proper bond, there is no authority to appoint a local guardian to sell property of nonresident insane persons.
6. IMPROVEMENTS—BETTERMENT ACT.—One who purchased land at a void probate sale may be entitled to recover for improvements made under color of such title, to the extent that they enhance the value of the lands.
7. IMPROVEMENTS—TEST OF GOOD FAITH.—To entitle an occupant of land under color of title to remuneration for his improvement under the betterment statute, and to a lien therefor, the test of good faith is, did he make them in the honest belief that he was the true proprietor and in ignorance that any other person claimed a better right to the land?
8. IMPROVEMENTS—ENHANCED VALUE OF LAND.—In determining the value of improvements under the betterment statute, the evidence should be directed to the enhanced value of the land by reason of the improvements; their cost being a mere circumstance tending to establish such enhanced value.

Appeal from Benton Chancery Court; *Ben F. McMahan,* Chancellor; reversed in part.

Rice & Rice, for appellants.

1. The chancery court had no jurisdiction, as appellee had a complete and adequate remedy at law. 93 Ark. 269; 81 *Id.* 51; 48 *Id.* 514; *Ib.* 332-3; 63 *Id.* 323.

2. No notice of the appointment of a curator is required. 82 Ark. 331; 93 *Id.* 104; 97 Ill. 338; 37 Am. Rep. 111; 96 N. Y. 525; 51 Wis. 587; 21 Cyc. 29; 154 Mass. 378; 38 Mich. 210; 81 Minn. 370; 63 N. H. 614; 52 Minn. 140. Notice to the mother, who was curator, was sufficient.

3. The suit should have been brought by the next friend. 93 Ark. 269.

4. This was a collateral attack on the judgment of court of competent jurisdiction. 44 Ark. 267. The land brought all it was worth and the cash was all paid over.

5. The purchase was made in good faith by Patton, and he made improvements, believing himself to be the owner, and he was entitled to betterments, taxes paid and improvements. 86 Ark. 368; 92 *Id.* 173; 47 *Id.* 528; 102 *Id.* 191; 53 *Id.* 545; 46 *Id.* 109; 96 *Id.* 109; 45 *Id.* 410.

HUMPHREYS, J. Appellee instituted suit against appellants in the Benton Chancery Court to cancel a deed from M. C. Patton, as curator, to J. W. Patton, of date September 9, 1916, conveying the following described real estate in Benton County, Arkansas, towit: northeast quarter northwest quarter section 21, and south half southeast quarter southwest quarter section 16, all in township 20 north, range 32 west, to expunge the record thereof and to cancel the orders and judgments of the Benton County Probate Court ordering and confirming the sale of said land. On the 14th day of August, 1916, appellant M. C. Patton, mother of appellee, applied to the Benton County Probate Court for appointment as guardian of appellee's estate, consisting of the lands aforesaid, without notice to and the presence of appellee before the court. Application for said appointment was made under section 1, act 77, Acts of the General Assembly of 1905. Letters of guardianship were immediately issued, and, on the same day, appellant M. C. Patton applied for an order of sale of said land under section 2 of said act and procured it without giving thirty days' notice in a newspaper published in said

county, as provided in said section. Pursuant to said order, the land was sold at public sale, after twenty days' notice in a newspaper of general circulation in said county, to J. W. Patton, the highest bidder at said sale, for $1,000, the full value of the land, according to the evidence. The sale was reported to, and confirmed by, the court. A deed was ordered executed, approved and delivered to the purchaser, J. W. Patton, who took possession of the land and began to make improvements thereon after the sale and completed them after procuring and recording his deed. The improvements consisted of clearing, digging a well, building a house and barn, etc. At the time and prior to the appointment of M. C. Patton as guardian for appellee aforesaid, appellee had been a resident of Oklahoma for eight or nine years and was adjudicated insane and confined in the asylum at Vinita in said State on the first day of July, 1916, where she remained until June, 1917, at which time she was discharged, as recovered. The chancery court canceled the deed, orders and proceedings of the probate court in relation to the sale of the lands, decreed possession thereof to appellee, denied appellant J. W. Patton a lien on the land for his improvements, but permitted him to remove them, in so far as it was possible without injury to the land. From that judgment and decree, an appeal has been duly prosecuted to this court.

Appellants contend that the chancery court had no jurisdiction to try the cause, because appellee had a complete and adequate remedy at law, either by motion to vacate the orders and judgments of the probate court or by certiorari to quash them. The gist of the action was to cancel the deed, expunge same from the record and regain possession of the land. The remedy at law either by motion to vacate the judgment or by certiorari would not have reached the cancellation of the deed or the expunging of same from the record, and, therefore, would not have been adequate and complete.

It is next insisted that the court should have dismissed the cause, because not brought by guardian or

next friend. This suit was filed on August 1, 1919, after appellee had been discharged from the Vinita asylum, as recovered. The certificate of the medical superintendent of that institution is as follows: "I hereby certify that Amanda E. Taylor was received in this institution on the first day of July, 1916, from Ottawa County and discharged June, 1917, as recovered." The evidence tended to show appellee was afflicted with periodical insanity, having lucid intervals. It is proper, when a party, not under guardianship, develops evidences of insanity, for the court to inquire into his mental condition for purposes of the particular suit, in order to protect his interests by the appointment of a guardian or next friend to prosecute or defend for him. *Peters* v. *Townsend,* 93 Ark. 103. Such inquiry might be appropriate to protect a sane defendant against the unauthorized suit of an insane person, but no such inquiry was suggested or demanded by appellants, and none was made on the court's own motion. An insane person, not under guardianship, can sue and be sued the same as a sane person. *Peters* v. *Townsend, supra.* Not having initiated such inquiry in the court below, appellants can not now insist that the suit should have been dismissed on account of the insanity of appellee, the plaintiff below.

It is next insisted that the probate court had jurisdiction of the subject-matter of litigation and that the proceedings therein are not subject to attack. The probate court of Benton County had no jurisdiction over the person or property of appellee and could acquire none by the appointment of a local guardian. Sections 1 and 2, act 77, Acts 1905, do not authorize the appointment of a guardian for a nonresident insane person nor the sale of such an one's property in this State by local guardian. Those sections only apply to insane citizens of this State confined in institutions or asylums for insane, either in or out of the State. Section 3 of said act governs with reference to the sale of the property of nonresidents who are insane. That section limits the jurisdiction of the probate courts of this State over the

property of nonresidents who are insane to authority to order the duly appointed guardian, or his agent under power of attorney, in the State of his residence, to sell said property and receive the proceeds therefor upon the execution of proper bond. The proceedings, therefore, of the probate court of Benton County, in appointing a local guardian to sell the real estate in question, were without authority and void.

Lastly, it is insisted that the court erred in denying appellant J. W. Patton remuneration for his improvements to the extent that they enhanced the value of the real estate. The mere fact that he purchased the land under void judicial proceedings can not preclude him from the benefits of the betterment statute. Occupants of land under color of title, who make improvements thereon in good faith, believing themselves to be the owners thereof, are protected under that statute to the extent of the enhanced value of the lands by reason of their improvements. To entitle an occupant to remuneration for his improvements, the test of good faith is: Did he make them in the honest belief that he was the true proprietor and in ignorance that any other person claimed a better right to the land? *Beard* v. *Dansby,* 48 Ark. 183. Applying that test in this case, we think appellant J. W. Patton was entitled to a lien on the land for its enhanced value by reason of the improvements made by him. Practically all the improvements were after he obtained a deed to the land. All the parties connected with the transaction thought the proceedings to sell the land were legal. There is nothing from which collusion in the sale and purchase thereof can reasonably be inferred. The property sold for its full value. J. W. Patton was a young farmer, inexperienced in titles. The evidence with reference to the value of the improvements consisted largely of the cost thereof. It should have been directed to the enhanced value of the land by reason of the improvements. The cost thereof would only be a circumstance tending to establish the enhanced value of the property on account of the improvements.

For the error indicated, the decree is reversed, in so far as it denied appellant J. W. Patton a lien on the land for the enhanced value thereof because of the improvements he made thereon, and the cause remanded with directions to proceed in accordance with this opinion. In all other respects, the decree is affirmed.

BRADLEY COUNTY ROAD IMPROVEMENT DISTRICTS NOS. 1 AND 2 *v.* JARRATT.

Opinion delivered May 24, 1920.

1. HIGHWAYS—PRELIMINARY SURVEYS.—Road Laws, 1919, vol. 1, No. 237, § 5, providing that boards of commissioners of highway districts "may" make application to the highway department for preliminary surveys, plans and estimates, and that the department "may" make such plans and estimates, is not mandatory, and hence where the department is unable to furnish the plans and estimates, a board of commissioners is authorized to employ an engineer to make such preliminary surveys, plans and estimates.
2. APPEAL AND ERROR—QUESTIONS NOT DEVELOPED.—Questions not developed by the evidence nor passed upon by the chancellor will not be determined upon appeal.

Appeal from Bradley Chancery Court; *E. G. Hammock,* Chancellor; reversed.

J. R. Wilson, for appellants.

All the attacks by appellee on the various provisions of act 237 are without merit and the act ought to be held valid and the decree should be reversed and the injunction dissolved. 15 R. C. L. 523-4; 16 L. R. A. 737; 17 Ore. 640; 5 L. R. A. 115; 120 Ark. 277; 36 Cyc. 1102.

J. C. Clary and *B. L. Herring,* for appellees.

The court properly granted the injunction. The method of dealing by public functionaries and the ruthless squandering of public tax money without regard to the actual and reasonable cost of the proposed employment is against the law of this State and all principles of equity for the reasons the chancellor stated and that

H. R. Carter's contract was void as a fraud upon the people of the districts. The decree should be affirmed.

W. C. Smedley, for appellee Tatum.

The act, No. 237, is void, because it repeals the long established rules of chancery practice requiring an attorney or guardian *ad litem* for nonresidents and minors. The act gives the commissioners unlimited powers and made their office perpetual; there is no provision for reimbursement to property owners for damages for property taken and no provision to protect taxpayers against contracts being let for construction work or anything else, and the commissioners are not required to report to any court or other tribunal and the public has no protection against unlawful contracts or expenditures of money and is against public policy. The act is unconstitutional and void, as it is confiscatory, and the contract with Carter was void. Art. 2, § 8, Const., Ark., and art. 14, Const., U. S. The decree is correct and should be affirmed. 80 Ark. 145.

HUMPHREYS, J. Appellees, E. A. Jarratt *et al.*, property owners in Bradley County Road Improvement Districts Nos. 1 and 2, instituted suit against appellants in the Bradley Chancery Court to restrain them from making a preliminary survey of the roads proposed to be constructed in said districts, created by act No. 237 of the Legislature of 1919, and to cancel contracts entered into between the boards of commissioners of said road improvement districts with H. R. Carter, an engineer, to do all the engineering work connected with the improvements to be made and supervision of the construction thereof, at his own expense, for a compensation equal to five per cent. of the cost of construction not exceeding one million dollars and four per cent. in excess of one million dollars, one-half of the compensation to be paid when the plans, specifications and estimates of cost of the improvements are completed, and the balance in installments as the work progresses. The validity of

the contracts was attacked on the grounds, first, that they embraced the cost of the preliminary surveys, plans and estimates of cost of the improvements, which, under the act aforesaid, were to be made and prepared for said districts by the Highway Department of Arkansas, free of charge; and, second, that the contracts were procured by taking advantage of the ignorance of the commissioners as to the meaning and terms of the act creating the districts and are arbitrary, unjust and inequitable.

Appellant, H. R. Carter, filed answer, admitting that he entered into the alleged contracts with said Bradley County Road Improvement Districts, but denying that the boards of commissioners of said districts were without authority to embrace in the contracts the charge for preliminary surveys, plans and estimates of the cost of improvements, and that the contracts were procured through a lack of knowledge on the part of the commissioners as to the meaning of the act creating the districts or that they are arbitrary, unjust and inequitable.

Appellee J. T. Tatum, alleged owner of real estate in said districts, also entered suit in said court to enjoin appellants from making a preliminary survey, plans and estimate of the cost of the contemplated improvements in said district, upon the same grounds alleged in the bill of appellees E. A. Jarratt *et al.*, and the further ground of the alleged invalidity of practically every section of act No. 237 aforesaid, creating Bradley County Road Improvements Districts Nos. 1 and 2.

Appellant H. R. Carter filed answer to the petition of appellee J. T. Tatum, specifically denying every allegation assailing the validity of his contracts with said improvement districts and the act of the Legislature creating them.

The testimony in the two cases was the same and disclosed that, after the passage of act No. 237, creating the districts, the commissioners of each met in the office of the State Highway Commissioner and perfected an organization; that the commissioners thereupon made personal requests of the State Highway Department to

have preliminary surveys made of the roads to be made under said act No. 237, which requests were refused by the State Highway Commissioner for the reason that no funds were available for that purpose; that the appropriations were insufficient to cover preliminary surveys, plans and estimates for proposed districts under the Alexander road law, which required preliminary surveys, plans and estimates of costs as prerequisites to the organization of proposed road districts; that only $20,000 had been appropriated for the purpose of making preliminary surveys by the State Highway Department; that the general and special sessions of the Legislature of 1919 provided that 9,600 miles of roads in the State should be improved; that a preliminary survey thereof would have cost $8 per mile and a final survey to ascertain the yardage of the road would have cost from $100 to $125 per mile; that the boards of commissioners of Bradley County Road Improvement Districts were informed by the State Highway Department that they would have to employ an engineer any way, and he could make the survey under the direction of the State Highway Department and file the surveys, plans and specifications with it for approval; that the course suggested was adopted; that three engineers made talks before the boards and applied for the position of engineer of each district, one of whom was H. R. Carter; that Carter did not tell the commissioners they would have to employ him, or use words to that effect; that, later, H. R. Carter was employed as engineer, and entered into written contracts with the commissioners for engineering services, including preliminary, as well as final, surveys, plans and specifications for the improvements and supervision of the construction thereof, for a fee of five per cent. on the cost of said improvements up to one million dollars and four per cent. in excess thereof.

The causes were submitted to the court upon the pleadings, testimony of the several witnesses, in substance detailed above, the written contracts of employment and a certified copy of act No. 237 aforesaid, from

which the court found that it was the purpose and intent of section 5 of said act No. 237 to absolve the property in said districts from the cost of preliminary surveys, plans and specifications, and to place that burden absolutely upon the State Highway Department as a condition precedent to proceeding with the improvements. In accordance with this finding, the court rendered decrees against appellants, permanently enjoining them from making the preliminary surveys, plans and estimates as a charge against the land situated in said districts, and from proceeding with the improvements at all until such time as the State Highway Department shall make the preliminary surveys, plans and estimates of cost of more than one type of surface roads and transmit them to the commissioners of said districts. By consent of all parties, both causes were consolidated for the purposes of appeal, and an appeal from the decrees has been duly prosecuted to this court.

It is insisted by appellants that the court erred in interpreting sections 5 and 6 of said act No. 237 as mandatory upon the State Highway Department to make the preliminary surveys, plans and estimates of cost of improvements to be made in said districts free of charge against the lands thereof as a condition precedent to proceeding with the improvements. The requirement in section 5 of said act for the board of commissioners in each district, after qualification, to apply to the State Highway Department for preliminary surveys, plans and estimates of cost of the proposed improvements is clearly mandatory, but it is just as clear, from the language used in said section 5, when read in connection with the other sections of the act, that the duty imposed upon the State Highway Department to make the preliminary surveys, plans and estimates of the cost of the improvement at the expense of the State was a sound discretionary one, dependent upon the conditions, facilities, etc. In this respect, the section reads: "And the State Highway Department may make such plans and estimates on more than one type of surface for the roads,

together with any recommendations that they may see fit to make." Had the intention been to compel or force the State Highway Department to make the preliminary surveys, plans and estimates, the Legislature could have easily employed the word "shall" in this connection, as it did in the first clause of the section, in relation to the application to said department for such surveys. The use of "shall" for "may" would not have been absolutely controlling as to the intent, but, in the connection used, would have been indicative of it. While the word "may" is frequently used in an imperative or mandatory sense, ordinarily its employment in statutes imports permission, possibility, ability, etc. 26 Cyc. 1590. Had the intention been to employ the word "may" in its imperative or mandatory sense in said section 5, the Legislature would certainly have imposed the duty upon the commissioners to adopt one of the preliminary surveys and plans furnished by said department. The section of the act immediately following made it optional with the commissioners whether they would accept the preliminary plans of said department, or some other plan. Again, the intention, in the use of the word "may" in said section 5, as imposing discretionary power only on the State Highway Department to make preliminary surveys, plans and estimates, is indicated in the broad mandatory powers conferred on the commissioners of the districts by sections 3 and 7 of said act. Section 3 provides:

"It shall be the duty of the respective boards of commissioners to make the improvements in their respective districts as herein authorized, as expeditiously and economically as possible, and they shall have all the necessary powers to accomplish this purpose."

Section 7 provides: "For the purpose of assisting them in the preparation of plans for the improvement in said districts, the commissioners of each of said districts may employ such persons as they see fit, including an engineer, and fix their compensation * * *."

It is apparent, from a reading of these two sections in connection with section 5 of said act, that the inten-

tion of the Legislature was that the commissioners should make the same as expeditiously and economically as possible, with the aid of preliminary surveys, plans and estimates of the State Highway Department, if the conditions as to finances, etc., warranted the department in making them, but, if unable to procure them from the department upon request, then to employ an engineer to assist them in the preparation of the plans and completion of the improvements. No other interpretation of section 5 of said act would give effect to the other provisions of the act and the accomplishment of the improvements intended by the Legislature. The undisputed proof is to the effect that the commissioners requested the State Highway Department to make the preliminary surveys and that the request was denied for the reason that no funds were available for that purpose.

The appellees contend that the decrees of injunction should be upheld because the engineering contracts were entered into without the exercise of discretion on the part of the commissioners and in ignorance by them of the provisions of the law, and for the further reason that the contracts are arbitrary, unjust and inequitable. The interpretation placed upon the act by the commissioners, as empowering them to make a contract with an engineer for preliminary surveys, plans and specifications, when unable to procure them from the State Highway Department for a good reason, was correct. The reasonableness or unreasonableness of the amount of the fee agreed upon for engineering services was not fully developed by the evidence nor passed upon by the court, so we refrain from expressing an opinion as to whether exorbitant, unjust or inequitable.

A number of other questions are raised and argued by appellees in support of the injunction decrees, but they were not developed by the evidence or passed upon by the chancellor. The gist of the evidence and the decrees of the court were restricted to the proposition of whether the commissioners had authority under the act to employ an engineer to make preliminary surveys,

plans and estimates of cost of the improvements. Many of the questions raised have been settled adversely to the contentions of appellees in recent opinions written by this court. The other questions not having been developed or passed upon by the chancellor, a decision of them at this time is pretermitted.

For the error indicated, the decrees of injunction are reversed and the causes remanded with directions to dissolve the writs and for such further proceedings as may be desired, not inconsistent with this opinion.

HEMPSTEAD COUNTY v. WILSON.

Opinion delivered May 31, 1920.

1. APPEAL AND ERROR—EVIDENCE NOT BROUGHT UP.—Where a bill of exceptions refers to certain documentary evidence which is not copied therein, it will be assumed that it tended to sustain the judgment appealed from.
2. SAME—OBJECTION NOT RAISED BELOW.—Where no objection was raised in the trial court that a claim against a county was not itemized, as required by Kirby's Digest, § 1454, the objection can not be raised on appeal.

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

U. A. Gentry, for appellant.

The claim was not in proper form and not itemized as required by law and the evidence did not support the finding and judgment against the county. Kirby's Digest, § 1454; 51 Ark. 524; 50 *Id.* 431.

Steve Carrigan, for appellee.

No objection was raised that the claim was not itemized. The claim referred to the pages of the fee book and was properly before the county and circuit court. 70 Ark. 607. This case settles the question against appellant's contention and the findings should be sustained.

McCULLOCH, C. J. Appellee Wilson is county clerk of Hempstead County and filed a claim for fees against the county in the following form:

"Washington, Ark., April 28, 1919.

"County of Hempstead:

To John L. Wilson, County Clerk, Dr.

"Services in and about county court, fee book J, pages 165 and 166.....$133.05"

An affidavit in statutory form was attached to the claim. The county court allowed $99.15 of the claim, but refused to allow the balance, and appellee prosecuted an appeal to the circuit court where on a trial anew the claim was allowed in full.

It is contended that there was not sufficient evidence to sustain the judgment. Mr. O. C. Bailey, the clerk of the circuit court, was introduced as a witness and testified concerning appellee's fee bill, and as to the method of making out circuit court fee bills. It appears from the testimony that the fees of appellee were based upon services performed with reference to the fee bills approved by the circuit court and filed with the county court for allowance. The testimony of Mr. Bailey, as set forth in the bill of exceptions, showed that he testified from the itemized circuit court fee bills and they constituted a part of the evidence in the case, but they were not copied in the bill of exceptions. We must assume therefore that those fee bills had some probative force in establishing appellee's claim in connection with the testimony of Mr. Bailey.

It is also contended that appellee's claim was not presented in proper form, in that it was not itemized as required by statute, which provides that "the county court shall require an itemized account of any claims presented to them for allowance, sworn to as required by the preceding section, and may, in all cases, require satisfactory evidence, in addition thereto, of the correctness of the account, and may examine the parties and witnesses on oath, touching the same." Kirby's Digest, § 1454.

Appellee's claim, as filed, did set forth the pages of the fee book in the office of the county clerk for the specification of the items. No objection to the sufficiency of the specification of the items was made in the court below, and it is too late to raise that question here for the

first time. If objection had been made on that point, the court could have permitted amendment. We are of the opinion therefore that there are no grounds for a reversal of the judgment and the same is affirmed.

McCORKLE v. H. K. COCHRAN COMPANY.

Opinion delivered May 31, 1920.

1. FRAUDS, STATUTE OF — PEREMPTORY INSTRUCTION — CONFLICTING EVIDENCE.—It was error to give a peremptory instruction for plaintiff in an action on a contract required to be in writing where there was a conflict in the evidence as to whether it was oral or in writing.
2. EVIDENCE—PAROL EVIDENCE OF CONTRACT.—Where a written contract for the sale of goods, required by the statute of frauds to be signed by the party to be charged, was not signed by the purchaser, no rule of evidence is violated by admission of oral testimony of an additional agreement not set forth in the writing.
3. FRAUDS, STATUTE OF—NECESSITY OF PLEADING.—The statute of frauds need not be pleaded where plaintiff declares on a written contract alleged to be signed by defendant, and defendant denies that he entered into a written contract.

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

W. J. Lanier, for appellant.

The execution of the order was clearly an issue of fact for the jury, and it was error to direct a verdict. 70 Ark. 230; 61 *Id.* 442; 66 *Id.* 363; 63 *Id.* 74; 62 *Id.* 63. If there was no written contract, then it was an oral one and subject to explanations as to what was said, done and agreed upon between Owens and appellant at the time, and were questions exclusively for the jury, and it was palpable error to take the case from the jury. Cases *supra.*

Mann & Mann, for appellee.

The testimony sought to be introduced was clearly for the purpose of adding to the terms of the contract. The writing was clear and unambiguous and no fraud or

mistake is alleged. It was properly excluded. The statute of frauds was not pleaded. The execution of the contract was admitted by the parties, and there was no issue for a jury, and a verdict was properly instructed. 56 Ark. 263; 105 *Id.* 638.

McCulloch, C. J. Appellee, a domestic corporation, sued appellant in the court below to recover damages for breach of an alleged contract for the sale by appellee to appellant of a car load of oats, bran, chops and meal. It is alleged in the complaint that the contract was in writing, dated January 14, 1919, and specified that there was to be a delivery of the car load of stuff on January 31, 1919. Appellant denied in his answer that he had executed a written contract for the purchase of the commodity as set forth in the complaint. There was a trial of the issues before a jury, and the court directed the jury to return a verdict in favor of appellee, which was done, and judgment was rendered accordingly.

Appellee's agent, Mr. Ownes, testified that he made the sale to appellant at the latter's place of business at Wheatley, Arkansas, that appellant gave witness the order which witness reduced to writing and made a carbon copy thereof, and that appellant signed the original order and witness delivered to appellant the carbon copy to which he subscribed the name of appellee. The original order with appellant's name signed to it was exhibited to the jury by the witness and was introduced in evidence. Appellant testified as a witness in his own behalf and denied that he signed the written order. He testified that the order was verbal and that it was reduced to writing by Mr. Ownes as a memorandum of the sale and that a carbon copy was delivered to him, but that he did not sign either the original or the carbon copy. He offered to testify that it was agreed between him and Mr. Ownes as a part of the oral contract of sale that he should have the right to cancel the order at any time on or before the date of delivery, January 31, 1919, and that he directed appellee before the date of delivery to cancel the order.

The court excluded this testimony from the jury, and, as before stated, gave a peremptory instruction in favor of appellee. We are of the opinion that the court erred in excluding the offered testimony, as well as in giving the peremptory instruction.

The main issue in the case was whether or not the contract was oral or written, and there was a sharp conflict in the testimony on that issue. Appellant testified positively that he did not sign the written order. If that was true, the written memorandum signed by appellee alone did not constitute a written contract and was within the statute of frauds. *Lee* v. *Vaughan's Seed Store,* 101 Ark. 68. Appellant not having bound himself by writing, the contract rested in parol and no rule of evidence was violated by permitting oral testimony to be introduced establishing the additional agreement not set forth in the writing, to the effect that appellant should have the right to cancel the order before delivery.

The point is made by counsel for appellee that the statute of frauds was not pleaded, but the answer to that contention is that the denial in appellant's answer was as broad as the allegation in the complaint. Appellee declared upon a written contract signed by appellant and the latter denied that he entered into a written contract. It is unnecessary to plead the statute of frauds until appellee undertakes to recover upon an oral contract.

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

INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION *v.* SANDERSON.

Opinion delivered May 31, 1920.

1. INSURANCE—LOSS OF TIME BY DISEASE.—In an action on a health policy applying "only in the event that the disease shall compel the insured to refrain from performing every act of business and be under the constant treatment of a regular physician," evidence *held* to sustain a finding of liability.

2. INSURANCE—CONFINEMENT TO HOUSE.—Where a health policy provided benefits only if the insured should by disease be compelled "to remain continuously and strictly within the house" and "be under the constant treatment of a regular physician," the fact that insured went out for a short time each day, under directions of his physician, for the purpose of getting sunshine and fresh air will not preclude recovery, though he could not recover if the disease was one which required him to remain outside the house rather than within it.
3. INSURANCE—CONFINEMENT TO HOUSE—QUESTION FOR JURY.—In an action on a health policy, where the insured claimed the benefit to be allowed in case of strict confinement in the house, the question whether he was so confined, though he made short daily trips for water and sunshine, *held* for the jury.
4. TRIAL—EFFECT OF REQUEST FOR PEREMPTORY INSTRUCTION.—Though both sides asked for a peremptory instruction, appellant did not waive its right to insist on a submission of the issues to the jury where it asked another instruction submitting the issues.
5. EVIDENCE—WEIGHT AND SUFFICIENCY OF PARTY'S TESTIMONY.—Where the only testimony upon a certain issue was that of the plaintiff himself, he being an interested witness, the jury was not bound to accept his testimony as true.
6. EVIDENCE—WEIGHT AND SUFFICIENCY OF PARTY'S TESTIMONY.—Even though plaintiff's testimony upon a certain issue should be accepted as true, if different inferences might have been drawn from it as to defendant's liability, the case should be submitted to the jury.

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

Arnold & Arnold, for appellant.

According to the undisputed evidence, there can be no recovery under the first clause of the policy, because appellee's disease was not sufficient to compel him to remain strictly and continuously within the house. He was not continuously confined to his house by the disease within the meaning of the policy. The court erred in withdrawing the case from the jury. 99 Me. 390; 59 Atl. 535; 135 Mich. 439; 97 N. W. 966; 104 N. W. 734; 47 Pa. Sup. Ct. 176; 110 N. E. 972; 141 Mich. 482; 23 L. R. A. (N. S.) 359 and notes; 42 *Id.* 700 and note. The case here was not withdrawn from the jury. 92 Ark.

378; 100 *Id.* 71. The insured was not entitled to recover the penalty. 92 Ark. 378.

M. E. Sanderson, for appellee.

There is no conflict in the testimony and no case for a jury. The court correctly interpreted the contract, and there is no error in the instructions. 113 Ark. 197; 117 *Id.* 145; 111 *Id.* 607.

McCULLOCH, C. J. This is an action on a policy of insurance issued by appellant to appellee, insuring appellee "against loss of time by disease not due to accidental injury." The two clauses of the policy on which the action is founded read as follows:

"LOSS BY DISEASE.

"Section III.

"HOUSE CONFINEMENT $50.00 first week and 29 succeeding weeks.

"The insurance provided shall cover only in the event that the disease shall compel the insured to remain continuously and strictly within the house for a period of or exceeding two full weeks and be under the constant treatment of a regular physician.

"NONCONFINEMENT $15.00 first week and $20.00 for eight weeks.

"The insurance provided shall cover only in the event the disease shall compel the insured to refrain from performing every act of business and be under the constant treatment of a regular physician."

Liability is asserted for the maximum amount ($175) allowed under the second clause, and for twenty-five weeks, or $1,250 under the first clause. Appellant conceded liability for the amount sought to be recovered under the second clause and tendered the amount to appellee. On the trial of the issues before a jury the court gave a peremptory instruction in appellee's favor. The question now before us on this appeal is whether or not the testimony presented an issue which should have been submitted to the jury.

The case was tried on the testimony of appellee himself and Doctor Phillips, who was appellee's physician. Appellant introduced no testimony at all. Appellee resided at Ashdown at the time he was stricken with the disease which caused the loss of time involved in this inquiry, and was engaged in farming and in the retail lumber business. He was manager of a lumber yard and looked after the office work, as well as the outside business. He became ill in the early part of the year 1918 while the policy was in force, and on consulting Doctor Phillips it was found that he was suffering with nephritis. On March 13, 1918, the physician pronounced appellee's condition of health to be very serious, and thereafter appellant gave but little attention to business, and his condition of health continued to grow worse. The testimony tended to show that he was entirely unable to give attention to business, and that he merely went down to his place of business, from time to time, to attend to business to a very limited extent. The evidence was sufficient, we think, to justify the finding that appellee's disease was sufficient to cause him to "refrain from performing every act of business and be under the constant treatment of a regular physician," within the meaning of the second clause of the policy. However, appellant concedes liability on this branch of the case, and it is unnecessary to discuss the evidence at length so far as it tends to establish liability under that clause.

On July 5, 1918, Doctor Phillips, who had been attending appellee regularly up to that time, advised him that his condition had become so serious that he should give up all matters of business and pleasure and go to Marlin Wells, Texas, to receive the benefit of the water and climate of that place. The physician also advised appellee that the fresh air and sunshine of that climate together with the water, would do more to build him up than anything else. At that time appellee had become very much weakened from the disease and was easily fatigued. To use the exact language of the physician, his testimony was that "the fresh air and sunshine to

this patient were more beneficial than remaining in the house, and tended to arrest the disease from which he was suffering." Pursuant to the physician's advice, appellee sold out his business and moved to Marlin, Texas, where he remained for a considerable time for the purpose of getting the benefit of the mineral water and the climate at that place. He was under the treatment of another physician while he was there, but his course of conduct and the progress of the disease is disclosed entirely by appellee's own testimony, as he did not introduce any other witness as to his stay at Marlin Wells.

Appellee stated in his testimony that he was confined to the house during his stay there, except that he made a daily trip to the postoffice to get his mail, and made trips a distance of four blocks to the wells to get water twice a day, and that he occasionally would stop for a short time at one of the stores along the way and make a purchase. He testified that there was a large pavilion at the well and that he would occasionally sit there for half an hour at a time, and that while at home he spent much of the time sitting out on the porch. On cross-examination of appellee it was drawn out that he had made two or three statements to appellant, and in response to the question whether or not that he had been "strictly and continuously confined within the house" he answered in the negative.

Each side asked for a peremptory instruction, and in addition to that appellant asked the court to give the following instruction:

"You are instructed that the policy sued on herein reads that plaintiff is entitled to recover only in two events:

"*First.* In the event the disease shall compel the insured to remain continuously and strictly within the house for a period of or exceeding two full weeks and be under the constant treatment of a regular physician, he is entitled to recover $50 for the first week and 29 succeeding weeks.

"*Second.* In the event the disease shall compel the insured to refrain from performing every act of business and be under the constant treatment of a regular physician, he is entitled to recover $15 for the first week and $20 per week for eight weeks, and you are instructed that the plaintiff is entitled to recover nothing herein except as provided for in said policy covering total disability, and for such time as he was only partially disabled on account of illness, he is entitled to recover nothing."

It is contended by learned counsel for appellant, in the first place, that according to the undisputed evidence there can be no recovery under the first clause of the policy for the reason that appellee's disease was not sufficient to compel him "to remain strictly and continuously within the house" within the meaning of the terms of the policy. It is argued that according to appellee's own testimony he was not continuously confined to his house by the disease, but that he left the house each day for the purpose of making trips to the well and certain other purposes. On the other hand, it is contended by appellee that according to the undisputed evidence he was confined to the house continuously within the meaning of the policy, and that the court was correct in giving a peremptory instruction. We are of the opinion that this branch of the case is ruled by the law as declared by this court in the case of *Great Eastern Casualty Co.* v. *Robins,* 111 Ark. 607, where we held, quoting from the syllabus, that "the term continuous confinement, within the meaning of an indemnity insurance policy, insuring plaintiff against sickness, does not mean that plaintiff must have been confined within the house every minute or hour, and the fact that he went out occasionally for the purpose of taking exercise and fresh air under the instructions of his physician is not sufficient to prevent plaintiff from recovering in an action on the policy."

The court in that case had given an instruction in line with the law as declared above, and we approved that instruction, notwithstanding the fact that there was undisputed evidence to the effect that the insured, though

confined to the house by disease, went out for a short time each day under the directions of his physician for the purpose of getting sunshine and fresh air. The language of the policy in that case was substantially the same as the language of the policy now before us, except the word "strictly" is used in this policy, but was not used in the policy in the other case. We do not think that the use of that word changes the effect of this clause of the policy. If the language of the policy in the other case was not to be literally construed so as to take the case without its operation because the insured had in fact been outside the walls of the house, we do not think the use of the word "strictly" in the policy now before us would call for a more literal application of the language used. It would be a very unreasonable construction to put on the policy and would practically nullify the benefits paid for under the policy to say that because a man was out of the house one time he was not insured against loss. If necessary daily trips to get water and for sunshine under the advice of a physician excluded the insured from the benefits under the policy, then it would follow that a single excursion from the house under any circumstances would have the same effect. The language should have reasonable interpretation to give the policy some effect rather than to nullify it.

On the other hand, it does not follow that, if it is necessary for the insured to remain out of the house for the purpose of getting fresh air, he can claim the benefits of the policy, because the insurer had the right to state the terms upon which its obligation was incurred, and they saw fit, in this instance, to insure only against such diseases as continuously confined to the house. If the disease required the insured to remain outside of the house, rather than to remain in the house, it does not come within the terms of the policy. But short trips away from the house for purposes necessary to bring beneficial results to the health of the insured does not take the case out of the operation of the language of the policy which requires confinement to the house. Our conclusion is

therefore that the testimony presented a question of fact for the determination of the jury as to whether or not appellee's disease and his state of health at the time required continuous confinement to the house, within the meaning of the policy, notwithstanding his short trips out for water and sunshine, and this issue should have been submitted to the jury. Both sides asked for a peremptory instruction, but appellant did not waive its right to insist on a submission of the issues to the jury, as it asked another instruction submitting the issues. *St. L. S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 67; *Sims* v. *Everett,* 113 Ark. 198; *Supreme Tribe of Ben Hur* v. *Gailey,* 117 Ark. 145; *St. L., I. M. & S. Ry. Co.* v. *Ingram,* 118 Ark. 377.

It is said by counsel for appellee that the additional instruction asked by appellant was not correct, and that therefore the case stood as if appellant had only asked for the peremptory instruction so as to bring it in the operation of the rule in *Mulkey* v. *Railway, supra.* Instruction No. 2 requested by appellant was a substantial copy of the two clauses of the policy, which were self-explanatory. The effect of the instruction, if given, would have been to submit to the jury the question of fact as to whether or not appellant's contention fell within the clause of the policy.

It can not be said that the testimony was undisputed, for there was no other testimony, except that of appellee himself, adduced in support of his right of action under the first clause of the policy, and appellee being an interested witness, the jury was not bound to accept his testimony. *Skillern* v. *Baker,* 82 Ark. 86; *Lilly* v. *Robinson Merc. Co.,* 106 Ark. 571; *Harris* v. *Bush,* 126 Ark. 369. Besides, under appellee's own testimony, it was a question for the jury to determine whether or not the disease was sufficient to compel his continuous confinement to the house. If the jury accepted his testimony as true, different inferences might have been drawn from it with respect to the effect of the

disease in confining him to the house, except as to necessary trips for the benefit of the water and sunshine.

For the error of the court in withdrawing the case from the jury by a peremptory instruction, the judgment will be reversed and the cause remanded for a new trial.

HARROWER v. INSURANCE COMPANY OF NORTH AMERICA.

Opinion delivered May 31, 1920.

1. EVIDENCE—WRITTEN CONTRACT—PRIOR NEGOTIATIONS.—Prior oral agreements and antecedent writings forming a part of the negotiations for a contract become merged in the subsequent written contract and are incompetent as evidence for the purpose of enlarging the scope of such written contract.
2. INSURANCE—ORAL AND WRITTEN CONTRACT.—Where insurer and insured entered into an oral agreement for a policy covering a term of three years, and the insurer delivered a policy for one year, which was accepted by the insured and the premium paid, the policy constituted a contract between the parties, and the oral agreement was merged into it, and was incompetent as evidence to enlarge it.
3. FRAUDS, STATUTE OF—AGREEMENT NOT TO BE PERFORMED WITHIN YEAR.—An oral agreement, made at the time an insurance policy was issued for one year, that other policies should be issued from year to year for three years, was an agreement not to be performed within a year, within the statute of frauds.
4. FRAUDS, STATUTE OF—STATUTE RAISED BY DEMURRER.—The question whether a contract set out in the complaint was within the statute of frauds was properly raised by demurrer.

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

John B. Crownover, for appellant.

The complaint stated a cause of action and the demurrer admits all its averments. The contract was partly performed, and defendants were bound in law to fulfill and complete the same. The general agent at Dardanelle had the same right to make the contract that the home office had. The demurrer should have been overruled and defendants required to answer. 20 L. R. A.

289; 76 Ark. 183. Appellant constituted the general agent at Dardanelle her agent to keep the insurance in force and this is admitted by the demurrer.

Mehaffy, Donham & Mehaffy, for appellees.

The oral agreement, if any, was merged in the written contract, which can not be varied by oral testimony. 71 Fed. 473; 13 Ky. Law Reporter 237; 34 N. W. 183. Parol testimony was not admissible. 4 So. 490. All prior negotiations were merged in the policy as written. 59 N. E 1129; 130 Ark. 97; 104 *Id.* 475; 176 Ill. 194; 72 Iowa 414; 27 Mo. App. 401. A contract in writing, free from doubt and ambiguity, can not be altered or contradicted by parol evidence except for fraud or mistake. 87 Pac. 869; 83 *Id.* 918; 87 Fed. 63. Preliminary negotiations do not constitute the contract. 87 Fed. 63. See, also, 79 N. E. 459; 121 Mass. 338; 17 L. R. A. 586. This was a written policy and the parol contract was merged. 206 S. W. 383.

McCULLOCH, C. J. Appellant instituted this action in the circuit court of Yell County, Dardanelle District, to recover on an alleged oral agreement between her and the two insurance companies sued, whereby the latter agreed to insure her property, consisting of a stock of merchandise and store fixtures, against loss or destruction by fire. The court sustained a demurrer to the complaint and rendered judgment dismissing the complaint, from which an appeal has been prosecuted.

It is alleged in the complaint that appellant entered into a contract with the said companies, acting through their general agent at Dardanelle, on January 28, 1916, whereby it was agreed that the companies should insure her property "for the term of three years from that date, and then from year to year until such time as she might direct such contract should cease, provided defendants continued the business of writing fire insurance in said town of Dardanelle after said term of three years."

It is further alleged that, pursuant to said contract, the said companies issued and delivered to her a joint policy for the first year in part performance of the original agreement, and that she paid the premium for that policy and at that time directed the agent to write other policies "from year to year during the said three years and to come for the premium money when such policies were so written," and that the said companies through their agent agreed to do so. It is also alleged that the property was destroyed by fire on October 8, 1918.

It is familiar law that prior oral agreements and antecedent writings forming a part of the negotiations for a contract become merged in the subsequent written contract and are incompetent as evidence for the purpose of enlarging the scope of such written contract. *Graves* v. *Bodcaw Lumber Co.,* 129 Ark. 354. This applies to the alleged oral agreement set forth in the first part of the complaint, for, according to the allegations of the complaint, the agreement was for a policy covering the term of three years from that time "and then from year to year, etc.", and that the companies issued and delivered a policy for one year, which was accepted by appellant and the premium paid. The policy issued and delivered constituted a contract between the parties, and all antecedent negotiations and agreements were merged into it. *Union National Bank* v. *German Ins. Co.,* 71 Fed. 473; *Moore* v. *Insurance Co.,* 34 N. W. 183; *Commercial Accident Co.* v. *Bates,* 176 Ill. 194; *Insurance Co.* v. *Mowry,* 96 U. S. 544.

The last allegation with respect to the agreement between the parties is that at the time of the issuance of the policy the further agreement was that other policies should be "issued from year to year during the said three years," and this contract, according to the allegations, was not to be performed within a year from the making thereof and was within the statute of frauds. Kirby's Digest, sec. 3654. According to the allegations of the complaint, this contract was executory, and was not to take effect immediately, and was not

a contract of insurance, but was one to insure or to issue a policy at a future date. A contract of insurance usually takes effect immediately, whereas a contract to insure or to issue a policy takes effect at a future date. The distinction between the two classes of contracts is made clear in the cases cited on the brief of counsel for appellees.

The question as to the contract being within the statute of frauds was properly raised by demurrer. *Izard* v. *Connecticut Fire Ins. Co.*, 128 Ark. 433.

The court was, therefore, correct in sustaining the demurrer, and the judgment is affirmed.

HUGHES v. GARDNER.

Opinion delivered May 31, 1920.

1. APPEAL AND ERROR—FORMER APPEAL—LAW OF CASE.—On a second appeal where the issues are the same as on the first appeal, and there has been no substantial change in the facts, what was declared as the law on the former appeal must control as the law of the case.

2. BILLS AND NOTES—GENUINENESS OF NOTE—BURDEN OF PROOF.—Under Kirby's Digest, § 3108, authorizing a writing purporting to have been executed by a party and referred to and filed with a pleading, to be read as genuine against such party unless he denies its genuineness by affidavit before trial, a note sued on and filed with the complaint, in the absence of such affidavit, may be introduced without formal proof of execution; the burden being on the defendant to prove that it is not genuine.

3. BILLS AND NOTES — GENUINENESS OF SIGNATURE — QUESTION FOR JURY.—Where the statutory presumption of genuineness of defendant's signature to the note sued on is aided by the introduction of a mortgage executed by defendant for the purpose of comparison of signatures, the genuineness of defendant's signature is for the jury, though defendant and two other witnesses testified the signature to the note was not defendant's.

Appeal from Benton Circuit Court; *W. A. Dickson*, Judge; affirmed.

W. N. Ivie, for appellant.

1. This is the second appeal in this case. 136 Ark. 332; 206 S. W. 678. The law was settled on the first appeal and the pleadings and issues are the same. The evidence here does not support the verdict. 46 Ark. 141; 2 *Id.* 360; 5 *Id.* 407; 6 *Id.* 86; 26 *Id.* 309; 70 *Id.* 385; 34 *Id.* 632; 16 Cyc. 1073; 118 Ark. 349. The mortgage introduced was clearly inadmissible in evidence. 32 Ark. 337, 16 Cyc. 1087. There is no evidence, not a scintilla, that appellant's deceased husband was acting or authorized to act as her agent in borrowing the money or that she had any knowledge or consented to such agency. 44 Ark. 213; 85 *Id.* 252; 92 *Id.* 315; 93 *Id.* 600.

The facts of this case are different from those on the first appeal. 125 Ark. 408. It was not the wife's intention to charge her separate estate. 48 Ark. 220; 66 *Id.* 113; 81 *Id.* 113; 106 *Id.* 418. The burden was on plaintiff. 103 *Id.* 246.

2. The testimony of appellee as to what appellant told him was hearsay and inadmissible. 86 Ark. 448; 76 *Id.* 435.

3. The verdict here is the result of a palpable mistake or of prejudice. 33 Ark. 751. The court here misconceived the court's opinion in the first appeal and committed prejudicial errors in the admission of testimony and its instructions to the jury.

Rice & Rice, for appellee.

No proper exceptions or objections were saved to the testimony adduced. There are no errors in the instructions. 70 Ark. 9; 136 *Id.* 338.

WOOD, J. This action was brought by the appellee against the appellant. The action was grounded on a promissory note dated June 23, 1913, purporting to have been executed by E. R. Hughes and appellant, Pearl Hughes, to the appellee for the sum of $500.

In defense of the action appellant set up *non est factum* and coverture.

This is the second appeal in this case. *Gardner* v. *Hughes,* 136 Ark. 332.

The issues here are the same as they were on the former appeal. Therefore, unless there has been some substantial change in the facts, what was declared as the law on the former appeal must control now under the familiar doctrine of the law of the case. *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475; *Morgan Engineering Co.* v. *Cache River Drainage Dist.,* 122 Ark. 491; *Carter* v. *Younger,* 123 Ark. 266; *U. S. Annuity & Life Ins. Co.* v. *Peak,* 129 Ark. 50.

On the former appeal the court directed a verdict in favor of Pearl Hughes. On the issue of *non est factum,* under the facts developed in the former appeal, we said: "If the undisputed evidence showed that appellee did not sign the note, it was proper for the court to sustain her pleading of *non est factum* by directed verdict. Under the state of pleadings the note itself is introduced, and her signature is *prima facie* genuine. Her subsequent denial thereof raised a question of disputed facts, which could only be determined by the jury."

Mrs. Hughes testified on the former trial as she did at the last trial that she did not sign the note. On the former appeal we held that her testimony did not overcome the *prima facie* genuineness of the note under the state of the pleadings and that it was still a question for the jury as to whether the note was genuine.

On this issue, if there were no other testimony in the present record than that of Mrs. Hughes, this court under the rule of the law of the case would be bound by its former announcement, even though such announcemen were erroneous.

On the last trial Mrs. Gould, the mother of Mrs. Hughes, testified that she was familiar with the latter's handwriting and that the signature on the note in controversy wasn't that of Mrs. Hughes. E. G. Sharp, cashier of the Farmers State Bank in Rogers, testified that he had in his possession checks signed by Mrs. Hughes

and knew her signature and that he did not believe that the signature on the note was that of Mrs. Hughes.

Section 3108 of Kirby's Digest provides: "Where the writing purported to have been executed by one of the parties is referred to in, and filed with, a pleading, it may be read as genuine against such party unless he denies its genuineness by affidavit before the trial is begun."

This is a rule for the production of evidence which relieves the plaintiff, who sues on a writing purporting to have been executed by the defendant, of the burden of proving the genuineness of the writing before its introduction as evidence where the defendant by affidavit has not denied the genuineness of the writing before the trial is begun. But in the absence of this statute the plaintiff would have the burden of showing the genuineness of the writing before he could introduce the same in evidence. The purpose of the statute, however, was only to permit the reading or introduction of the writing without formal proof of its execution and to make it *prima facie* genuine. Where the defendant has not complied with this statute the plaintiff may introduce and read the writing on which his action is founded, and under the statute the presumption is that it is genuine. The burden is then cast upon the defendant, if he would defeat the action, to prove that the writing is not genuine.

In other words, a failure upon the part of the defendant to comply with the statute raises the inference or presumption of law that the writing on which he is sued and purporting to be signed by him is genuine, and, having failed to file the affidavit provided by the statute, the burden is cast on him to show that it is not genuine.

The rule applicable to such presumptions is announced in 16 Cyc. 1073, as follows:

"A presumption of law is a rule of law announcing a definite probative weight attached by jurisprudence to a proposition of logic. It is an assumption made by the

law that a strong inference of fact is *prima facie* correct, and will, therefore, sustain the burden of evidence, until conflicting facts on the point are shown. When such evidence is introduced, the assumption of law is *functus officio* and drops out of sight. The inference of fact which has been assumed to be correct continues to have its logical weight in the case."

Learned counsel for appellant contends that, under the above rule, the presumption that the note is genuine has been overcome by the testimony of appellant and her two corroborating witnesses, that the signature is not appellant's. But we are not called to determine whether the testimony thus produced by appellant is sufficient to overcome the *prima facie* genuineness of the note raised by the failure of appellant to comply with the statute, for the reason that appellee did not rest upon the statutory presumption. Appellee introduced in evidence a mortgage which purported to be signed by appellant and duly acknowledged by her. This mortgage was recorded. Counsel for appellant objected to the introduction of the mortgage on the ground that it was not the basis of the suit and had not been filed with any pleading in the case and was therefore not a paper that could be used in evidence for the purpose of comparing the signature thereon with the signature on the note to prove the genuineness of the latter. The court overruled the objection and permitted the appellee to introduce the mortgage.

Counsel for appellant says in his brief that the signing and execution of the mortgage was denied under oath, and that this mortgage was clearly inadmissible under the doctrine announced by this court in *Miller* v. *Jones*, 32 Ark. 337, where we held (quoting syllabus): "Proof of handwriting may be made by comparison, by the jury, of the writing to be proved with other writings, admitted to be genuine, already in the case; but a comparison with writings not already in the case is not admissible."

Now, when the mortgage was offered and introduced in evidence, appellant did not object to its introduction

on the ground that it was not signed by her, but only on the ground that "it is not sued on in this case, and is not a paper belonging to or filed with any pleading in the suit." Besides, as we construe the record, abstracted by appellant, the execution of the mortgage by appellant was not disputed when appellee was seeking to prove that the signature to the note was made by the same person who signed the mortgage.

The record shows the following on the redirect examination of witness Sharp by the appellee:

"Q. Now, I will ask you to take these two signatures and this signature to the mortgage introduced. The signature of Pearl Hughes to the mortgage and the signature on that note, and tell the jury whether they are the same.

"*Counsel for the defendant, W. N. Ivie:* I object to that. In the first place, there is no contest or dispute about these two signatures.

"*The Court:* You admit that they are by the same party?

"*Counsel for defendant, W. N. Ivie:* We do not admit that they are the same party, but we deny signing either note or mortgage. It is not disputed.

"*The Court:* If you do not dispute it, there is no use of going into it.

"*Counsel for defendant, W. N. Ivie:* We do not dispute it.

"*Counsel for plaintiff, C. M. Rice:* Let the record show, then, that there is no dispute.

"*The Court:* All right."

The above examination concluded the testimony on behalf of the appellee. The appellee testified, at the time the mortgage was introduced, that they (E. R. and Pearl Hughes) executed and delivered to him the mortgage to secure the note, and appellee's counsel then announced that the purpose of introducing the mortgage was to compare the signatures. Therefore, the manifest purpose of the above examination of witness Sharp was to show, by comparison of the signature to the note which

was in dispute, with the signature to the mortgage, the execution of which by appellant had been proved and was not in dispute, that appellant had signed the note as well as the mortgage. The court evidently so understood it, and obviously counsel for appellant so understood it. If counsel wished to object to the mortgage on the ground that appellant had not signed same, then was the time for him to speak and let the court know that he made this additional objection to the mortgage as evidence. True, the appellant testified that she "signed neither one of them." But even at that time appellant did not ask to have the mortgage excluded, on the ground that it had not been signed by her.

We conclude, therefore, that the court did not err in admitting the mortgage in evidence for the purpose indicated. This mortgage and the admission of appellant's counsel in open court in connection therewith, to the effect that there was no dispute that the signature to the note was by the same party who signed the mortgage, were most cogent facts before the jury on the last trial that they did not have before them on the first.

In the case of *Miller* v. *Jones, supra,* papers that were not in evidence and that had been excluded were handed to the jury for the comparison of signatures on papers that were in evidence in the case, and we held that "it was error to allow the papers not in the case to be handed to the jury for a comparison with those read in evidence." That case has no application for the reason that here the mortgage was read in evidence and was a paper in the case.

Concerning the issue of coverture on the former appeal we said: "There is substantial proof in the case tending to show that the money was loaned to appellee on the statement that it was to be used for the purpose of going East to look after her separate property. If her signature was genuine, a question for the jury to determine, then the proof tended to show that appellee armed her husband with a negotiable instrument to raise money for her personal benefit, and she would be bound by the

statement of her agent thus authorized to raise money for her, to the effect that money was wanted for her personal benefit. Appellee's denial that the money was borrowed for her personal benefit or that of her separate property raised a question of fact for the jury to determine."

On the issue of coverture the facts developed at the last trial are substantially the same as they were in the first trial. In all essential particulars there is no material difference. Hence what was said on this issue on the former appeal is controlling. *Hartford Fire Ins. Co.* v. *Enoch, supra; Ins. Co.* v. *Peak, supra.*

The court did not err in refusing to take the issues of *non est factum* and coverture from the jury. These issues were submitted under correct instructions.

Appellant, as one of the grounds of her motion for new trial, challenges the integrity of the verdict on account of alleged misconduct of one of the jurors as set forth in an affidavit attached to the motion. It could serve no useful purpose to set out and comment upon the contents of the affidavit. It suffices to say that we have considered the same and find that the trial court did not err in refusing to set aside the verdict because of alleged misconduct of one of the jurors.

There is no reversible error. The judgment is, therefore, affirmed.

HARDEMAN *v.* ARTHURS.

Opinion delivered May 31, 1920.

1. LANDLORD AND TENANT—SHARE-CROPPER NOT A TENANT.—A contract whereby a land owner was to furnish the tools, teams, seed, and land and to direct the mode of cultivation and harvesting, without giving to the other party exclusive dominion of the land or of the crops to be planted thereon, creates the relation of employer and employee, and not of landlord and tenant.
2. LANDLORD AND SHARE-CROPPER—TITLE TO CROP.—Under a contract between a land owner and share-cropper, the title to the crop is in the land owner, and one who purchases the crop from the share-cropper is liable to the land owner therefor as for conversion.

Appeal from Woodruff Circuit Court, Southern District; *J. M. Jackson,* Judge; reversed.

Jonas F. Dyson, for appellant.

The court erred in directing a verdict for appellee. There was a case made for a jury under proper instructions, and the judgment should be reversed for a new trial before a jury under proper instructions.

Roy D. Campbell, for appellee.

1. The appeal should be dismissed for failure to comply with rule 9 by appellant, as he has not made a proper abstract.

2. Wilsons made a tender of the amount due appellant, which was refused. No proper exceptions were saved to the instructions. The contract here established the relation of landlord and tenant, and appellee Arthurs could not be sued by appellant in a court of law for converting his property. 48 Ark. 265 is not in point. 46 *Id.* 254. The remedy was in equity. 36 Ark. 575; 44 *Id.* 108; 48 *Id.* 355; 72 *Id.* 132. See, also, 132 Ark. 594. Appellant has mistaken his remedy.

WOOD, J. L. P. Hardeman, as party of the first part, entered into a contract with William and Grover Wilson, the parties of the second part, whereby the party of the first part was to furnish the tools, teams, seed, and the land as his part and the parties of the second part were to furnish all the labor necessary to cultivate the 40 acres of land "according to the rules of share cropping." If the parties of the second part failed to perform the necessary labor according to the instructions of the first party or his foreman, the first party could have the same done at the current wages of the country, after giving the second party notice, and charge the amount to the second party to be paid out of their half of the crop.

Such were the essential provisions of the contract under which the Wilsons cultivated the land of Hardeman for the year 1917. In December, 1917, the Wilsons

sold to W. A. Arthurs a bale of cotton, produced by them on the farm of Hardeman under the above contract.

Hardeman, hereafter for convenience called appellant, brought this action against Arthurs, hereafter called appellee, to recover the sum of $129, which appellant alleged was the value of the bale of cotton belonging to appellant that appellee had purchased of the Wilsons.

The appellant alleged that appellee knew at the time he purchased the bale of cotton from the Wilsons that the same was raised by the Wilsons on appellant's land under a share-cropper's contract.

The appellee answered denying the allegations of the appellant's complaint and alleged that any cotton purchased by him from the Wilsons was purchased in good faith without any knowledge of any interest or title of the appellant in the cotton. He alleged that the Wilsons were necessary parties and moved that they be made parties defendant, which was done.

The Wilsons answered admitting that they made a crop on the land of appellant in the year 1917; that appellant had furnished them certain supplies for that year, but alleged that they had performed work for the appellant and that upon an accounting with appellant, including the bale of cotton sold by them to the appellee, they would be due the appellant the sum of $32.50, which they tendered in open court. They further alleged that appellee purchased the bale of cotton from them in good faith without any knowledge or notice of appellant's claim on the cotton.

Appellant replied to the answer of the Wilsons and set up that they were indebted to him in the sum of $87.70, for which he asked judgment.

The appellant testified that the Wilsons worked a share crop with him.

The testimony of the Wilsons in substance was to the effect that they made the contract to make a crop on appellant's place in the year of 1917; that appellant was to furnish everything and get one-half. They made five bales of cotton and divided it all with appellant ex-

cept the last bale, which was sold by them to the appellee for $116.44.

Appellee testified that he bought the bale of cotton from the Wilsons; that he had no notice that appellant had any interest in the cotton. He had bought two bales from them previously. Appellee knew that the cotton came from the appellant's place, but did not know anything about the contract of appellant and the Wilsons.

On cross-examination, the appellee was asked: "Q. At the time they sold the cotton to you, didn't they go into the facts of the case and tell you that they had been dividing this cotton with Hardeman, out there?" A. "Well, I don't know; I don't remember if they did."

Appellant testified that the Wilsons raised five bales of cotton including the bale in controversy under the share crop contract, which he made an exhibit to his complaint. The court instructed the jury to return a verdict in favor of the appellee, to which ruling the appellant excepted.

The appellant prayed for the following instruction: "You are instructed that the title to the crop raised by one working on the shares is in the landlord, and one who purchases same or any part thereof is responsible to the landlord for the conversion thereof."

The court refused this prayer, to which ruling the appellant duly excepted.

A judgment was entered dismissing the appellant's complaint as to the appellee, Arthurs, from which is this appeal.

The court erred in instructing the jury to return a verdict in favor of the appellee. The contract, as we construe it, clearly creates the relation of employer and employee, rather than that of landlord and tenant. There is no language in the contract indicating that the share of the crop which appellant was to receive was for the use or rent of the land or that the possession of the land was surrendered by the appellant to the Wilsons for the year 1917. There is nothing to show that the Wilsons had either exclusive dominion of the land during that period or of the crops to be planted thereon, giving them

the right to pursue their own methods in the cultivation thereof and the right to gather and hold the same as their own, until the division was made between them and the appellant. On the contrary, the language of the contract shows that appellant had the right to direct the Wilsons as to how they should perform the labor necessary for the cultivation and harvesting of the crop. In *Tinsley* v. *Craige,* 54 Ark. 346-9, we said:

"Ordinarily when the parties occupy the relation of landlord and tenant, the title to the crop is in the tenant, and he pays the landlord rent in kind or otherwise; and in general where they occupy the relation of landlord and cropper on shares, the title to the crop is in the landlord, and he delivers a part of it to the cropper in payment of his services."

The relation is determined by the terms of the contract which in this case plainly shows that the relation, as before stated, is that of employer and employee, rather than landlord and tenant. See also *Hammock* v. *Creekmore,* 48 Ark. 264; *Neal* v. *Brandon,* 70 Ark. 79-82; *St. L., I. M. & S. Ry. Co.* v. *Hardie,* 87 Ark. 475-83; *Valentine* v. *Edwards,* 112 Ark. 35-46.

For the error indicated the judgment is reversed with directions to grant appellant a new trial as to appellee Arthurs.

RUNDELL *v.* ROGERS.

Opinion delivered May 31, 1920.

1. LANDLORD AND TENANT—LIABILITY FOR REPAIRS.—Unless a landlord agrees with his tenant to repair leased premises, he can not, in the absence of a statute, be compelled to do so.
2. CUSTOMS AND USAGES—LOCAL CUSTOM NOT PROVABLE WHEN.—A local custom can not be shown to render a landlord liable for failure to make repairs in contravention of the rule that he is not required to do so in the absence of agreement or statute.
3. CUSTOMS AND USAGES—SUFFICIENCY OF EVIDENCE.—A local custom can not be established by testimony which fails to show that it is of such long standing as to be generally known.

Appeal from Saline Circuit Court; *M. H. Holleman,* Special Judge; reversed.

The appellant, *pro se.*

1. It was not the duty of the landlord to keep the fence in repair, as there was no agreement to do so. 16 R. C. L. 1030, § 552; 33 L. R. A. 449 and notes; 72 Ark. 405; 63 *Id.* 430; 18 A. & E. Enc. L., vol. 4215 and 246, § 2; 16 R. C. L. 1033, § 553.

2. There was error in admitting testimony as to "custom" relative to upkeep and repairs. 18 A. & E. Enc. 217; 210 S. W. 626; L. R. A. 1917 F. 997; 33 L. R. A. 451, notes; 65 N. W. 913. Custom was not pleaded. 1 L. R. A. 1497. Parol testimony as to custom fell short of showing that such a custom was in general use or of long-standing or generally known to both parties. 17 C. J. 518, notes 8 (a) and 10 (a), and page 523, note 62 (b); 108 Ark., *Ry.* v. *Wirtel; Ward Fur. Co.* v. *Isbell,* 81 *Id.* Had the duty been upon appellant by contract or custom to keep the premises in repair, the proof fails to show any effort by appellee to minimize his loss or damage. 203 S. W. 836; 16 R. C. L. 559, § 29; 16 *Id.* 1057, § 587. Appellant was not liable in damages for repairs without an agreement to do so, even if appellant retained part of the premises, and there is no proof of this kind. 10 L. R. A. 147; 60 *Id.* 585. The tenant knew the condition of the lands and enclosures and it was satisfactory to him when he rented. He made no complaint, and can not complain now, of the conditions. 16 R. C. L. 1030, § 552; 33 L. R. A. 449 and note.

J. S. Utley, for appellee.

1. It is not necessary to plead custom. 85 Ark. 568. It was proved to be generally known and of long standing, and parties are presumed to have contracted with reference to it as a part of the contract. 46 Ark. 222; 113 *Id.* 325.

2. This court will not disturb the verdict when the evidence is conflicting and the legal evidence tends to

sustain it. 117 Ark. 71; *Ib.* 223; 108 *Id.* 578; 87 *Id.* 109. The instructions correctly state the law.

WOOD, J. This action was brought by the appellee against the appellant. The appellee alleged that he rented about five acres of land from the appellant which was to be cultivated in corn during the year 1918; that appellee was to pay one-third of what was produced to the appellant; that appellant with the permission of appellee gathered his share of the corn; that in doing so he gathered more than one-third; that the appellant negligently failed to keep the fence in good repair around the land and thereby negligently permitted hogs to get in the field and to eat and destroy all the corn that appellant left; that on account of the negligence of the appellant, as set forth, the appellee lost thirty bushels of corn, worth $1.75 per bushel. The appellant denied the allegations of the complaint.

The appellee testified to the renting of the land as set forth in the complaint and that he planted the same in corn; that after the crop was laid by he went away and was gone until late in the summer; that on his return he found that appellant's hogs had been getting in the corn; that the inclosure around appellant's pasture, which was within the same general inclosure as the cornfield, was not hog proof; that he saw appellant's hogs in the pasture and saw hog tracks where they had been passing through an opening under a culvert between appellee's cornfield and appellant's pasture; that appellee gave appellant permission to gather his share of the corn; that later when appellee came home he found that all the corn was gone.

Over appellant's objection appellee and other witnesses were permitted to testify that the custom in that locality was for the owner to keep up the fence around a farm when it was rented. To this ruling of the court the appellant duly excepted.

According to the undisputed evidence there was no agreement on the part of the appellant to make repairs of any kind.

From a judgment in favor of the appellee is this appeal.

"Unless a landlord agrees with his tenant to repair leased premises, he can not, in the absence of a statute, be compelled to do so," is a rule of law well established in this State and elsewhere. *Delaney* v. *Jackson,* 95 Ark. 131; *Jones* v. *Felker,* 72 Ark. 405; *Brown* v. *Dwight Mfg. Co.,* L. R. A. 1917 F, 997; 16 R. C. L. 1030, sec. 552, n. 18; 18 Am. & Eng. Enc. of Law 215, 4a.

A local custom can not be shown in order to render the landlord liable for failure to make repairs in contravention of the above well esta ished rule. 18 Am. & Eng. Enc. of Law 217.

"The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended." 7 Wallace 423. Moreover, if it were competent to prove a local custom, the testimony adduced by the appellee in this case was not sufficient to show that the custom was of such long standing as to be generally known. *St. L., I. M. & S. Ry. Co.* v. *Wirbel,* 108 Ark. 437; *Ward Furn. Mfg. Co.* v. *Isbell,* 81 Ark. 549.

The testimony concerning the local custom was, therefore, incompetent and the court erred in admitting it. The error is prejudicial to appellant. The judgment is, therefore, reversed and the cause will be remanded for new trial.

RUDOLPH v. KELLY.

Opinion delivered May 31, 1920.

1. SALES—EVIDENCE NOT GERMANE TO ISSUE.—Where the issue in an action of replevin to recover a Ford touring car was whether plaintiff had sold the car to defendant for a tract of land, testimony as to the value of the land, and as to the consideration originally paid for such land, was properly excluded as not germane to the issue.
2. PLEADING—INCONSISTENT CLAIMS.—In an action to recover an automobile alleged to have been exchanged for land, plaintiff will not be heard to contend on the one hand that he did not sell the car, but, on the other hand, if he did sell the car defendant made false representations.

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

McMillan & McMillan, for appellant.

1. Even though plaintiff did agree to trade the car for the land, he rescinded the sale, and had a right to rescind for fraudulent misrepresentations as to the value of the land that were material and that he acted upon them and was injured. Defendant knew his representations were false and fraudulent. 123 Ark. 492; 52 *Id.* 30.

2. Defendant obtained the land under false pretenses. Plaintiff had the right to rescind for the fraud perpetrated on him, and the court erred in excluding the testimony offered and in its instructions to the jury.

W. H. Mizell and *D. D. Glover,* for appellee.

The only question here is, was there a trade made by Kelley and Rudolph? This was a question of fact, which was submitted to a jury under proper instructions, and there was no error in admitting or excluding evidence. The verdict is final and conclusive. The cases cited by appellant are not in point.

WOOD, J. This action was brought by the appellant against the appellee to recover the possession of a Ford touring car.

The appellant alleged that he was the owner and entitled to the immediate possession of the car; that it was worth $500; that the appellee upon demand of appellant refused to surrender the same.

The appellee denied the allegations of the complaint and alleged that he had been damaged by the wrongful bringing of the suit in the sum of $500, for which he asked judgment.

The facts, which the testimony on behalf of the appellee tended to show, are substantially as follows: Appellant was a dealer in automobiles. The appellee owned a Chevrolet car and proposed to the appellant to trade him the same for a Ford. This the appellant re-

fused. The appellee gave his Chevrolet and the sum of $50 to Charley Allen for a 40-acre tract of land near Arkadelphia, Arkansas. While the appellee was negotiating for this land, the appellant told him that if he could make the deal with Allen for the land appellant would give the appellee the Ford car for the land. After the appellee had bought the land, he and his wife made the deed to the appellant. While appellee was negotiating for the land, the appellant told appellee that he was going away, and that appellee could make the deed and deliver it to appellant's agent, Thompson, who was authorized to receive it. The appellee delivered the deed to appellant's agent, who delivered to appellee the Ford car.

The facts, which the testimony on behalf of the appellant tended to show, are substantially as follows: When appellee proposed to trade appellant 40 acres of land for appellant's Ford car, appellant told appellee that he might make the trade if the land was all right. Appellee said it was a 40-acre tract of good land; that the timber had never been cut over, and he thought it was worth $400. Appellant let appellee have the car in controversy for the purpose of delivering appellee's Chevrolet, which appellee had traded for the land. Appellee never brought the car back. Appellant was to get a note secured by the land and a Ford car. Appellant had never seen the land at the time he agreed to take same in trade for the car. The appellant did not trade the car for the land. Appellee did not make the deed to the appellant before he, appellee, took possession of the car. Appellee had the car in his possession which appellant had loaned him, and when appellant got back from Hot Springs he found that appellee had left the deed with appellant's agent, Thompson. Appellant denied that he had instructed his agent, Thompson, to deliver the car and accept the deed in his absence.

Appellant testified that the car in controversy was taken in on trade for a Dodge car from one Brewer, the understanding being that he, appellant, or Brewer, had

the right to dispose of it for $500, the amount of the balance Brewer owed on the Dodge car. The effect of appellant's testimony was that he did not own the car in controversy at the time he loaned the same to the appellee; that it was only left with him by Brewer to secure appellant in the sum of $500, for the balance of the purchase money due him from Brewer for a Dodge car, which either he or Brewer had the right to sell; that appellant loaned the car in controversy to the appellee; that appellant was contemplating a trade of the car with the appellee for 40 acres of land provided the appellee obtained the land, but that the trade between the appellant and appellee had not been consummated at the time appellant left for Hot Springs. The trade between appellant and appellee, according to appellant's version, was that he was to sell appellee the car for $500 and take the appellee's note for same secured by the land and the car.

The appellant offered to prove by Charlie Adams the value of the land which appellant sold to the appellee. The court refused to admit this testimony, to which ruling the appellant excepted.

The appellant further offered to show by witness Allen that at the time he traded the land to the appellee for the Chevrolet car, appellee represented that he had the right to sell the Chevrolet; that at that time one Dr. Moore held a $75 ownership note against the car which appellee traded to Allen for the land.

The court refused to allow this testimony, to which ruling the appellant duly excepted.

The trial resulted in a verdict and judgment in favor of the appellee. From that judgment is this appeal.

The court did not err in its rulings. The offered testimony was not germane to the issue between the appellant and the appellee. The offered testimony related to issues that were entirely collateral. The clear cut issue between the appellant and the appellee, as set forth by the pleadings and the testimony of the parties respectively, is, whether or not the appellant had sold the auto-

mobile in controversy to the appellee for the tract of land conveyed by the appellee to appellant.

Appellant set up in his complaint that he was the owner and entitled to immediate possession of the automobile. He grounded his ownership and right to possession on the following testimony: "The trade was, I was to get a note secured by the land and the Ford car. I loaned him the car to go make the trade with Mr. Allen and deliver the Chevrolet to Mr. Allen." In his rebuttal testimony, the appellant again stated, "The trade is like I stated it was in my original statement. I did not trade the car for the piece of land."

On the other hand, appellee denied that the appellant was the owner of the car and testified in part: "I traded my land for the car. I got the land from Charlie Allen. Traded Allen a Chevrolet car and Allen made me a deed to the land; it was a fractional forty, but the same land traded to me by Allen was traded to Rudolph. We made an even trade. The land for the car."

The appellant will not be heard to say in one breath, "I did not sell the car," and in the next breath, "But if I did sell it the appellee made false representations which caused me to do so, and the appellee consequently had no title to the land which he gave me in consideration for the automobile." A party will not be allowed in this manner to play fast and loose in a lawsuit. The positions which appellant thus asks the court to allow him to assume in this litigation were wholly inconsistent with each other. Furthermore, even if the appellant had set up that there was a sale of the automobile and that the consideration therefor had failed on account of the deceit and fraud of the appellee, there is no testimony whatever in the record to sustain such contention. There is no testimony to prove that if the sale was made, which was asserted by the appellee and denied by the appellant, the consideration failed because the appellee had no title to the land. On the contrary, the undisputed evidence shows that his title to the land was complete.

The issue and the only issue between the appellant and the appellee was submitted to the jury under correct instructions. There was evidence to sustain the verdict.

Affirmed.

SPIVEY v. TAYLOR.

Opinion delivered May 31, 1920.

1. JUDGMENT — CONTROL AFTER LAPSE OF TERM.—Courts of record lose control over their judgments after the lapse of the term, and, in the absence of a statute conferring such power, can not at a subsequent term alter or vacate them.
2. COURTS—COUNTY COURT—REVIEW OF PROCEEDINGS.—Where the county court, on objections to the report of the county treasurer, continued the cause until another day of the same term for further testimony but failed to set aside a judgment confirming the treasurer's accounts, and the term lapsed without the petition having been heard, it was error for the circuit court to dismiss an appeal by the objectors; the judgment of the county court having become final at the close of the term.

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

STATEMENT OF FACTS.

The report of George P. Taylor, as county treasurer, was approved by the county court, and at the same term W. A. Spivey and others, as school directors of a common school district in St. Francis County, filed objections to his report on the ground that it failed to show an amount of money which he had received belonging to said school district.

The treasurer filed a reply, denying the allegations of the petition. The court continued the cause until another day of the same term for further testimony. The term lapsed without the petition having been heard and without the order confirming the treasurer's settlement having been set aside. Spivey and the other school directors filed an affidavit for appeal to the circuit court within six months as prescribed by the statute. The county treasurer made a motion in the circuit court to dismiss

the appeal, which motion was by the court granted. From the judgment rendered in the circuit court Spivey and the other directors have duly prosecuted an appeal to this court.

J. Walker Morrow and *Henry G. Gatling,* for appellants.

1. The original order became final on the lapse of the term of court and no appeal was taken to the circuit court. 36 Ark. 513. The court could not vacate the order after the term lapsed. 14 Ark. 25; 6 *Id.* 282. See, also, 2 Ark. 66; 5 *Id.* 23; 6 *Id.* 92; 14 *Id.* 573; 23 *Id.* 603; 22 *Id.* 176; 39 *Id.* 485.

2. The county court granted the appeal and the transcript was filed in time as per *nunc pro tunc* entry. The judgment need not be entered of record before the appeal is taken. 69 Ark. 51; 108 *Id.* 526.

3. Appellants are authorized to prosecute the appeal. They are citizens of St. Francis County, school directors and tax payers. 90 Ark. 219; Kirby's Digest, §§ 1487, 1493; 95 Ark. 385; 185 S. W. 455; 114 Ark. 299; 185 S. W. 282. The circuit court erred in dismissing the appeal and judgment should be entered against appellee. 116 Ark. 420; 195 Ark. 116; 88 *Id.* 592; 111 *Id.* 337; 113 *Id.* 31. The undisputed evidence is that appellee received $3,000 public school funds and has not accounted for same. 172 S. W. 880.

Mann, Bussey & Mann, for appellee.

The court did not err in granting the motion of appellee to dismiss. Kirby's Digest, §§ 7174-5; 100 Ark. 571; 116 *Id.* 365; Kirby's Digest, § 1162.

HART, J. (after stating the facts). The court erred in dismissing the appeal. The county court allowed Spivey and the other directors of the common school district to file objections to the report of the county treasurer on the ground that he had failed to account in his report for certain money belonging to the school district. This was done at the same term at which the report had

been filed and approved. Without opening the judgment confirming the report, the court continued the cause to a subsequent day of the same term for further testimony. The term lapsed without any further action having been taken by the county court. Spivey and the other school directors filed an affidavit for appeal to the circuit court within the time prescribed by the statute. The circuit court should have heard and determined their appeal.

In *Brandenburg* v. *State*, 24 Ark. 50, the court held that the county court acts judicially in adjusting the accounts of an internal improvement commissioner, and has no power to set aside its judgment after the lapse of the term. In *Desha County* v. *Newman*, 33 Ark. 788, it was held that as a general rule county courts, like circuit courts, have no power to set aside, vacate, or modify their judgment after the close of the term at which they are rendered, unless provision is made therefor by statute. The general rule is that courts of record lose control over their judgments after the lapse of the term, and in the absence of a statute conferring such power can not at a subsequent term alter or vacate them. *Malpas* v. *Lowenstein*, 46 Ark. 552; *Brady* v. *Hamlett*, 33 Ark. 105; *Kersh* v. *Lincoln County*, 36 Ark. 589; *Joyner* v. *Hall*, 36 Ark. 513; *Johnson* v. *Campbell*, 52 Ark. 316; *Terry* v. *Logue*, 97 Ark. 314, and *Corning* v. *Thompson*, 113 Ark. 237.

In the present case the county court did not set aside the judgment confirming the treasurer's accounts, and its judgment became final at the close of the term. Therefore Spivey and the other directors had the right to appeal from the judgment. If the court had desired to continue the cause until a subsequent term, without the judgment becoming final, the judgment should have been set aside so as to keep the cause within the control of the court. This view of the law was recognized in *Haley* v. *Thompson*, 116 Ark. 354. There the proceedings were had under section 7174 of Kirby's Digest, providing, in substance, that when 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 the date of such settlement to reconsider and adjust the same. The court held that relief under this statute did not prevent the taxpayer from being made a party to the settlement of the county officer having his settlement corrected upon appeal to the circuit court.

It follows that the court erred in dismissing the appeal of Spivey and the other school directors, and for that error the judgment must be reversed and the cause remanded for further proceedings according to law.

LIGHTLE v. SCHMIDT.

Opinion delivered May 31, 1920.

1. LIS PENDENS—NOTICE OF PENDING SUIT.—A suit for the specific performance of a contract for the sale of real estate is within the rule as to *lis pendens*, and one who acquires an interest in the property pending the suit from a party thereto is bound by the result of the suit.
2. SAME—WHEN ENFORCED AGAINST THIRD PERSON.—Where a suit for specific performance was instituted by a purchaser of land before the vendor had conveyed it to a third person pursuant to a prior parol contract of sale, and before the third person had taken possession or paid any part of the purchase money, such third person was bound by the *lis pendens* notice of such suit.

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

STATEMENT OF FACTS.

On the 19th day of May, 1919, J. E. Lightle brought suit in equity against Sidney W. Schmidt to enforce the specific performance of a written contract for the sale of a tract of land in White County, Arkansas, and a *lis pendens* notice was filed under the provisions of section 5149 of Kirby's Digest.

J. S. Booth filed an intervention and claimed to be an innocent purchaser for value of the land in controversy.

It appears from the record that the duly authorized agent of Sidney W. Schmidt entered into a written contract with J. E. Lightle to convey to him the land in controversy, and, it being conceded that the contract was binding upon Schmidt, it is not necessary to set it out in the statement of the facts.

Another agent of Schmidt entered into a verbal contract with J. S. Booth for the sale of the land in controversy to him. A deed was forwarded to Schmidt for execution and was received and executed by Schmidt on May 17, 1919. Schmidt, after executing the deed, held it for a few days to see if his other agent would not get a greater price for the land. Schmidt was notified by telegram that J. E. Lightle, on the 19th day of May, 1919, had filed a suit for specific performance of the contract for the sale of the land made with him. The parol contract between the agent of Schmidt and J. S. Booth for the sale of the land in controversy was made on May 15, 1919. Under its terms the cashier of a bank was directed to pay the purchase money when the deed and abstract of title was delivered to it. Booth did not enter into possession of the land and was notified of the suit by Lightle for a specific performance before the deed was delivered to the bank.

The complaint of the plaintiff was dismissed for want of equity, and the case is here on appeal.

Brundidge & Neelly, for appellant.

1. The deed was never delivered until after the suit and *lis pendens* notice were filed. The writing executed by Schmidt's agent to Lightle is binding; the verbal contract was void under the statute of frauds. It was the duty of the purchaser to go to the recorder's office and ascertain if notice of *lis pendens* was filed; if he did not, he acts at his own peril. 118 Ark. 144; Kirby's Digest, § 5149.

2. When did the title pass from Schmidt to Booth? No title passes until delivery of the deed (8 R. C. L. 973), even though the intent to deliver is clear. 98 Ark.

471; 113 *Id.* 294. Under our decisions there was no delivery of the deed and no title passed from Schmidt until after the filing of the *lis pendens,* and Booth is bound by the notice. This case falls squarely within the *lis pendens* rule.

Miller & Yingling and *Eugene Cypert,* for appellees.

The *lis pendens* notice was not sufficient to put appellee Booth on notice of the filing of this suit before he acquired any interest in the land. The *lis pendens* rule is not favored by the courts but only adopted from necessity. 2 Devlin on Real Estate (3 ed.), p. 1444, § 791. The authorities cited for appellant are not in point and do not apply, as the deed from Schmidt to Booth antedates the filing of the suit and *lis pendens* notice. The statute and rule are not retroactive. 132 Ark. 208; 97 Minn. 423; 7 Anno. Cases 109. Schmidt, after his acceptance of Booth's offer to purchase by his execution of the deed tendered by Booth, became only a trustee, holding the title for Booth until the deed could be delivered by the means used. 105 Ky. 63. The judgment is right.

HART, J. (after stating the facts). It is conceded that the contract between Lightle and Schmidt was one that the former might enforce in a suit for specific performance if Booth was bound by the *lis pendens* notice filed when the suit was instituted. In *Marshall* v. *Whatley* (Ga.), 36 L. R. A. (N. S.) 552, it was held that a suit for the specific performance of a contract for the sale of real estate is within the rule as to *lis pendens,* and that one who acquires an interest in the property pending the suit from a party thereto, is bound by the result of the suit. Several decisions from courts of last resort of other States are cited in support of the rule. The doctrine of *lis pendens* is founded on public policy, and has been long adhered to as essential to the due administration of justice in order that an end may be put to litigation. *Bailey* v. *Ford,* 132 Ark. 208.

Counsel for Booth seek to uphold the decree, upon the principles announced in *Moulton* v. *Kolodzik* (Minn.),

7 Ann. Cases, p. 1090, and *Parks* v. *Smoot,* 105 Ky. 63, in which it is held that a person who enters into an executory contract for the purchase of land prior to the institution of a suit involving the title thereto acquires an interest in the land and may after such suit is brought pay the purchase money and receive a deed to the land unaffected by the rule of *lis pendens.* Those cases, however, have no application to the facts in the present case. In each of these cases the executory contract of sale was binding and enforceable in equity. It is true that in the latter case the contract of sale was a parol one, but the purchaser had entered into the possession of the land and was entitled to a specific performance of his contract. Here the suit by Lightle for specific performance was instituted before the deed to Booth was delivered and before Booth had paid any part of the purchase money. Neither had Booth entered into the possession of the land. Hence he was not entitled to a specific performance of his contract. Before the rights of parties completing a parol contract for the sale of lands pending litigation will be protected, it must appear that the interest under the executory agreement is capable of being enforced. *Rooney* v. *Michael* (Ala.), 4 So. Rep. 421. In order that the interest acquired by Booth may be effectual against the rule of *lis pendens,* his contract must be enforceable. *Gibler* v. *Trimble,* 14 Ohio 323, and *Clarkson* v. *Morgan,* 6 B. Monroe (Ky.) 441.

As we have already seen the contract with Booth was not obligatory on the parties and could not have been enforced. Therefore he was affected by the *lis pendens* notice in the suit for specific performance by Lightle against Schmidt.

It follows that the chancery court erred in dismissing the complaint of the plaintiff for want of equity. For that error the decree must be reversed and the cause remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

JOHNSON v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered May 31, 1920.

EVIDENCE—CONCLUSION OF WITNESS.—On petition by attorneys to enforce their statutory lien against a railroad company, testimony of the defendant relative to the contract between himself and the attorneys, that "it was understood," etc., *held* not inadmissible as a conclusion or opinion of the witness as to the intention of the parties, where the witness in explanation added, "That is what was said."

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

Allyn Smith, for appellants.

This is the second appeal in this case. 214 S. W. 17. The judgment on this appeal should also be reversed, because the testimony of the administrator shows that he testified to a conclusion and not to facts within his own personal knowledge. The whole of Wall's testimony was incompetent. 214 S. W. 23; 213 S. W. 4. Where a clause in a contract is ambiguous, to determine its true meaning and the intention of the parties, a witness can not state his conclusions, but the facts within his personal knowledge. 110 Ill. App. 23; 112 *Id.* 50; 78 Fed. (C. C. A.) 325; 105 Ark. 421; 151 S. W. 275; 179 *Id.* 1187, par. 3; 128 Fed. (C. C. A.) 672; 39 So. 883; 49 N. Y. 390; 177 Pac. 321; 55 Ill. 514. Where a written instrument is ambiguous, parol evidence is admissible to show the circumstances attending the transaction. 95 Pac. 154; 88 Miss. (6 Allen) 553. The parol evidence must be confined to the acts and language of the parties. 66 Am. Dec. 274. Facts must be stated, not conclusions. 24 Ark. 255; 67 Id. 371; 95 *Id.* 155; 125 S. W. 1036; 57 N. Y. 147; 133 Ill. 79; 16 N. H. 410; 112 Ind. 309. Opinions of witnesses are incompetent. 108 Iowa 500; 79 N. W. 285; 94 *Id.* 206; 49 Iowa 703; 91 Kan. 871-2; 89 N. E. 723. Prior negotiations were incompetent. 128 Fed. (C. C. A.) 672. Wall's testimony was incompetent. See, also, 66 Am.

Dec. 274; 26 Okla. 33; 73 U. S. 773. For the error in admitting this testimony and the weight given it by the court, the judgment should be reversed. Cases *supra.*

Troy Pace, for appellee.

1. The appellants have not fully abstracted the testimony, and the judgment should be affirmed under rule 9. 87 Ark. 202; *Savage* v. *Savage,* 143 Ark. 388.

2. The law of this case is settled in 214 S. W. 17-19. The facts are undisputed. The law holds a man responsible for ambiguities in his own expressions. 86 S. E. 911. No error was committed by the court in admitting testimony as to the understanding of the administrator as to the intention in the use of the ambiguous language. The rule is well settled that in the construction of contracts effect should be given to the intention of the parties at the time they entered into the contract. 238 U. S. 202. In ascertaining that intention the courts look to what the parties said. 17 Wall. 19. If the language is ambiguous it is to be interpreted in the sense that the promisor knew, or had reason to know, that the promisee understood it. 207 Fed. 682; 100 N. E. 1111; 80 Atl. 25; 73 N. Y. 505. Where the contract is ambiguous, it will be construed most strongly against the party employing the words concerning which the doubt arises. 12 Wall. 404; 107 N. E. 1066. The contract must be determined by what the parties said contemporaneously with the making thereof. 67 Ark. 542-550; 218 S. W. 831; 214 S. W. 17, 19-20. See, also, 26 N. E. 510; 85 Ill. 138; 39 Ind. 1; 76 S. E. 91. On the whole the judgment is right and there was no error.

HART, J. This is a petition to enforce an attorney's lien under the statute, by Jo Johnson and others against the Missouri Pacific Railroad Company. This is the second appeal in the case. The opinion on the former appeal is reported under the style of *Johnson* v. *Mo. Pac. Rd. Co.,* 139 Ark. 507.

On the former appeal the court held that where a written instrument contains a latent ambiguity, parol testimony of the facts and circumstances surrounding its execution may be given to clear away its uncertainty, such evidence being admissible, not for the purpose of adding to, nor substracting from the contract, but for the purpose of ascertaining what the parties meant by the words used. On the remand of the case, it was tried before the court sitting as a jury. The court found the issues in favor of the defendant, and the case is here on appeal.

Johnson testified for himself, but, inasmuch as the only question raised by the appeal is as to the competency of the testimony for the railroad company and its legal sufficiency to sustain the finding of the court, it will not be necessary to abstract the evidence adduced in favor of Johnson.

An engineer of the Mo. Pac. Rd. Co. was killed while operating a passenger train in the State of Arkansas, and his death resulted from the negligence of the company in leaving a boulder on the railroad track which derailed the engine. Johnson was an attorney at law, and was consulted by G. W. Wall, the decedent's administrator, about bringing a suit against the railroad company for damages. Johnson and the administrator talked about the case before they entered into a written contract for the employment of Johnson. Johnson brought a suit for damages, and, while it was pending, the administrator effected a compromise with the railroad company. He claimed that under the contract Johnson was not entitled to any fee for his services because the amount for which the claim was settled was less than $10,000, and that by the terms of the contract Johnson was not to receive any compensation unless a greater amount than $10,000 was recovered.

On the other hand, it was claimed by Johnson that the limitation of $10,000 was in case, he, Johnson, compromised the suit without the sanction of the administrator. Hence this lawsuit.

We copy from the testimony of G. W. Wall, the administrator, as shown by the record, the following:

"Q. Have you in your hand a copy of the contract that was executed by you?

"A. Yes, sir.

"Q. I notice in the contract, down beneath the printed part and before the signature, some writing in pen and ink; 'My part to be not less than $10,000,' and it is admitted that this was written by Mr. Johnson, and the further paragraph: 'And I have privilege of accepting the railroad company's 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," is in your handwriting?

"A. Yes, sir.

"Q. With reference to the first clause, 'My part to be not less than $10,000,' to whom does it refer?

"A. To the estate.

"Q. What was the agreement between you and Mr. Johnson and what was the intention in the use of that language?

"*By Mr. Johnson:* We object as irrelevant, immaterial, incompetent and calling for a conclusion of the witness.

"*By the Court:* It is a compound question. First he asks what was the agreement, and then what was the intention. I will overrule the objection and let him answer, but, in that connection will say this, that the opinion of the witness as to the intention will not be considered by the court as evidence in the case.

"*By Mr. Johnson:* Note our exceptions."

After some further questions with regard to the matter we also quote from the testimony of Wall the following:

"Q. What was said between you and Mr. Johnson, at the time, with reference to this $10,000 provision?

"*By Mr. Smith:* At the time of the signing of the contract?

"A. That was understood at the time—that the estate was to receive not less than $10,000 and no fee to go to the attorney on a recovery under $10,000.

"*By Mr. Smith:* I move to exclude the answer of the witness as not responsive.

"*By the Court:* I am of the opinion that the objection should be sustained 'that it was understood,' without stating how it was understood.

"A. That is what was said in regard to the $10,000."

Other portions of the testimony of Wall show that under the contract Johnson was not to have any compensation unless more than $10,000 was recovered and that it did not make any difference in this regard whether the compromise was effected by the administrator or by Johnson.

It is earnestly insisted by counsel for Johnson that the judgment should be again reversed because the testimony of the administrator shows that he was testifying to a conclusion and not to facts within his own personal knowledge. We can not agree with counsel. When that part of Wall's testimony which we have copied from the transcript in our statement of facts is carefully considered, it shows that Wall was testifying as to the facts and circumstances surrounding the execution of the instrument and as to matters of his own personal knowledge. It is true he first used the words, "that it was understood," at the time that the estate was to receive not less than $10,000 and that no fee was to go to the attorney on a recovery under $10,000.

The court sustained an objection to the language "that it was understood" because the witness did not state how it was understood. The witness immediately answered that that was what was said in regard to the $10,000. This indicated that the witness used the words, "that it was understood," as a colloquialism in the sense of that it was agreed. The language of the trial court, when objection was first made to the testimony of Wall,

as shown in our statement of facts, indicates that the court understood the law and did not intend to base its finding on any conclusion or opinion of the witness as to the intention of the parties in making the contract. Therefore, the court did not err in receiving the testimony of Wall.

The testimony for the railroad company was legally sufficient to support the finding of the court, and the judgment must be affirmed.

FAIRBAIRN *v.* POFAHL.

Opinion delivered May 31, 1920.

1. VENDOR AND PURCHASER—EFFECT OF BOND FOR TITLE.—Where a vendor sells land, takes the notes of the vendee for the purchase money, and executes to him a bond for title, the effect of the contract in equity is to create a mortgage in favor of the vendor upon the land to secure the purchase money, subject to all the essential incidents of a mortgage.
2. VENDOR AND PURCHASER—PROVISION FOR ACCELERATING PAYMENTS. —Where a series of notes were given in payment of a tract of land, and the contract of purchase stipulated that, upon default in payment of two of the notes, the vendor might declare the en- the sum due, the fact that this stipulation is not carried into the face of the notes does not invalidate it.
3. VENDOR AND PURCHASER—ACCELERATION OF PAYMENT—PROVISION FOR, NOT FORFEITURE.—Where a vendor sold land under a contract stipulating that upon default in payment of two of a series of notes the entire sum might be declared due, such provision is not invalid as being in the nature of a penalty or forfeiture.

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

Carmichael & Brooks, for appellant.

1. The contract in this case created a mortgage in equity. 85 Ark. 211; 66 *Id.* 170.

2. The precipitating or accelerating clause is binding on the parties and valid. 73 Ark. 415; 29 *Id.* 346; 66 *Id.* 367; 68 *Id.* 314; Elliott on Contracts, § 3517.

3. Plaintiff had the right, on account of the admitted default, to declare the whole amount due and have judgment for the total sale price and a foreclosure.

A. J. Newman, for appellees.

Appellant could not at her option declare the notes for the purchase price of the property due and foreclose for same upon a failure to pay two or more when due as provided in the contract of sale but *not so provided* in any or either of the notes. 73 Ark. 342; 84 *Id.* 435; 90 *Id.* 92. Chancery courts may relieve the purchaser of a forfeiture stipulated in the contract upon equitable grounds. 65 Ark. 527-530; 72 *Id.* 363-5; 19 Id. 23-6. Chancery abhors forfeitures. 59 Ark. 408; 77 *Id.* 168, 307. The decree is right, just and equitable.

SMITH, J. This case was tried in the court below upon the following agreed statement of facts:

On September 16, 1918, appellant entered into a contract to sell E. C. Smith a lot in the city of Little Rock for the sum of $1,200 of which $100 was in cash, and the balance of purchase money was evidenced by 110 notes for $10 each, the first note falling due October 16, 1918, and one note on the 16th day of each month thereafter, with interest at 8 per cent. The contract of sale provided that if a second default in payment was made all the notes then remaining unpaid should at once become due and payable. The contract also provided that Smith should insure the property for appellant's benefit and should keep the premiums paid. Smith failed to insure the property and made default for four consecutive months in the payment of his notes. Thereafter, for a valuable consideration, Smith assigned his contract to appellees J. H. and Mary Pofahl.

This suit was brought to enforce the contract, and at the time it was brought four notes were due and unpaid. After the suit had been brought and service had, an answer was filed by the Pofahls, in which they asked to be allowed to pay all money past due, and the court

fixed a time within which they might do so, together with court costs and an allowance for an attorney's fee. Within the time limited, the tender was made, and appellant's complaint dismissed, and this appeal is from that order.

Appellee states the issue to be decided as follows: "Can the appellant, at her option, declare the residue of the promissory notes of appellees due and foreclose same upon a failure to pay two or more of such notes when due, as provided in the contract of sale, but not so provided or expressed in either or any of said notes?"

This court has several times said that, "Where the vendor sells lands, takes the notes of the vendee for the purchase money, and executes to him a bond for title, the effect of the contract in equity is to create a mortgage in favor of the vendor upon the land to secure the purchase money, subject to all the essential incidents of a mortgage." *Newman v. Mountain Park Land Co.,* 85 Ark. 208; *Strauss v. White,* 66 Ark. 170, and cases there cited.

The law as thus announced is applicable to the facts of this case. Appellant has in equity a contract having the essential incidents of a mortgage, and it only remains to be decided whether the provision of the contract maturing all the notes in the event of the default stipulated against is valid and enforceable.

It is first insisted that the provision is void for the reason that the stipulation occurs only in the contract and is not contained in the notes, or any of them.

In the case of *Farnsworth* v. *Hoover,* 66 Ark. 367, a mortgage was given to secure a loan of $500, due in five years, and the interest notes each provided that, on failure to pay interest within thirty days after due, the holder might collect principal and interest at once. That provision did not appear in the mortgage securing the notes. It was there contended that the provision maturing the entire debt was void; but the court held otherwise and in the opinion said: "The mortgage sufficiently identifies the notes, evidencing the debt which it

was given to secure. The mortgage being only a security or incident to the debt, it was not necessary for it also to contain a condition making the whole debt due upon failure to pay any installment of interest, in order to justify foreclosure for the entire debt. It was sufficient that the notes contained such a provision. The notes and mortgage were executed at the same time, and in relation to the same subject, as parts of one transaction constituting one contract. 1 Jones, Mortg., §§ 71, 76, 349, 354; *Fletcher* v. *Daugherty,* 13 Neb. 224.

"In the cases cited to support the opposite view, neither the note nor mortgage contained such a provision as that in the notes sued on herein. In the absence of such a clause in either the note or mortgage, there would, to be sure, be no authority to declare the whole debt due."

Here the bond for title and the notes constituted a single contract, and it is this contract or equitable mortgage which appellant seeks to enforce, and the notes merely evidence the sum due and secured by the contract, and we think the provision accelerating the payments, if otherwise valid, is not rendered unenforceable by reason of the fact that it does not appear in both the contract and the notes.

In Jones on Mortgages (7 ed.), vol. 1, sec. 76, the law is stated as follows: "A stipulation that the whole sum shall become due and payable upon any default in the payment of the principal or interest is universally held to be legal and valid. It is not objectionable as being in the nature of a penalty or forfeiture." A note to the text cites a large number of cases supporting the text quoted.

Our own case of *Farnsworth* v. *Hoover, supra,* from which we have quoted, is itself authority for upholding the validity of a provision accelerating the maturity of payments, for such was the effect of that decision.

No forfeiture is worked by upholding the provision. Appellees may pay the sum due and the accrued interest and thus perfect their right to a deed. They may pur-

chase at the foreclosure sale and thus acquire the title; or if another purchases at that sale and bids a sum in excess of the balance due appellees will be entitled to that excess. In any event, their rights are not forfeited under the contract. By their default they have accelerated the terms of payment; but this is not a forfeiture.

It follows, therefore, that the court was in error in dismissing appellant's complaint and that a decree should have been entered for the foreclosure of the lien, and the decree will, therefore, be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

MOLINE TIMBER COMPANY v. TAYLOR.

Opinion delivered May 31, 1920.

1. MASTER AND SERVANT—CONDITION OF MACHINERY—INSTRUCTION.—In an employee's action for injuries received while operating a band cut-off saw which ran through a slot in a table, an instruction with reference to the broken condition of a guide above the table was not abstract where there was evidence tending to show that the broken condition of the guide gave the saw more play and made it more dangerous to operate.
2. MASTER AND SERVANT—ASSUMPTION OF RISK.—In an employee's action for injuries received while operating a band cut-off saw, where the foreman on Saturday morning promised to repair a broken guide "as soon as he could," it was a question for the jury whether plaintiff assumed the risk in going to work on Monday morning without the repairs having been made.
3. MASTER AND SERVANT—EFFECT OF PROMISE TO MAKE REPAIRS.—The effect of a promise to repair, and of a reliance by the servant thereon, is to create a new stipulation whereby the master assumes the risk impendent during the time specified for repairs to be made; and where no definite time is specified in which the repairs are to be made, the suspension of the master's right to avail himself of the defense of assumption of risk by the servant continues for a reasonable time.
4. PARENT AND CHILD—RIGHT OF CHILD TO RECOVER FOR INJURIES.—In an action by a minor servant to recover for personal injuries, an instruction authorizing the servant to recover for loss of time from date of injury was not erroneous where the father had emancipated his son, nor where the father had estopped himself to claim his minor son's wages by suing as next friend of his son.

5. ESTOPPEL—PARENT SUING AS NEXT FRIEND OF CHILD.—A father who sues the employer of his infant son as next friend of the latter for loss of wages caused by personal injuries is estopped from claiming anything on account of loss of plaintiff's services.
6. APPEAL AND ERROR—GENERAL OBJECTION TO INSTRUCTION.—A general objection to an instruction that is not inherently erroneous is insufficient.
7. DAMAGES—WHEN EXCESSIVE.—An award of $12,500 to a youth having an expectancy of forty-three and a half years who had previously been earning $4.25 a day and had earned only $2.25 a day since his injury *held* excessive for the loss of two fingers and a portion if his left hand, and judgment reduced to $8,000.

Appeal from Hempstead Circuit Court; *James S. Steel,* Judge, on exchange; modified and affirmed.

Gaugham & Sifford and *T. D. Wynne,* for appellant.

1. There was error in the instructions given for plaintiff and in refusing those asked for defendant. No. 1 for plaintiff was abstract and prejudicial. 87 Ark. 471, 243; 135 *Id.* 330. Instruction No. 2 for plaintiff ignores the testimony of the plaintiff himself that he understood that when the promise was made by the foreman to repair the machine that the repairs would be made by Monday morning.

2. The instruction as to the measure of damages was inherently incorrect. 65 Ark. 619.

3. It was error to refuse the instruction asked by defendant. The testimony presented an issue of fact for the jury. 31 Ark. 684; 52 *Id.* 45; 14 R. C. L. 75; 126 S. W. 106; 31 L. R. A. (N. S.) 1131; 8 S. W. 252.

4. The verdict is excessive. 193 S. W. 793; 106 Ark. 177; 89 *Id.* 522.

D. D. Glover and *Pace, Campbell & Davis,* for appellee.

1. There is no error in the instructions given. 57 Ark. 203; 87 *Id.* 243; 54 *Id.* 151; 81 *Id.* 327; 90 *Id.* 326. Identical instructions have been approved by this court. 86 Ark. 507; 90 *Id.* 555; 130 *Id.* 542. It was for the jury to say under the evidence whether or not plaintiff was

guilty of contributory negligence. 174 N. Y. 385; 100 U. S. 213.

2. The evidence shows that appellee was permitted by his father to do business for himself and receive his own wages, an implied emancipation, and entitled appellee to recover for the pecuniary loss resulting from his diminished earning capacity. 77 Ark. 35; 91 *Id.* 122; 16 L. R. A. 154; 86 S. W. 486. Instruction No. 2 was not specifically objected to. 110 Ark. 117; 103 *Id.* 584-9.

The verdict is not excessive. 170 N. W. 461; 48 App. D. C. 364.

SMITH, J. Appellee sustained an injury while operating a band cut-off saw in appellant's saw mill. The saw ran through a slot in a table having an iron apron. On top of the iron apron was a board fifteen or eighteen inches wide and six or seven feet long, through which the cut-off saw ran through a slit or groove corresponding with the slit or groove in the iron apron of the table, and appellee claims that his injury was due to the fact that the board on top of the table was defective, in that it had cupped up and had split for a distance of several inches, and that there was a broken guide above the table, which gave the saw too much play, and that on account of the broken condition of this guide the saw had cut out a space where it went through the table larger than it had originally been, thereby giving the saw more play and making it more dangerous to operate.

Appellee was only eighteen years old at the time of his injury, yet he was an experienced and skillful saw mill man, and had worked in various departments of the mill. He had been engaged at the table at which he sustained his injury only a few days, yet he discovered its dangerous condition, and reported that fact to Anderson, his foreman. Appellee testified that the attention of the foreman was called to the defective and dangerous condition under which the saw was being used on Saturday morning, and the foreman promised to repair the defect as soon as he could, and appellee relied

upon this promise and continued in the service. On the following Monday morning appellee reported for duty, and went to work at the table in question, and between nine and ten o'clock that morning received the injury to compensate which this suit was brought. The injury resulted in the loss of appellee's little finger, and the one next to it, and the loss of half that hand down to the wrist joint.

Appellant saved exceptions to the instructions which were given, and also to the refusal of the court to give other instructions which it requested.

The first instruction given recited the alleged cause of negligence upon which a recovery was asked. It is conceded that the instruction correctly declared the law as an abstract proposition; but it is contended that it was error for the court to instruct with reference to the broken condition of the guide, for the reason that if the guide was in a defective condition, that fact had nothing to do with the injury.

But appellee testified that the absence of the guide had caused the saw itself to cut out a place possibly three-quarters of an inch wide at a place which was properly just a crack, and had cut a hole nearly twice as long as the saw was wide, and that the saw thus had a vibration or play which made its use dangerous. The operator of this saw stood in front of the table and pushed the dimension stuff he was sawing up against the saw, using both hands in doing so, and appellee was thus employed when he was injured. The objection that the instruction was abstract does not, therefore, appear to be well taken.

It is very earnestly insisted that the court should have told the jury that appellee assumed the risk of operating the machine and should have given a requested instruction to that effect, and that error was committed in so modifying the instruction as to submit that question to the jury. This instruction was based upon the premise that, even though the foreman had promised to repair the defect in the machine, yet if appellee under-

stood these repairs were to be made before he resumed work on Monday morning, and that the repairs were not so made, and that he knew that the defect of which he had complained still existed when he went to work Monday, that he assumed the risk of operating the machine in its then existing condition.

The theory of the instruction as requested was that the time had expired during which appellee would be relieved of the assumption of risk on account of the promise to repair. It is true that appellee did say that he understood the repair would be made by Monday; but he did not say that the foreman had promised the repair would be made by Monday. His testimony on that point, when amplified, was that the foreman had promised to make the repair as soon as he could, and that he supposed it would be made by Monday morning; but he still expected the repairs would be made and went to work under that assumption. He also testified that the foreman "told me just as soon as he could get to it; that he was in a rush and he couldn't shut the machine down then; for me to go ahead, and he would do it just as soon as he could."

The modification of the instruction was not improper, because, without the modification, the instruction would have told the jury that there was no suspension of the assumption of risk beyond Monday morning, whereas if appellee was still relying upon the promise to repair, and had the right to do so, then it could not be said, as a matter of law, that there was a suspension of the assumption of risk, and the modification properly submitted that question of fact to the jury.

We have many cases discussing the effect of the master's promise to repair, but nowhere is the law stated more clearly than in the case of *St. L., I. M. & S. Ry. Co.* v. *Holman,* 90 Ark. 565, where it was said: "The effect of a promise to repair by the master, and of the continuance in his service by the servant, in reliance upon the promise, is to create a new stipulation whereby the master assumes the risk impendent during the time

specified for the repairs to be made. Where no definite period is specified in which the given defects are to be remedied, the suspension of the master's right to avail himself of the defense of assumption of the risk by the servant continues for a reasonable time."

Nor can it be said as a matter of law that if Monday morning was not the definitely specified time within which the promise to repair was to be complied with appellee would not have a right for a longer period of time to rely on that promise. Only one full day had intervened between the time the promise was made and the occurrence of the injury, and that day was Sunday, and was not a working day at the mill.

An instruction on the question of the measure of damages permitted appellee to recover for the loss of time from the date of his injury, the objection now urged to the instruction being that appellee, at the time of his injury, was still a minor, and that appellee's father was entitled to these earnings during the remaining period of appellee's minority. It appears, however, that appellee had been emancipated by his father, and for more than a year had been allowed to collect and to appropriate his earnings to his own use. But, however that may be, the father brought this action as next friend of his son, and the instruction complained of directed the jury to assess compensation for any loss of time or diminished earning capacity from the date of the injury, and the father would be and is thereby estopped from claiming anything on account of appellee's services. *Mo. Pac. Ry. Co.* v. *Block,* 142 Ark. 127; *Baker* v. *Flint & Pere Marquette Ry. Co.,* 16 L. R. A. 154. Moreover, the objection to the instruction in the court below was a general one, and, as it is not inherently erroneous, the reversal of the judgment would not be required because it was given.

It is finally insisted that the judgment recovered is excessive; and we agree with counsel in this contention. The judgment was for $12,500. No other error appears in the record, and that error may be cured by the reduc-

tion of the judgment. It is always a difficult question for us to determine to what extent a judgment should be reduced which we regard as excessive; but we think the present record presents a case in which that action should be taken. Appellee lost two fingers and a portion of his hand, and for a period of seven weeks was under the constant treatment of a physician, during which time he necessarily suffered much pain and sustained a total loss of earnings. Prior to his injury, which occurred on February 3, 1919, he earned $4.25 per day, and since his injury he had been able to earn only $2 per day. Necessarily there is a tenderness which may for some time yet to come prevent appellee from doing kinds of labor which he may later on be able to perform, and there will always be a diminished capacity to perform labor; and the disfigurement is also permanent. The trial in the court below occurred on October 20, 1919. But the case is not that of a man who has lost a hand. Appellee still has his thumb and his two principal fingers, and he will be able to do many things with that hand which do not require much gripping power or great strength which he could not do without the three fingers he still has. Appellee was a right-handed man, and the injury occurred to his left hand. We think under all the circumstances a judgment for $8,000 will fairly compensate the injury sustained, and the judgment will be reduced to that sum, and as thus modified will be affirmed.

Mr. Justice HUMPHREYS dissents from that part of the opinion reducing the judgment.

HUMPHREYS, J. (dissenting). Appellee, C. W. Taylor, began to work for appellant when a mere school boy, working at odd times and on Saturdays. He showed so much aptitude for that character of work, the foreman suggested that he quit school and adopt the mill business as his life's work. He gave up his education and became a regular employee in appellant's company. He became skilled in the use of machines of all kinds in the mill and was advanced until, at the time of his injury, he was re-

ceiving $4.25 a day, and was in line for promotion. His expectancy was forty-three and a half years. His injury wholly incapacitated him for the character of work he had theretofore been doing. He was re-employed and made an effort to carry on his old work, but was compelled, on account of the character of the injury, to give it up entirely and take up a different character of labor, from which he was able to earn $2 per day as a maximum amount. His actual loss, therefore, was $2.25 per day. Figured upon this basis on an expectancy of forty-three and a half years, the present value of his earning capacity is $12,275. His injury was a severe one, causing him much pain and anguish of mind. The condition in which his hand is left will necessarily embarrass and humiliate him throughout life. The verdict of the jury is not excessive, based upon the actual pecuniary loss to appellee, and, when the other elements of damage above mentioned are taken into consideration, it is quite clear that the verdict of the jury was not excessive.

For these reasons, I am unable to concur with my associates in the reduction of the judgment. I therefore dissent from the judgment in this regard.

DAMRON v. BOWLEN.

Opinion delivered May 31, 1920.

DEEDS—INCAPACITY OF GRANTOR.—In a suit by an aged woman to cancel her deed to land, evidence *held* to sustain finding that she was mentally incompetent to convey.

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

Brundidge & Neelly, for appellant.

1. The allegations of the complaint are wholly unsustained by the testimony. 134 Ark. 81-91.

2. No undue influence was proved. 78 Ark. 420; 49 *Id.* 367-371; 107 Atl. 537-9; 17 A. & E. Anno. Cases 984, note, 986. Mere failure of consideration without

fraud or *mala fides* is not sufficient in equity to obtain a rescission of an executed contract. 4 R. C. L. 500. A disposition of property induced by gratitude for kindness or affection is not the result of undue influence. 27 A. & E. Enc. L. 497; 118 U. S. 127-135; Redfield on Wills 522-4, 533; 84 Ark. 109; 20 Cyc. 1212.

3. The proof in the record establishes that plaintiff was mentally competent to excute the deed. 34 Ark. 613, 623; 136 *Id.* 72. A consideration of the entire testimony and the action of plaintiff after the execution of the deed warrants a reversal of the decree canceling it. The burden was on plaintiff to establish by clear, strong and conclusive evidence that she did not have sufficient mental capacity to understand and comprehend the nature and effect of her act. 100 Ark. 565; 96 *Id.* 265; 119 *Id.* 466-8; 67 Am. St. 788. See, also, 8 R. C. L. 944-5, §§ 20, 21; 115 Ark. 430; 123 *Id.* 166; 4 R. C. L. 503; Buswell on Insanity, ch. 8, p. 216, § 194. The decree of cancellation should be reversed.

Gardner K. Oliphint, on the brief for appellant.

C. L. Pearce, for appellee.

1. The relation of parent and child did not exist as to appellant, even if it did as to Mrs. DeLille.

2. The evidence shows undue influence.

3. Aside from the claim that appellee was *non compos mentis* it would be inequitable to allow appellant to hold this property against appellee.

4. The testimony shows that appellee is *non compos mentis.* 14 R. C. L. 589; 1 Black on Res. & Can. 676; 14 R. C. L. 590; 1 Black, Res. & Can. 691; 7 Ark. 166. See, also, 21 R. C. L. 503; 1 Black, Res. & Can. 698, 632, 652. Courts of equity have power to cancel the deeds of insane or weak-minded persons to guard against imposition or resist importunity. 1 Pom., Eq. Jur. (4 ed.), p. 2113; 14 R. C. L. 593; 115 Ark. 430; 123 *Id.* 174; 129 *Id.* 91. See, also, 14 Ann. Cas. 505; Ann. Cases 1912 A. 702; 4 L. R. A. 637, 640.

5. The findings of the chancellor will not be disturbed if it does not appear that they are against the clear preponderance of the evidence. 81 Ark. 68; 91 *Id.* 549; 101 *Id.* 398; 121 *Id.* 550.

SMITH, J. This suit was instituted August 19, 1919, by appellee to cancel a deed which she had executed to appellant on October 26, 1918, and had delivered on the following day, to an eighty-acre farm owned by her. The deed provided that appellee should remain in full and complete possession of the land during her life, and that she should receive as her own all rents and profits therefrom, and that she should have the exclusive control and management thereof. Appellee was past seventy years, and was childless. She had no blood relatives except some nephews; but appellant and a Mrs. DeLille had both lived with appellee before they were married, and each of them called appellee mother, and she called each of them daughter. In May, 1918, appellee executed and delivered to Mrs. DeLille a deed to another eighty-acre tract of land she owned, and appellant insists that there was no more consideration for that deed than there was for her own, and that the consideration in each case was love and affection, and she insists that the fact that no suit has been brought to cancel the DeLille deed should be strongly persuasive of the grantor's capacity to execute the two deeds. This litigation does not involve the DeLille deed; but it appears that Mrs. DeLille was an adopted daughter, and had lived in appellee's home for many years, while appellant was not an adopted daughter, and had lived in appellee's home only a few months altogether; in fact, for a period of about fifteen years there was no communication between appellant and appellee. Appellee lived on the farm near Bald Knob, in White County, and appellant's home was at Bono, in Craighead County. Appellant came to appellee's home in response to a telegram signed by appellee asking her to do so, and appellee within a few days after appellant's arrival executed and delivered the deed here sought to be canceled.

It is not shown that any undue influence was exerted to obtain the deed, but the court found that appellee did not possess sufficient mental capacity to comprehend the effect of her action in executing the deed, and decreed its cancellation, and this appeal is from that decree.

Appellee testified that she was past seventy, and that her health was feeble. That she was told that she had frequently called the name of appellant during a spell of illness she had had, but that she had no recollection of having done so, and that if she did this it was done in delirium because of the fever she had, and that she was sick when she executed the deed and did not realize or appreciate what she had done, and that while she remembered something about the transaction, it was "kind of like a dream to me." Mrs. DeLille testified that appellant's husband went to town for a notary public, and that Mr. DeLille went with him, that the deed had been prepared before the notary came, and that the notary was there only a few minutes, and that appellee at the time was just getting over an attack of the influenza from which she had been suffering.

A Dr. W. A. Clark testified that he had known appellee for thirty years, and that he had been her family physician for the two years immediately preceding the time of taking his deposition. That in November or December, 1917, appellee was adjudged insane by the probate court of White County, and he was appointed her guardian, and that he served as such until April or May, 1918, when he procured his discharge. That appellee was taken to a hospital in Memphis in August, 1917, and remained there for five months, during which time her condition, both mental and physical, was very bad. That after her return from the hospital her condition was improved, but that she had since had other serious illness. He expressed the opinion that appellee was incapable of transacting ordinary business affairs, and that "her mind is like a child's mind," but that she was in better physical condition in the last three months than she had been in for more than two years before. A Dr.

Cleveland testified that he had known appellee for thirty-five years, and for the large part of that time had been her physician, and he expressed the opinion that in recent years "she has very much deteriorated both mentally and physically," and "in my opinion she was not capable of transacting important business" at the time of the execution of the deed.

J. S. Baker, a near neighbor who had known appellee intimately since 1880, testified that "her mind seemed kind of wavy," and a number of other neighbors detailed various incidents upon which they based the opinion that appellee's mentality had failed and that she was not capable of understanding and transacting important business.

A tenant on the place named Sprouse, in response to the question whether appellee had sufficient mental capacity to execute the deed, expressed the opinion that if she had mind enough to bring a suit to set her deed aside, she had mind enough to make the deed. Another tenant named Russell expressed the opinion that he had observed no change in appellee's mentality, and that she had the capacity to make the deed or other contract. He testified that no one could get along with appellee, and he had been unable to do so, and that she came into the field where he was plowing and stated that he was trespassing and ordered him out of the field.

Other witnesses who had known appellee for varying lengths of time and who had more or less association with her, expressed the opinion that she was sane. Some of these witnesses had had opportunity to see and observe appellee quite frequently, while others based opinions upon observation so slight as to carry but little weight.

The two physicians had special opportunities to observe appellee; but, even without their testimony, the evidence appears to be fairly balanced on the question of appellee's competency. The testimony of these physicians should, of course, be considered; in fact, their testimony is highly persuasive, and upon a consideration of

the whole testimony we have concluded that the finding of the court below is not clearly against the preponderance of the evidence, and the decree is, therefore, affirmed.

GOOD *v.* STATE LINE OIL & GAS COMPANY.

Opinion delivered May 31, 1920.

1. GARNISHMENT—PRIORITY OF LIEN.—As between the general creditors of a particular debtor, the creditor obtaining and first serving a writ of garnishment upon a third person owing the debtor will acquire a prior and paramount lien thereon to the extent of his claim.
2. GARNISHMENT—FINDING AS TO TRUST FUND.—In a garnishment proceeding where other general creditors intervened, a finding of the chancellor that the funds garnished were trust funds belonging to all the other creditors was not supported by an agreed statement of facts to the effect that the creditors set out therein are due the amounts set opposite their repective names, and that no creditor is in a position to identify the funds garnished.

Appeal from Craighead Chancery Court, Western District; *Archer Wheatley,* Chancellor; reversed.

The appellants, *pro sese.*

The court erred in decreeing to interveners participation in the funds before appellant's lien thereon by reason of the garnishment had been discharged. Under the agreed statement of facts appellants (plaintiffs below) were creditors of P. C. Ford and entitled to full payment of their respective debts before interveners could participate, because the garnishment was served long prior to the time of the intervention. Kirby's Digest, § 360; 56 Ark. 275; 39 *Id.* 97; 60 *Id.* 394; 68 *Id.* 275.

E. L. Westbrook, for appellees.

1. No proper abstract for appellants has been made and filed and the decree should be affirmed under rule 9. 110 Ark. 7; 120 *Id.* 499; 105 *Id.* 23, 63.

2. Appellants have raised no question that requires answer. Justice has been done in a court of equity and there is no error.

HUMPHREYS, J. Appellnats instituted suit in the Craighead Chancery Court, Western District, against appellees, State Line Oil & Gas Company, P. C. Ford, manager, and P. C. Ford, to recover amounts set opposite their respective names, as creditors of P. C. Ford. Said appellees being nonresidents, a writ of garnishment was issued and duly served against the Bank of Jonesboro to impound money deposited in said bank by the said P. C. Ford. A warning order was issued against the appellees aforesaid in the manner, form and for the time prescribed by law.

Subsequently, interventions were filed by appellees H. J. Spencer *et al.*, claiming amounts set opposite their respective names, as creditors of the said P. C. Ford, under the same conditions as amounts due appellants by the said P. C. Ford, and praying that they be permitted to share in the funds deposited to the credit of P. C. Ford in the Bank of Jonesboro and theretofore garnished by appellants.

Thereupon, appellants filed a motion to strike said interventions from the files, alleging priority as creditors of the said P. C. Ford, by reason of the writ of garnishment they had caused to be issued and served upon the Bank of Jonesboro, impounding funds deposited therein by the said P. C. Ford, and alleging further that the interveners had no equitable rights in the fund.

The cause was submitted to the court upon an agreed statement of facts embodying the substance of the pleadings and evidence, from which the court found that $1,888.81 was on deposit in the Bank of Jonesboro in the name of P. C. Ford, but that neither P. C. Ford nor the State Line Oil & Gas Company had any ownership therein, but were trust funds belonging to appellants and interveners in proportion to their respective claims. In accordance with the findings, the court decreed that the Bank of Jonesboro should pay to the clerk of the court, who had theretofore been appointed receiver on the application of the interveners, the trust fund aforesaid, and that the receiver, Ben Eddins, should apportion said

amount between all claimants who had filed their claims prior to the 15th day of October, 1918, pursuant to an order theretofore made, in proportion to their respective claims, as designated by the amounts set opposite the name of each.

From the findings and decree of the chancery court, an appeal has been duly prosecuted to this court.

Appellants insist that the court erred in decreeing interveners' participation in the funds before appellants' lien thereon, by reason of the garnishment, had been discharged. "The lien of garnishment dates from the time the garnishment writ is served upon the garnishee." *Bergman* v. *Sells & Co.*, 39 Ark. 97. "Service of process on a garnishee creates a lien in favor of the plaintiff on the money due from the garnishee to the defendant, and upon constructive service the court may ascertain the amount due from the garnishee to the defendant and subject such money to the satisfaction of the plaintiff's claim." *St. L. S. W. Ry. Co.* v. *Vanderberg*, 91 Ark. 252. It follows therefore that, as between general creditors and a particular debtor, the one obtaining and first serving a writ of garnishment upon a third party owing the debtor will acquire a prior and paramount lien thereon to the extent of his claim. Interveners' contention, however, is that the garnished fund was a trust fund held for the benefit equally of appellants and interveners, and that appellants could not acquire a paramount lien thereon by virtue of garnishment proceedings. Interveners' contention would be correct if the facts in the case supported the finding and decree of the chancellor. The agreed statement of facts in this particular is as follows: "It is agreed that the creditors set out herein are due the amounts set opposite their respective names as individuals, and that the said P. C. Ford is due the parties set out herein the sums set opposite their names; that no creditor is in a position to identify the funds garnished; that the sum of $1,888.81 is deposited in the Bank of Jonesboro to the credit of P. C. Ford and the Bank of Jonesboro is indebted to the said P. C. Ford in

the sum of $1,888.81." The agreed statement of facts does not support the finding and decree of the court, nor the contention of interveners that the garnished fund was a trust fund in which all of the creditors were equally interested in proportion to their respective claims. The court, therefore, erred in ordering the receiver, Ben Eddins, to distribute the fund equally between all creditors who filed their claims prior to October 15, 1918, in proportion to the amount claimed by each. The order should have been to pay appellants' claims in full with any balance over to the interveners equally, in proportion to their respective claims.

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

MITCHELL v. REDUS.

Opinion delivered May 31, 1920.

1. SPECIFIC PERFORMANCE—ILLEGAL CONSIDERATION.—An executory agreement by defendant to convey certain land to plaintiff on condition that plaintiff would not prosecute defendant for carnal abuse of her daughter or sue him for damages *held* illegal and not enforceable.
2. SPECIFIC PERFORMANCE—PART PERFORMANCE.—An oral agreement by defendant to convey land to plaintiff will not be enforced though plaintiff was put in possession and made repairs amounting to $2 or $3, as such repairs were too inconsequential to be classed as valuable and permanent.

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

J. A. Weas and *Gardner K. Oliphint*, for appellant.

1. The contract to convey is fully established by the evidence and defendant made a gift of the property to appellant and she was entitled to specific performance. Authorities will be cited in oral argument.

2. The agreement to convey was fully established; there was a sufficient consideration, and the agreement

to convey was not against public policy. 110 N. W. 840; 9 L. R. A. (N. S.) 508, 513; 25 R. C. L., par. 1920, pp. 220-1; Pomeroy on Cont., p. 193, § 137. Specific performance should have been granted. 21 Ark. 110; 30 *Id.* 547. See, also, 136 Ark. 447, 452; 79 *Id.* 100; 30 *Id.* 249-262; 126 *Id.* 541; 82 *Id.* 33; 25 R. C. L. 551, par. 142. Specific performance should have been decreed.

John M. Rose, for appellee.

1. The agreement to convey, if actually made, was wholly void and against public policy. 102 Ark. 326.

2. The alleged agreement was oral and within the statute of frauds, but there are exceptions which take it out of the statute. 25 R. C. L. 261-264. The evidence must be clear, convincing and conclusive. 39 Ark. 424; 32 *Id.* 478. A refusal to grant plaintiff specific performance could not have amounted to fraud. She should have sued at law for damages. 75 Ark. 526. The possession taken was not sufficient to take the case out of the statute of frauds. The chancellor was correct in his findings, and they should not be disturbed, as they are sustained by the evidence. Specific performance was clearly within the discretion of the chancellor, and the decree is sustained by a clear preponderance of the evidence. 125 Ark. 589; 103 *Id.* 551.

HUMPHREYS, J. Appellant instituted suit against appellee, on the 28th day of July, 1919, in the Pulaski Chancery Court, to require him to execute her a deed to lots seven and eight, block 6, Ratterree's Addition to Argenta, Arkansas, in accordance with an alleged agreement to that effect between them.

Appellee filed answer, denying that he had agreed to convey the lots to her.

The cause was submitted to the court upon the pleadings and evidence, which resulted in a dismissal of appellant's bill for want of equity. From that decree an appeal has been duly prosecuted to this court.

The undisputed evidence showed that appellee, a married negro man, employed a negro girl, twelve years

of age, in May, 1915, daughter of appellant, to work in his rooming house in Argenta; that she remained in his employ a number of months, and, during that time, gave birth to a boy child, who bears the name of appellee.

The testimony of appellant tended to show that appellee assumed responsibility for the pregnancy of the girl and voluntarily agreed to convey said property to appellant when he paid it out, and, in the meantime, to keep it in repair, if appellant would not prosecute him for carnal abuse or sue him for damages; that she agreed to the proposal, and, pursuant to the agreement, was placed in the possession of the property, where she has since continuously resided with her family, including the girl and child; that, during the occupancy, appellee paid the taxes, kept the property in repair and made permanent improvements thereon, appellant expending two or three dollars, only, for repairs on the roof; that appellee never collected any rent from her or demanded any until a short time before the institution of the suit; that appellee then attempted to sell the property to a third party and demanded possession thereof.

Appellee's testimony tended to show that he was not the father of the child; that he never assumed responsibility for it; that he never promised to convey the property to the appellant to prevent her from prosecuting or suing him; that he never placed her in possession thereof under a contract to convey it to her when he paid for it, but, on the contrary, placed her in possession under a contract of tenancy, which remained in force until the institution of this suit.

It is unnecessary to analyze and determine in whose favor the evidence preponderates in order to adjudge the issues involved in this appeal. Giving the evidence of appellant full credence, it shows either that she was placed in possession of the property under promise to convey it to her, on condition she would not prosecute appellee for carnal abuse or sue him for damages; or else, under a voluntary oral gift. A court of equity will not enforce specific performance in either case. First: "Any con-

tract, the consideration of which, in whole or in part, is to conceal a crime or to stifle a prosecution therefor, is illegal and void, though it may represent a just debt and security for its payment." *Goodrum* v. *Merchants & Planters Bank,* 102 Ark. 326. Appellant's evidence carries an admission that the consideration, in part, for the sale and seizin of the lots was to stifle a prosecution for carnal abuse. This necessarily rendered the contract void and nonenforceable as against public policy. Second: "A parol gift of land will not be enforced unless followed by possession and by valuable and substantial improvements made by the donee, or unless there are some other special facts which would render the failure to complete the donation peculiarly inequitable." *Young* v. *Crawford,* 82 Ark. 33. The evidence is entirely barren of special facts in relation to the property, or its occupancy, which would render the failure to complete the donation peculiarly inequitable and unjust. Likewise, the betterments placed upon the property by appellant were too inconsequential to be classed as valuable and permanent.

No error appearing, the decree is affirmed.

WILLIAMS LUMBER COMPANY *v.* DUDLEY & HEALAN.

Opinion delivered June 7, 1920.

1. LOGS AND LOGGING—EVIDENCE OF MODIFICATION OF CONTRACT.—In an action for balance claimed due on a contract for the manufacture of lumber, evidence *held* to warrant a finding that the provision as to stacking the lumber for measurement was modified.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict based on conflicting evidence will not be disturbed.
3. LOGS AND LOGGING—EVIDENCE.—Where the original contract, providing for measuring lumber to be manfactured in the mill yards, was modified so as to permit the lumber to be moved by the purchaser without being measured, evidence as to the amount of lumber produced from the logs sawed was admissible over objection that the proof of the amount of lumber was made in a fashion different from that fixed by the contract.

Appeal from Van Buren Circuit Court; *J. M. Shinn,* Judge; affirmed.

S. W. Woods, for appellants.

The evidence was not sufficient to sustain the verdict and the court erred in permitting appellees to make proof of the amount of lumber manufactured according to a different basis than that specified in the contract. The questions of law are elementary. The court declared the law correctly in instruction No. 3 for defendants but misled the jury by allowing plaintiffs to introduce the pretended log scale. The verdict is also contrary to the law as declared in Nos. 3 and 4, given for defendants.

The appellees, *pro se.*

The pleadings of the appellant lumber company settles the point of the agency of Powell. The question as to whether the contract was rescinded by agreement of the parties was one of fact and properly submitted to the jury, and they found the issue against appellants. The testimony supports the finding and is conclusive. The log scale was properly introduced as the best means of ascertaining the approximate number of feet. It was not the best testimony, but the best obtainable and approximately correct. The duty of measuring the lumber was on appellants, and the log scale was clearly admissible. The verdict of the jury settles all issues against appellants.

McCULLOCH, C. J. Appellees entered into a written contract on June 18, 1918, with B. J. Powell, one of the appellants, where it was agreed that said appellant should cut the standing timber on a large body of land owned by appellees and manufacture the same into lumber for the price of $7.50 per thousand feet, board measure, and an additional sum of 50 cents per thousand feet for stacking the lumber on the mill yard. The contract provided that appellees should manufacture the lumber according to certain specifications and to stack it on the mill yard and Powell should "check up and accurately

measure all lumber cut and stacked under this contract and according to the specifications under the contract."

Appellees instituted this action against Powell and his co-appellant, Williams Lumber Company, alleging that the latter was a partner with Powell in the transaction and that Powell acted as the agent of said corporation; that appellees had manufactured 1,007,508 feet of lumber under the contract and that appellants had paid thereon the sum of $5,462.01, leaving a balance of $1,640.92, and had refused to pay said sum. Judgment is prayed for the amount of the balance due under the contract. Appellants filed answer, denying that Williams Lumber Company was a party to said contract or was interested therein, and denied that Powell was indebted to appellees in any sum for lumber manufactured under the contract. The answer sets forth the amount of lumber manufactured under the contract by appellees according to the contention of appellants and also alleges that appellants had paid to appellees the sum of $145.74 in excess of the amount due, for which judgment over against appellees is prayed for. There was a trial of the issues before a jury, and the judgment was in favor of appellees for the recovery of $1,250.

It is contended here that the evidence was not sufficient to sustain the verdict and that the court erred in permitting appellees to make proof of the amount of lumber manufactured according to a different basis than that specified in the contract. The contract provides that payment be made at the specified price per thousand feet according to the measurement designated as "board measure;" that appellees should stack the lumber on the yard, and that Powell should measure it after it was cut and stacked and pay for it according to the prices mentioned. The contention, however, of appellees is that the contract was changed by mutual agreement concerning the requirement that appellants should stack the lumber on the yard and that it was agreed instead that appellants should accept the lumber as it came from the saw and haul it away to the lumber yard of the Williams Lum-

ber Company at Shirley. It is earnestly insisted by counsel for appellants that there is no proof in support of this contention, but we are of the opinion that there was sufficient testimony justifying the submission to the jury.

The testimony of one of the appellees, who gave personal attention to the transaction with appellants, is rather vague as to what was actually said between the parties, but there is testimony to the effect that appellants hauled the lumber away as taken from the saw without requiring it to be stacked and that there was an agreement between the parties that appellants could have the lumber sticks used in stacking lumber for the purpose of stacking it in piles on the mill yard at Shirley. If, as contended by appellees, the lumber was accepted by appellants as it came from the saw and was hauled away by them, that constituted a waiver of the express stipulation of the contract with respect to the stacking on the mill yard, even though there was no express agreement that the contract should be changed in any regard.

Appellees introduced proof showing the measurement of the logs cut from the land and hauled into the mill and the amount of merchantable lumber contained in each log. They also introduced proof tending to show that board measure, which means the grading and measurement of each board after being manufactured, exceeds the log measure about twenty per centum on average logs—in other words, that the output of logs properly manufactured into lumber will, according to board measure, be on an average twenty per centum in excess of log measurement. There is scarcely any dispute about that, and the testimony in this case shows that most of the logs would run about 30 or 33 1/3 per centum according to board measure over log measure. This proof was adduced by appellees, not for the purpose, as we understand it, of changing the rule of measurement specified in the contract, but to show what amount of the lumber was manufactured under the contract according to the kind of measurement specified in the contract. In other words, the amount to be recovered was sought to be established

by proof of the quantity of lumber according to board measure, but in order to arrive at it appellees proved what the actual measurement was according to the rules for log measure and then added the percentage of gain.

If, as contended by appellees, the lumber was taken from the saw and hauled away before being stacked, this was the only available method of proof to establish what the amount of lumber was according to board measure. Powell was, according to the terms of the contract, to check and measure the lumber after it was stacked on the yard, but this was not done because that feature of the contract was changed, and appellants hauled the lumber away before it was stacked. We think that the court was correct in allowing appellees to make out their case by the only kind of testimony that was available, that is, by proving the amount of lumber in each log according to accepted standards of measurements and then by adding the amount of difference between log measure and board measure. There was a conflict in the testimony as to the character of the logs, whether appellees measured in rotten logs which did not produce merchantable lumber, but we think that there was enough testimony to show that, after reasonable deductions were made for rotten logs and lumber not properly manufactured, there was an average gain of twenty per centum over the log measurement. Appellants presented before the jury what they claimed to be an accurate account of the amount of lumber according to board measure, and it was much less in quantity than the amount that appellees contended they had manufactured. This conflict, however, was settled by the verdict of the jury, and we are of the opinion that there was sufficient testimony to support the verdict. There was also testimony tending to show that Williams Lumber Company was a party in interest under the contract and that Powell acted as the agent of that company in making the contract. The contention of appellants is that Williams Lumber Company was not interested in the contract, but was merely a purchaser from Powell of the lumber manufactured under the contract. There are

many circumstances proved by the evidence, which, standing alone, would not be sufficient to establish the interest of Williams Lumber Company in this contract, but, when all were considered together, they warranted the inference by the jury that the Williams Lumber Company was a party to the contract, and not merely a purchaser of the lumber from Powell. It is unnecessary to undertake to detail those circumstances.

There were objections to the ruling of the court with respect to instructions to the jury, but the objections are based mainly on the ground of insufficiency of the evidence to support the issues, and, since we have reached the conclusion that the evidence was legally sufficient on each of the issues presented, it becomes unnecessary to discuss the court's charge.

Judgment affirmed.

HESTER v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Opinion delivered June 7, 1920.

1. RAILROADS—DEFECTIVE STOCK GUARD.—The owner of a crop can not recover damages for injury to his crop by hogs on account of the defective condition of a stock guard on defendant's railroad where notice of such defective condition was not given to defendant, as required by Kirby's Digest, §§ 6644, 6645, as amended by Acts 1909, p. 135.
2. RAILROADS—CONSTRUCTION OF PENAL STATUTE.—Special and Private Acts 1911, No. 447, as amended by act 53 of 1913, requiring certain railroads to build and maintain sufficient fences along their right-of-way, is a penal statute and must be strictly construed.
3. RAILROADS — STATUTE REQUIRING FENCING — LIABILITY.—No civil action for damage to crops will lie against a railroad company for a violation of Special and Private Acts 1911, No. 447, as amended by act 53 of 1913, requiring certain railroads to build and maintain sufficient fences and stock guards; the penalty therein provided being the only remedy.

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

Arthur C. Thomas and *J. S. Utley*, for appellant.

1. The court erred in sustaining the motion to quash. 216 S. W. 5.

2. The court erred in sustaining the demurrer of defendant. The complaint was sufficient and stated a cause of action. Act 447, Acts 1911, amending act No. 53 of 1913. The act is constitutional and valid. 2 Elliott on Railroads, par. 668; 3 *Id.* 1102, 1184-5; 11 L. R. A. 285. The intent of the Legislature governs, and in construing a statute the court looks to the former mischief, the proposed remedy, the reason of the change and the conditions existing. 47 Ark. 330; Kirby's Digest, §§ 6644-5. Recovery of the penalty is the only remedy open to one whose stock is killed by a violation of the statute. 75 Ark. 615. When the stock guard is not sufficient to prevent stock from passing over it, this does not show that the guard was unsuitable and unsafe. 74 Ark. 589. Notice from a tenant to repair a stock guard is insufficient. 84 Ark. 14. See, also, 103 Ark. 613. The railroad company was liable for damages where it has failed to erect and maintain fences and cattle guards along its right-of-way over inclosed lands. 43 L. R. A. (N. S.) 450 and notes; 122 Mo. App. 492; 66 Mo. 567; 37 *Id.* 654; 144 Mo. App. 691; 129 S. W. 52; 20 Mo. App. 644; 43 L. R. A. (N. S.) 452 and note.

Thos. S. Buzbee, H. T. Harrison and *C. L. Johnson*, for appellee.

1. There was no error in sustaining the motion to quash the service of summons. 257 Fed. 138.

2. The demurrer was properly sustained. Appellant did not give the written notice of any defects which is a condition precedent to a suit for failure to maintain a proper stock guard. The decision below was eminently correct. 68 Ark. 238, 548; 71 *Id.* 133. Plaintiff failed to allege a cause of action against the defendant. The Missouri cases have no application here, as they are based on the Missouri statute. Rev. Stat. Mo., § 115 of 1899; 43 L. R. A. (N. S.) 452; 25 Minn. 328.

The action here is based on act 447, Acts 1911. The act is clear and unambiguous, the intention is plain and was to keep stock off the right-of-way. 92 Ark. 1. The act is penal and does not provide for compensatory damages as prayed by appellants. Railroads are not by the common law compelled to fence their tracks, and as this is a penal act it should be strictly construed in favor of those on whom the burden is sought to be imposed. 79 Ark. 517; 71 *Id.* 232.

WOOD, J. This action was brought by the appellant against the appellee. The appellant alleged in substance that the appellee operated a railroad, over 100 miles long, in the State of Arkansas, and over certain lands in Saline County, Arkansas, describing them; that in the year 1918 appellant cultivated a crop of corn consisting of thirty acres on the land described; that prior to 1918 the appellee had constructed stock guards on both the east and west sides of the inclosure of the lands at the points where the railroad enters the inclosure, but had negligently failed and refused to maintain said stock guards in a suitable and safe condition; that appellee prior to the year 1918 had erected a fence along each side of its right-of-way over said lands, but had negligently permitted them to become so out of repair as to not be substantially and sufficiently in condition to keep live stock from passing through and under said fence and into the adjoining lands of the appellant as described in the complaint; that, as a result of the negligence of appellant in failing and refusing to keep and maintain said stock yards in a suitable and safe condition and in negligently permitting said fence to become out of repairs as aforesaid, hogs passed over said stock guards on to appellee's right-of-way and thence through said right-of-way fences on to said lands of appellant, destroying his crop and damaging him in the sum of $1,120, for which damages he prayed judgment.

The appellee demurred to the complaint on the grounds, first, that the complaint does not allege that

written notice had been given the appellee or its agent that the stock guards were in a defective condition; second, because the allegations of the complaint are not sufficient to constitute a cause of action against the appellee.

The court sustained the demurrer and entered judgment dismissing appellant's complaint. From that judgment is this appeal.

First. The complaint does not state a cause of action under sections 6644 and 6645 of Kirby's Digest as amended by act 53 of the Acts of 1909, page 135, for the reason that the complaint does not allege that the written notice required by the statute had been given. The giving of this notice is a condition precedent to the right of recovery in an action based on that statute. *C., R. I. & P. Ry. Co.* v. *Adams,* 84 Ark. 14.

Second. The complaint does not state a cause of action under act 447 of the Acts of 1911 as amended by act 53 of the Acts of 1913. The statute is as follows:

"Section 1. Every firm, person or corporation owning or operating any railroad over one hundred miles in length, which extends into or through Grant, Saline or Hot Spring counties, Arkansas, shall be required to build and maintain a fence along each side of their rights-of-way therein, substantially and sufficiently to keep off said rights-of-way all mules, horses, hogs, sheep, cattle, goats and stock of all kinds."

"Section 2. Said persons, firms or corporations shall provide and maintain gates, with good latches, or openings, at least eight feet wide, at all private road crossings, and stock guards at all public road crossings; and shall also be required to provide open crossings with stock guards every two miles, if there should be no opening or crossing within four miles of each other. No right-of-way shall be fenced through towns and municipal corporations, and a space of not less than three hundred feet shall be left open at all flag stations thereon."

"Section 3. If said railroad right-of-way fence should contain any gates as herein provided, any person using same in crossing or entering the said right-of-way

shall be required to close and fasten the gates behind them, and any said person failing to comply with the provisions of this section shall be guilty of a misdemeanor, and, upon conviction therefor, shall be fined in any sum not less than one dollar and not more than ten dollars for each separate offense."

"Section 4. Any said person, firm or corporation violating the provisions of this act shall be fined any sum not less than fifty dollars and not more than five hundred dollars for each offense, and each day shall constitute a separate offense."

This statute is penal. Its violation is a misdemeanor and subjects the offender to a fine. It does not provide any remedy by way of civil action to those who may be damaged by reason of its violation nor that the penalty may be recovered by any individual, nor by the State for the benefit of any individual. Penal statutes are strictly construed, therefore, no civil action will lie for damages against the appellee railroad for the violation of the above statute. *State* v. *International Harvester Co.*, 79 Ark. 517; *Choctaw & Memphis Ry. Co.* v. *Vosburg,* 71 Ark. 232; *St. L. M. & S. E. Ry. Co.* v. *Busic,* 74 Ark. 589, and other cases in 4 Crawford's Digest, "Statute," § 71, pp. 4694-5.

In the cases from Missouri, cited and relied upon by counsel for appellant to sustain their contention, the causes of action in those cases were founded upon a statute which expressly made the corporation liable "in double the amount of all damages which shall be done," etc., by reason of its failure to comply with the provisions of the statute. Of course, cases based upon such a statute can have no application here.

The judgment is correct, and it is, therefore, affirmed.

SECURITY LIFE INSURANCE COMPANY OF AMERICA v. BATES.

Opinion delivered June 7, 1920.

1. TRIAL—BOTH PARTIES REQUESTING DIRECTED VERDICT.—Where both parties ask for a peremptory instruction, and do nothing more, they assume the facts to be undisputed, and in effect submit to the trial court the determination of the inferences to be drawn from them.
2. APPEAL AND ERROR—DIRECTION OF VERDICT—REVIEW.—In reviewing the action of the trial court where both parties requested a directed verdict, and nothing more, the Supreme Court is limited to a consideration of the correctness of its finding on the law, if there is any evidence in support of its finding.
3. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—The general rule is that a principal is bound by all acts of a general agent which are within the apparent scope of his authority, whether they have been authorized or not, and even if they are contrary to express directions.
4. INSURANCE—AUTHORITY OF LOCAL AGENT.—In an action on a life policy, evidence *held* to justify trial court in finding that a local agent possessed the apparent authority to receive an application for a permit to enlist in the army and to go overseas given by the insured's brothers, and to accept the same.
5. INSURANCE—AUTHORITY OF AGENT—FINDING.—In an action on a policy of life insurance, evidence *held* to justify a finding by the trial court that a local agent of the insurer had authority to accept an application for a permit to enlist in the army and to go overseas in the form in which it was presented to him, and that the brothers of the insured were justified in relying upon such agent's promise to procure a permit.
6. INSURANCE—PAYMENT OF PREMIUMS.—Where the agent of a life insurance company agreed to take care of the premiums on a policy of life insurance for the insured, the insurance company can not defend on the ground that an extra insurance premium was unpaid.

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

STATEMENT OF FACTS.

Amos B. Bates, administrator of the estate of Alvin S. Bates, sued the Security Life Insurance Company of America to recover on a policy of life insurance for $2,000.

The company defended on the ground that the policy had been forfeited because the insured had not complied with the War Clause contained in it.

On the 27th day of August, 1917, the Security Life Insurance Company of America issued a life insurance policy to Alvin S. Bates for $2,000, payable to the insured's administrators, executors or assigns. The policy contained the following clause:

"This policy shall be incontestable after one year from its date, except for nonpayment of premiums and except for naval or military service in time of war without a permit, which are risks not assumed by the company; provided that, in case of the death of the insured while engaged in such service without a permit, the amount payable hereunder shall be the reserve on the policy at date of death. All statements made by insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy unless it is contained in the application therefor."

Amos B. Bates lived at Sulphur Springs, in Yell County, Arkansas, and was drafted into the army of the United States on September 19, 1917. While in the army at Camp Pike, Arkansas, in November, 1917, Alvin S. Bates sent to his brothers at Sulphur Springs, Arkansas, a paper writing in which he asked the company to issue him a permit to engage in the military service of the United States. The insured and his brothers traded with a mercantile firm in Dardanelle in Yell County, of which Ben Wirt, the agent of the insurance company, was the credit man. Wirt had taken the application for the insurance and had delivered the policy to the insured. In fact, the policy was left by the insured in Wirt's possession. An arrangement was made with Wirt whereby the firm, of which he was the credit man, would pay the premiums as they fell due and charge the same to the account of the Bates brothers. While at Camp Pike, Arkansas, in November, 1917, the insured filled out an application to the company to secure a permit to engage in the military service of the United States and to go be-

yond the limits of the United States, and mailed it to his brothers at Sulphur Springs, Arkansas, and asked them to take it to Ben Wirt and do what was necessary to be done with regard to securing such permit. The brothers of the insured carried the application to Ben Wirt, and, handing it to him, asked Wirt for information as to what should be done in the premises. Wirt looked at the application and handed it back to the brothers of the insured, saying to them, "I will make it all right." Relying on the promises of the agent, the brothers went on home and never took any other steps in the matter. They did not pay the extra premium of $100 on the thousand required of those drafted in the army and going beyond the limits of the United States. They had made arrangements with Mr. Wirt for the firm, of which he was the credit man, to pay the premiums and charge the same to the account of the Bates Brothers. Alvin S. Bates was sent to France, and in July, 1918, was killed in battle while in the military service of the United States. When the second premium became due on August 27, 1918, Mr. Wirt paid the same and charged it to the account of the Bates Brothers. He did not, however, pay the extra premium above referred to. At the time the payments were made it was not known that the insured had been killed in battle during the latter part of the previous month. The brothers of the insured relied wholly upon the promise made by Mr. Wirt to secure the permit for the insured to go with the army to France and to pay the premiums as agreed upon, and for that reason took no further steps in the matter.

Ben Wirt was a witness for the defendant. According to his testimony he was the agent of the insurance company at Dardanelle and secured the application of Alvin S. Bates for a policy of $2,000 in the company. Soon after the United States became involved in the war with Germany, Wirt received instructions from the company that any policy holder who was engaged in the military service of the United States would have to have a permit from the company. Subsequently Wirt was in-

structed that any policy holder who had been granted this permit and went beyond the limits of the United States would have to pay an additional $100 on the thousand. Wirt wrote to the company for blank permits for the policy holders to fill out. The company wrote him that they had no regular forms at that time. Wirt then drew up some forms of his own and sent them to the policy holders. He mailed one of these to Alvin S. Bates at Camp Pike, Arkansas. He instructed Bates to sign the application for a permit and put the number of his company and regiment on it and forward it to the company. The form was never returned to Wirt and he supposed from that that Bates had received it. Wirt wrote to the company and asked if he would be allowed to sign his name to applications for permits and was informed that the insured would have to sign in person. When the brothers applied to Wirt, he told them he would look after the matter for them and make it all right. He had in mind that he had already sent an application to Alvin S. Bates and thought that was sufficient.

On cross-examination Wirt was asked if the Security Life Insurance Company had a general agent at Dardanelle, Ark. He replied, "I represent them as, general agent, local territory." Wirt further stated that it was not only necessary for a policy holder to have a permit to engage in the military service of the United States, but that if the policy holder went overseas in the service, an extra premium of $100 on each thousand was required. The company at first failed to send Wirt any blank forms for permits because it did not have any. Later it did send to him such blank forms. Wirt explained to Alvin S. Bates that he would have to pay an extra premium if he went overseas in the United States army. He told Bates to notify him with regard to the matter before he left for France and that he would take care of the matter for him. Wirt told Bates about the extra premium a few days before Bates went to Camp Pike. Wirt understood that Bates was about to be sent overseas at the time the brothers showed him the application which the insured

had signed for permission to enter the military service. Both sides requested a peremptory instruction and asked for no other instructions.

The court directed a verdict for the plaintiff, and from the judgment rendered the defendant has appealed.

F. W. Bull (of Chicago, Ill.) and *T. E. Helm,* for appellant.

The undisputed facts show that plaintiff should not recover except for the reserve value and for the yearly premium paid by mistake after the death of the insured. Wirt was not a general agent and in the matter of lending money was not the agent at all of defendant company. No permit was ever issued by Wirt and he had no authority to issue permits. 85 Ark. 337. Wirt's acts did nothing to render the policy valid or make the defendant liable. It was void except as to the reserve value and the premium paid after death, and a tender was made as to both and refused. No war service permit was issued by the company and the extra premium was not paid as required by the policy and there was no waiver nor estoppel. 122 Ark. 357; 3 Cooley's Briefs on Ins. 2513; 85 Ark. 337; 122 *Id.* 179; *Miller* v. *Ill. Bankers' Assn.,* 138 Ark. 442.

The extra premium for foreign service was not paid and under the policy appellee could only recover the reserve and premium paid after death, as stated above.

J. B. Crownover, for appellee.

The death of the insured is admitted and the testimony fails to show that he was "killed while in action" or while taking a part in hostilities or while in the military service. 138 Ark. 442.

The defendant company is estopped. 142 Ark. 132; 206 S. W. 970; 2 May on Ins., § 361. There was no error in giving the peremptory instruction, as there was evidence to sustain it.

HART, J. (after stating the facts). Where both parties ask for a peremptory instruction and do nothing more, they assume the facts to be undisputed, and in effect submit to the trial court the determination of the inferences to be drawn from them. *St. L., I. M. & S. Ry. Co.* v. *Ingram,* 118 Ark. 388.

In the case at bar each party asked the court for a peremptory instruction and requested no other instruction. This then amounted to a submission of the cause to the court sitting as a jury, and in reviewing the action of the trial court we are limited to a consideration of the correctness of the finding on the law and must affirm the judgment if there is any evidence in support of the court's finding.

Wirt testified that he was the general agent of the company in local territory. The general rule is, that a principal is bound by the acts of its agent within the authority conferred upon him and this includes what is usually necessary to the performance of such duties. In discussing the authority of a general agent in *Oak Leaf Mill Co.* v. *Cooper,* 103 Ark. 79, the court said:

"A principal is not only bound by the acts of the agent done under express authority, but he is also bound by all acts of a general agent which are within the apparent scope of his authority, whether they have been authorized by the principal or not, and even if they are contrary to express directions. The principal in such case is not only bound by the authority actually given to the general agent, but by the authority which the third person dealing with him has a right to believe has been given to him. *Brown* v. *Brown,* 96 Ark. 456. The question in all such cases relative to the acts of a general agent is, not whether the authority of such agent was limited, but whether the person dealing with such agent had knowledge or notice of such limitations of his authority."

Wirt said that he was the general agent, local territory. The words, "local territory," did not limit his powers as agent, but only restricted the territory over which he might exercise the powers of a general agent.

Wirt testified that when the brothers came to him and submitted the insured's application for a permit to go overseas and he told them that it was all right, that he would attend to the matter, he had in mind that he had already sent a blank form to the insured at Camp Pike, to be filled out, and supposed that the insured would fill out the blank form and mail it to the company. In testing, however, the legal sufficiency of the evidence to support the finding of the court, we must consider the evidence in the light most favorable to the plaintiff. It does not appear that Wirt communicated to the brothers of the insured that he had already sent in a blank form to the insured at Camp Pike to be there filled out by him and mailed to the company at its home office. Wirt told the brothers that it was all right and he would attend to the matter. He had already told the insured when he passed through Dardanelle on his way to Camp Pike to notify him in case he got orders to go overseas so that he might attend to the matter of getting a permit for the insured. Wirt also told the insured that he would attend to the matter of paying the premiums.

Under this state of the record the court was justified in finding that Wirt was general agent of the company at Dardanelle and possessed, at least, the apparent authority to receive the application for a permit to enlist in the army and to go overseas, given to him by the insured's brothers and to accept the same.

The court was further justified in finding that he had authority to accept such application in the form it was presented to him, and that the brothers of the insured were justified in relying upon his promise in the premises. Therefore, the evidence was legally sufficient to justify a finding by the trial court in favor of the plaintiff.

Again, it is insisted that the court was not warranted in finding in behalf of the plaintiff because no extra premium was paid as required in case of policy holders who were soldiers in the United States army and had received permits from the company to enter such service and to go over sea and fight in the war with Germany.

It will be remembered that the insured was killed in battle in France in July, 1918, and that his second premium was not due until the 22d of August, 1918. In pursuance of the agreement of the insured and his brothers, Wirt charged the amount of the second premium on the books of the merchant with whom he worked, to Bates Brothers, and remitted the amount to the company. It is true this was done before any of the parties knew that the insured had been killed in battle, but it was done pursuant to an agreement made by Wirt with both the insured and his brothers. Wirt was the credit man for a mercantile firm in Dardanelle and had authority to say when and how much money would be paid by the firm for each customer. He agreed with the insured and his brothers to take care of the premiums on his policy and to pay them to the company and charge the Bates Brothers with them on the books of the mercantile company. Of course, in making the payment to the insurance company he was acting as agent of the Bates Brothers, but in receiving the money he was acting as agent of the insurance company. The Bates Brothers made an arrangement in advance with the mercantile company to secure the money and Wirt promised to apply it to the payment of the premiums as they fell due. Both the insured and his brothers were justified in believing that Wirt would pay the second premium when it fell due, and that he would pay the additional premium under the War Risk Clause. They had made arrangements for the money with the mercantile firm of which Wirt was the credit man and he agreed to send the money in to the insurance company. As general agent of the company, he had the authority to receive the money and send it in. The money was there under his control all the time, and he had nothing to do but send it in to the company. Therefore the court was justified in finding that the insured had done all that was necessary for him to do with regard to paying his premium. *New York Life Insurance Company* v. *Allen,* 143 Ark. 143, and *Sovereign Camp Woodmen of the World* v. *Newsom,* 142 Ark. 132.

It follows that the judgment must be affirmed.

SKINNER v. STONE.

Opinion delivered June 7, 1920.

1. FRAUDS, STATUTE OF—SUFFICIENCY OF DESCRIPTION OF LAND.—Where the owner of 120 acres of land in a certain county, in reply to an inquiry as to his price on a described 80-acre tract in such county, wrote offering to sell his 120 acres in the county for a sum named, and it was shown that he owned only one 40-acre tract in addition to the eighty acres described, the offer sufficiently described the land to comply with the statute.
2. VENDOR AND PURCHASER—CHARACTER OF CONVEYANCE.—Where a party agrees to convey land without specifying the kind of conveyance, it will be implied that a conveyance in fee simple with covenants of general warranty was intended.
3. SPECIFIC PERFORMANCE — PRIOR EASEMENT.—The existence of a railroad right-of-way over land agreed to be sold, which was known to both parties, though not mentioned in the contract, will not interfere with the performance of the contract, as it will be presumed that the purchaser proposed to purchase subject to it, and the vendor had a right to exempt the easement if he thought it essential to do so.
4. SPECIFIC PERFORMANCE — ACCEPTANCE OF OFFER.—Where a purchaser by letter accepted a vendor's offer to sell the land for cash, a request in the same letter that the vendor execute the deed and forward it to a designated bank for delivery on payment of the price did not impose a condition of acceptance, but was merely a suggestion as to the method of performance.
5. SPECIFIC PERFORMANCE—METHOD OF PAYMENT.—Where a contract for the sale of land does not specify the mode of payment, the vendor is entitled to demand payment in money, but, since payments are usually made by check or draft, the vendor can not avoid specific performance on the ground that the purchaser did not tender payment in money, without giving the purchaser a chance to pay in money, if that condition was to be imposed.

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

J. E. Callaway, for appellant.

It is apparent from the testimony that the minds of the parties never met and that there was in reality no contract. 85 Ark. 4. The contract was not in writing and within the statute of frauds. *Ib.* In no event was appellee entitled to specific performance, as the terms of

the contract are not established with exactness nor the clear intent of the parties. 36 Cyc. 589; Pomeroy on Spec. Perf., par. 159. It is a matter of discretion and not of right. 2 Parsons on Cont. (3 ed.), p. 510. The letters showed that appellant did not understand the meaning of appellee as to the price and terms of payment. 34 Iowa 218-21; 132 Mass. 129; 48 Am. Rep. 516. It was error to grant specific performance.

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

1. The contract here satisfies the statute of frauds, and there was a binding contract. 85 Ark. 1-4; 34 Ia. 218. This was an Arkansas contract and our decisions govern. The minds of the parties met. 114 Ark. 415; 47 *Id.* 519; 105 Ark. 518-522.

2. The contract was in writing and the statute of frauds was not plead. 96 Ark. 184-9; 105 *Id.* 638. The memorandum in writing was sufficient and sufficiently describes the land. The letters are sufficient. 85 Ark. 1; 136 *Id.* 451; 36 L. R. A. (N. S.) 154; 1 So. 149. "That is certain which can be made certain." 37 N. W. 353; 7 L. R. A. 87; 119 S. W. 445; 60 L. R. A. 415; 96 Am. Dec. 671. Appellant, as the testimony shows, agreed to make a warranty deed. 13 Ark. 426; 7 *Id.* 153. An incumbrance on land does not prevent specific performance if the buyer is willing to accept in that condition. 45 Ark. 17, 31; 114 *Id.* 436-9.

3. Appellee has always been ready and willing to perform his contract and a tender was not necessary. 93 Ark. 497; 68 *Id.* 505.

4. Appellant is estopped to urge that he did not know that the M. & F. Bank and that he did not approve of the form of the deed submitted him. He was silent where he should have spoken. Appellant has neither sought to do equity and does not come into court with clean hands.

SMITH, J. This is a suit to enforce the specific performance of a contract for the sale of certain lands in Clark County owned by appellant, Lewis Skinner. The suit is based upon the following correspondence:

"Gurdon, Ark., June 3, 1919.

"Mr. Lewis Skinner, Perryville, Ind.

"Dear Sir: I am in the land business here, and will buy either your timber on the east half of the northeast quarter of section 21, township 9 south, range 20 west, Clark County, Arkansas, or I will buy land and timber if you will make me a fair price on it. What do you want for it?

"Very truly yours,

"Will W. Stone."

"Perryville, Ind., June 28, 1919.

"Mr. Will W. Stone, Gurdon, Ark.

"Dear Sir: Your letter received asking for prices on land owned by me in Clark County, Arkansas. I will sell land and timber, 120 acres, for $2,500 cash.

"Yours truly,

"Lewis Skinner."

"Gurdon, Ark., July 5, 1919.

"Lewis Skinner, R. F. D. No. 1, Perryville, Ind.

"Dear Mr. Skinner: Your price for your 120 acres of land near Smithton, Clark County, Arkansas, is rather high, but I am accepting your offer to take twenty-five hundred dollars cash for this land, and am inclosing you deed Arkansas form for you to make deed to Will W. Stone and have acknowledged before a notary public, attach draft to deed and send to the Merchants & Farmers Bank, Gurdon, Arkansas, and I will take care of same.

"Very truly yours,

"Will W. Stone."

It will be observed that the first letter was a proposal to buy the timber on the east half northeast quarter section 21, township 9 south, range 20 west, or to buy both the land and the timber, and in response appellant proposed to sell 120 acres of land and timber for $2,500 cash. The testimony taken at the trial showed that appellant

owned, in addition to the eighty acres above described, a forty-acre tract, making 120 acres, and that he owned no other land in that county, and that the two tracts constituted the land referred to by appellant in his letter as the "land owned by me in Clark County, Arkansas."

It also appears from the testimony that appellant made no response to the letter of July 5, but, instead, came down to Clark County, and went over his land, and made inquiry about its then market value, without letting appellee know of his presence in the neighborhood.

Finally, when pressed to close the deal in accordance with the correspondence set out above, appellant declined to do so upon the ground that the minds of the parties had not met upon certain essential details. First, as to the kind of deed which should be made, whether quitclaim or warranty. Second, that appellant had previously granted a right-of-way over a portion of the land to a sawmill company for a railroad, and the parties had not reached an agreement in regard to this easement. It is also urged that appellant knew nothing about the responsibility or solvency of the Merchants & Farmers Bank, of Gurdon, Arkansas, and could not, therefore, be compelled to accept this bank as his agent in closing the transaction; and that no tender of the purchase money had been made; and that appellee's offer to "take care" of a draft to be attached to the deed could not be treated as a tender.

It is also said that the letters set out above do not meet the requirements of the statute of frauds, in that the property to be conveyed is not sufficiently described.

Answering this last insistence first, it may be said that appellant's letter, fairly construed, proposed to sell all the land owned by him in that county, and the testimony shows that to have been 120 acres. Appellee's first letter describes particularly and exactly eighty acres of the land, and the testimony makes the remaining forty acres equally as certain. *Miller* v. *Dargan,* 136 Ark. 237; *Fordyce Lumber Co.* v. *Wallace,* 85 Ark. 1; *Hirschman* v. *Forehand,* 114 Ark. 436.

Upon the question of the kind of deed contemplated by the parties, this court has held that, "Where a party agrees to convey land, and there is nothing said as to the nature and extent of the title to be conveyed, nor anything connected with the transaction, going to indicate the particular species of conveyance intended, the law implies a deed in fee simple, and with covenants of general warranty." *Holland* v. *Rogers,* 33 Ark. 255; *Witter* v. *Biscoe,* 13 Ark. 422.

Upon the question of the prior incumbrance, it may be said that in decreeing the specific performance of the contract the court expressly excepted the right-of-way previously conveyed the lumber company for its railroad. Moreover, the testimony shows that appellee knew of this easement, and it will, therefore, be presumed that he proposed to purchase subject to it. Appellee did not prepare the deed, but sent to appellant a blank to be used, and appellant had both the right and the opportunity to prepare and return to appellee a deed specifically exempting this easement if he thought it essential so to do.

It is true, of course, that appellant could not have been required to close the deal through the Merchants & Farmers Bank at Gurdon, he not having agreed to do so. But appellee did not impose this as a condition. The letter of July 5th must be treated as a suggestion whereby the deal could be closed without delay; and as the appellant did not ask that the deal be closed in some other manner, he is in no position to say that appellee imposed a condition which was not satisfactory.

So, too, in regard to the tender. Appellant did not exact cash, but the reference to cash must be treated as referring to the time of payment rather than to the manner of payment, as in ordinary transactions a check or draft is regarded as the equivalent of money. Appellant would have been within his legal rights in demanding money, but common fairness demanded that, after his offer had been accepted, he give appellee a chance to pay in money if that condition was to be imposed.

We think a binding contract was made when appellee, by his letter of July 5th, accepted appellant's proposition, contained in the letter of June 28th, and that the statement about sending the draft to the Merchants & Farmers Bank was not an additional and unagreed upon condition, but was a mere suggestion to expedite the consummation of a contract which the letter itself closed by accepting unconditionally appellant's offer to sell.

We conclude, therefore, that the court correctly decreed the specific performance of the contract, and that decree is affirmed.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. HELENA WHOLESALE GROCERY COMPANY.

Opinion delivered June 7, 1920.

1. PLEADING—AMENDMENT OF EXHIBIT—CHANGE OF CAUSE OF ACTION.—In an action against a railroad company for damage to a shipment, where plaintiff was allowed to strike out the word "to" from an exhibit stating an account of the damaged goods and to insert the word "for," so that the exhibit read "sold for" the railroad, instead of "sold to," there was no amendment changing the cause of action from the one stated in the complaint.
2. CARRIER—LIABILITY FOR DAMAGE TO SHIPMENT.—Where a railroad company's claim department advised its local agent that a certain consignee could not abandon a damaged shipment, and directed the agent to have the consignee take and handle the shipment to the best advantage, and to submit a claim for damages, the railroad company will be held to have admitted its liability, leaving to the agent to determine the amount thereof.

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

Fink & Dinning, for appellant.

1. Plaintiff was permitted to recover upon a cause of action entirely different from the one stated in the complaint. The rule as to amendments, so as to correspond to the testimony, does not apply, as plaintiff's witnesses testify that no goods were sold, and if sold

they were of no value. 75 Ark. 465; 102 *Id.* 20; 109 *Id.* 206, 217-18. The amendment was improper. 67 Ark. 142; 124 *Id.* 229.

2. Station agents have no authority to adjust claims against railroads for loss or damage to property. 10 C. J. 220. If the station had authority and had paid like claims before, there is no testimony to show that any superior officer had any knowledge that Howell had ever agreed to pay or adjust any claim for damage or loss, nor any that the station agent had ever made any such alleged agreements with other shippers. 95 Ark. 558; 59 *Id.* 395. There was no consideration for such an agreement if the agent had authority to bind the defendant. Appellee had no right to reject the car. 99 Ark. 568; 90 *Id.* 524; 44 *Id.* 439. The consignee was bound to accept the shipment. 3 Hutch. on Car. (3 ed.), § 1363; 6 Thompson on Negl., § 72555; 15 S. W. 502; 22 N. W. 831.

R. B. Campbell and *Sam Latkin,* for appellee.

1. The amendment to the exhibits was properly allowed. Kirby's Digest, §§ 6140-8; 124 Ark. 232; 103 *Id.* 83; 104 *Id.* 276; 75 *Id.* 469.

2. The peremptory instruction was properly denied. There was no evidence to support it. 89 Ark. 368; 96 *Id.* 451. As to the actual authority of a local agent, see 41 Pa. Sup. Ct. 141-4; 10 C. J. 221.

3. There was a consideration to support the agreement in this case. 50 N. W. 891. The following decisions control this: 43 Ark. 172; 10 *Id.* 585. The verdict is supported by the evidence, and there are no errors of law.

SMITH, J. The complaint in this case consists of two counts, in each of which damages to a car of potatoes were claimed. The Helena Wholesale Grocery Company, appellee here, was the plaintiff below and was the consignee in both shipments. There was an exhibit to each count of the complaint, and they are identical in form except as to dates and amounts. "Exhibit A" reads as follows:

"Helena, Ark., 5/25/16.

"Sold (to) for Y. & M. V. Railroad:

Articles.	Weight.	Price.	
65 bags of potatoes hauled to dump	162½	1.09	177.12
To labor overhauling 175 bags	175	10	17.50
			194.62

Car No. 23818. Initial Soo."

Over the objection of appellant, appellee was allowed to strike out the word "to" and insert the word "for" so that, as a result of that amendment, the exhibit was made to read "sold for" the railroad, instead of "sold to" the railroad. Appellant insists that this amendment changed the nature of the cause of action and permitted a recovery upon a cause of action that was entirely different from the one stated in the complaint. We think, however, that the change was, in fact, an unimportant one, as it is apparent that, without reference to the amendment, the sum sought to be recovered is the damage to a shipment of two cars of potatoes.

The testimony is chiefly directed to the second car, although, according to the testimony offered on appellee's behalf, the two cars were handled under the same direction from a Mr. Howell, who was appellant's agent at Helena, the place of delivery of the two shipments.

The amount of damages appears to be undisputed, and the jury returned a verdict on each count for the sum sued for.

As to the first car, it may be said that, according to the testimony on appellee's behalf, Mr. Howell directed appellee to take charge of that car and dispose of the potatoes to the best advantage, and to present a claim for the damage, and that this was done.

The instructions to the jury authorized a finding for appellee for both cars, provided there was a finding that the agent of the railroad company had authorized appellee to dispose of the potatoes and that the railroad com-

pany's agent was authorized to make that settlement. The railroad company asked no instruction except one directing a verdict in its favor, and, while the testimony is conflicting both as to the agent's authority and as to his directions to appellee, concerning the shipments, the testimony is legally sufficient to show that the agent possessed the necessary authority and that he exercised it.

It is insisted, however, that as to the second car the jury was not warranted in finding that the agent had made a settlement in regard thereto, for the reason that the undisputed testimony shows that this settlement was made pursuant to a telegram from the General Claims Department at Chicago.

It appears that Mr. White, the president of the grocery company, refused to receive this second shipment, whereupon Mr. Howell wired the claims department in Chicago for instructions, and, in response, received the following telegram:

"Exchange wires date, ART 10763, potatoes, consignee can't legally abandon shipment, have him take, handle best advantage, submit a claim, wire delivery."

When shown this telegram, White stated that he would handle the car of potatoes, but that he would do so for the railroad company.

We agree with appellant that, whatever may have been the authority of Howell in regard to other shipments, this telegram defined his authority in regard to this second shipment. White admits that he saw this telegram, and he must therefore be held to have known that it measured and defined Howell's authority, so far as that shipment was concerned, but it does not follow, on that account, that the judgment as to the second car must be reversed.

The telegram set out above was sent in response to one advising the claims department of the damaged condition of the shipment and of the consignee's refusal to receive it. The purpose of the telegram from the claims department was to insist that appellee could not legally abandon the shipment, but it did not deny liability for

the damage then existing. Upon the contrary, the telegram, fairly interpreted, concedes liability and expresses a purpose to discharge it. The consignee was directed to handle the shipment to the best advantage and to submit a claim for such damages as could not be avoided.

This direction to submit a claim would appear to indicate that the railroad company was not questioning its liability for the damages, but desired to investigate only the extent of that liability, and, as we have said, the testimony is undisputed as to the amount of damage. So that if, as we have concluded, the telegram, set out above, assumed liability and agreed to pay it, and the extent of this liability is undisputed, it is unimportant to determine whether the instructions given were applicable to the second car, as well as to the first one.

We conclude, therefore, that there is no error in the record, and the judgment is affirmed.

RURAL SINGLE SCHOOL DISTRICTS NOS. 2, 3 AND 4 *v.* LAKE CITY SPECIAL SCHOOL DISTRICT.

Opinion delivered June 7, 1920.

1. APPEAL AND ERROR—SUFFICIENCY OF ABSTRACT.—Where the evidence heard by the trial court is not abstracted, it will be presumed that the court's finding was sustained by sufficient evidence.
2. APPEAL AND ERROR—CONFLICT BETWEEN JUDGMENT AND BILL OF EXCEPTIONS.—The judgment and recitals therein are the highest evidence to determine the course, conduct and result of the suit; and where the judgment recited that the cause was heard on other evidence in addition to that abstracted, it controls, notwithstanding recitals to the contrary in docket entries or in bills of exceptions.

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

The appellants, *pro sese.*

The act and district are void because of the uncertainty of the description of the boundary line. 105 Ark. 392; 122 *Id.* 191; 130 *Id.* 70.

The Legislature has no power to change the boundaries of school districts, and the act is void.

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

Appellants have failed to abstract the evidence, and the judgment should be affirmed. 131 Ark. 362.

HUMPHREYS, J. Lake City Special School District of Craighead County, Arkansas, was organized by Special Act No. 672, Acts of the General Assembly of 1919. The act incorporated territory in the district theretofore embraced in Common School District No. 2, Rural Single School District No. 3 and Rural Single School District No. 4, in said county and State. It was provided by section 8 of the act that "the county judge of Craighead County, Arkansas, is hereby authorized and directed to change the records, at the next term of this court, after the passage of this act, establishing the boundaries of said district, as described in section 1 of this act, describing it in metes and bounds." Application was made to the county court of Craighead County at its April term, 1919, to change the records so as to describe the boundary line of Lake City Special School District in the manner described in said act. The court granted the petition and changed the boundary line in said school district so as to conform to the description of the district contained in the act. From the order of the county court, changing the boundary line of the district aforesaid, the directors of Common School District No. 2, Rural Single School District No. 3 and Rural Single District No. 4, filed affidavits within the time required by law for an appeal to the circuit court, and the proceedings had and done in the county court were transcribed and certified by the county clerk to the circuit court of said county. The cause was submitted in the circuit court at the September, 1919, term thereof, upon the original file of the county court of Craighead County, a certified copy of Act No. 672 of the General Assembly of the State of Arkansas for 1919, the order of the county court appealed from by appellant herein, maps and plans of the United States

survey and other evidence, which resulted in a dismissal of the proceedings instituted by appellants. From the judgment of dismissal, an appeal has been duly prosecuted to this court.

Appellee insists that the judgment of the court should be affirmed because appellants have failed to abstract the evidence adduced at the trial, referred to in the judgment of the court as "other evidence." The abstract does not purport to set forth the evidence referred to. The errors insisted upon by appellants for reversal are of that character which can be determined only on a consideration of the testimony in the case; hence, it was incumbent upon appellant to abstract the testimony of the witnesses, and, having failed to do so, the court will not consider the alleged errors insisted upon for reversal. As has been said by this court: "Where the evidence heard by the trial court is not abstracted, it will be presumed that the court's finding was sustained by sufficient evidence." *Billingsley* v. *Adams,* 102 Ark. 511; *Jones* v. *Bank of Commerce of Fort Smith, Ark.,* 131 Ark. 362.

The great volume of work in this court forbids that the judges take time to explore the transcript to ascertain the testimony of the witnesses in any given case. To do so would greatly retard the work, hence the necessity of rule nine, requiring appellants to abstract the testimony in each case.

The judgment is therefore affirmed for failure to comply with rule nine of this court.

OPINION ON REHEARING.

HUMPHREYS, J. On rehearing, appellant insists that all the evidence considered by the trial court in the trial of the cause was abstracted in its brief. In proof of this, our attention is called to the following notation on the court's docket: "Submitted to the court upon the pleadings and exhibits," to the bill of exceptions which shows that certain evidence was offered and excluded and in which the following recital appeared: "This was all the

evidence introduced by either party upon the trial of the above entitled cause."

The docket entry was not the last expression of the court. The bill of exceptions was the act of the judge in vacation. The judgment and recitals therein are the last expressions of the court and the highest evidence by which to determine the course, conduct and result of the suit. Whenever it conflicts with the recitals in docket entries or in a bill of exceptions, the recitals in the judgment will control and all else must yield. If the judgment roll contains an erroneous recital, the only remedy is to obtain a correction thereof. In the instant case, the judgment recites that the case was heard upon other evidence than that set out in the abstract, and we can not treat the recital therein as *dictum,* in accordance with the suggestion of appellant.

SHACKLEFORD v. SHACKLEFORD.

Opinion delivered June 7, 1920.

1. PARENT AND CHILD—CONVEYANCES BETWEEN.—Where a deed is given to a mother by a child recently come of age, the transaction will be closely scrutinized, and the burden is on the parent to clear the transaction of every shadow of suspicion and to establish its fairness and good faith.
2. DEEDS—LOVE AND AFFECTION AS CONSIDERATION.—A deed executed to a parent by a child after reaching majority for love and affection is binding if the transaction is thoroughly understood and voluntarily made.
3. DEEDS—UNDUE INFLUENCE.—In a suit to cancel deeds to a mother by her son and daughter, executed when they had recently come of age and while they remained under her roof, evidence *held* to establish that they were procured by undue influence.

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

Samuel Frauenthal and *Grover T. Owen,* for appellants.

The deeds were obtained by undue influence and on a promise to reconvey. Appellee is a self-constituted and

self-confessed trustee, and stood in a fiduciary capacity, and the court erred in not canceling the deeds. 43 N. E. 336; 6 Cyc. 335, 681; 186 Pa. St. 314; 29 Cyc. 657; 102 Ark. 232; 12 Peters 241; 173 U. S. 17; 1 Black on Resc. & Can. 659; 18 A. & E. Anno. Cases 538; 51 So. Rep. 321; 1 Black on R. & C., pp. 667, 633. The burden of proof was on defendant. The findings of the chancellor are not conclusive. In chancery appeals the case should be heard *de novo* on the whole record. 75 Ark. 72; 149 S. W. 60; 43 Ark. 307. If the findings are erroneous the cause should be reversed. 31 Ark. 85; 85 *Id.* 617; 98 *Id.* 159; 102 *Id.* 383; 92 *Id.* 315; 76 *Id.* 156. Undue influence is proved. 87 Ark. 148; 75 Fed. 480. The burden was on defendant and she has failed and the chancellor erred in his findings.

Price Shofner and *Mehaffy, Donham & Mehaffy,* for appellee.

The findings of the chancellor will not be disturbed unless against the clear preponderance of the evidence. No showing of a promise to reconvey is made, nor is there proof of any undue influence. 121 Ark. 309; 102 *Id.* 232; 8 R. C. L. 1032; 75 Fed. 480; 38 Mich. 238; 37 N. Y. S. 757; 82 N. E. 881; *Ib.* 395; 24 N. E. 622; 24 S. E. 928; 64 N. W. 25; 33 So. 902; 87 Ark. 148; 20 R. C. L. 588, 591, etc.

Natural love and affection is a sufficient consideration between mother and daughter. 106 Pac. 857; Central Law Journal, April 2, 1920.

HUMPHREYS, J. This suit was instituted by appellants against appellee in the Pulaski Chancery Court to cancel deeds executed by appellants to appellee, conveying an undivided two-thirds interest in the west half of lots one and two in block seventeen in Pope's Addition to the city of Little Rock, Pulaski County, Arkansas, on the ground that they were procured by appellee from appellants through undue influence.

Appellee filed answer, denying that the deeds in question were procured by her through undue influence, but,

on the contrary, were executed by appellants freely and of their own accord with a full understanding of all the facts.

The cause was submitted upon the pleadings and evidence, which resulted in a decree in the chancery court, dismissing the bill of appellants for want of equity. From that decree, an appeal has been prosecuted to this court, and the cause is before us for trial *de novo*.

The facts, in substance, are as follows: John D. Shackleford and his wife, Ada B. Shackleford, appellee herein, had not lived together as husband and wife for several years prior to the purchase of the property in litigation by John D. Shackleford on October 13, 1911. He roomed with and cared for their two boys, John M. and Bill, and appellee roomed with their daughter, Ada Mae, and looked after all of them. At the time of the purchase of the property, it was Shackleford's intention that his two children, appellants herein, should have the property. A settled hatred existed between Shackleford and his wife. He procured a divorce from her, without contest, on June 28, 1915. At that time, the property in question and his farm were encumbered in the same mortgage for a large sum. A property settlement was arranged, by which the appellee received the income from the home, or property in question, and was to pay Shackleford $25 per month to assist in meeting the interest payments on the mortgage. Appellee failed to meet her monthly payments and requested the mortgagee to foreclose, planning to buy the home place in at the sale. Before suit in foreclosure was commenced, Shackleford arranged a loan, placing the city home and farm under separate mortgages. The home place was mortgaged for $4,000 to a building and loan association. Appellee had fallen behind $350 on her property settlement contract. Shackleford, who had remarried, desiring to assist his children, then approaching their majority, in such way that his former wife could not reap any benefit therefrom, after considerable negotiation, conveyed the home place, September 25, 1917, to

appellants and appellee jointly, on condition that appellee pay him $350 she owed under the original property settlement contract and assume the building and loan mortgage on the property. The value of the property was about $10,000 or $12,000 at the time the deed was executed. Appellee accepted the deed and assumed the mortgage under the advice of her attorney, who, at the time, advised her to get a deed from appellants before she put all her money into the place, suggesting that she might have to borrow money on the property, in which event, unless she did obtain such a deed, it would be necessary to get the children's consent, and that it was advisable any way, as she did not know what might happen. Ada Mae had attained to the age of 18 on August 26, just prior to the execution of the deed, and John M. reached his majority on November 20, thereafter. Ada Mae had resided continuously with her mother, and John M. also made his home with her, except when away at school, the training camp at Leon Springs, Texas, and in France. Both of them had been in sympathy and aligned themselves with their mother during the trouble which culminated in a divorce, and remained loyal to her until a short time before bringing this suit. John M. advised with his mother in the matter of divorce and to some extent in the property adjustment which resulted in the conveyance of the property in question by John D. Shackleford to them jointly. Appellee procured a quitclaim deed from Ada Mae to her undivided interest in said property, in the consideration of love and affection, on the 13th day of October, 1917, who was, at the time, residing with her; and from John M. to his undivided interest therein for the same consideration on the first day of December, 1917, while he was on a flying visit to her from the camp in Texas. He had resided in the home with his mother before going to the camp. Both deeds were executed by appellants without independent advice. The deed from Ada Mae was prepared by appellee's attorney in his office and executed immediately in a nearby notary's office. The deed from John

M. was prepared by himself on a blank warranty deed form procured by him in a down-town abstract office, and signed at home with directions to appellee to take it to a notary and have him fill out the acknowledgment.

Ada Mae testified that her mother possessed a violent temper, dealt harshly with her to such an extent that she had to do whatever her mother wanted her to; that she executed the quitclaim deed to her undivided one-third interest through the persistent entreaties and undue pressure of appellee, continuing daily through a period of about two weeks; that her entreaties partook of the nature of begging or pleading, crying and manifestations of anger; that she said her lawyer advised the execution of the deed, that John M. thought it right and was going to give his interest to her when he came home, that she was keeping up the taxes, repairs and paying off the mortgage, that she cared for her when her father kicked her out, that unless she made the deed she would not be treating her right, and that a refusal to execute it would show that she was under the influence of her father. She denied that she had stated to any one that she had voluntarily executed the deed, but, on the contrary, said that she would not have executed the deed of her own volition. She also testified that she heard most of the conversation between her mother and brother concerning the deed he executed to her, and that the understanding between them was that he should have his interest back when he came home from France; that, when he returned from France, appellee refused to make a deed conveying the property back to them, saying that if we got the property back, it must be through the courts.

John M. Shackleford testified that appellee, his mother, was accustomed to weeping and begging to prevail upon him and his sister to do things they would not otherwise do, and, when she commenced crying and carrying on, she could always get them to do anything she willed; that he came home from the camp at Leon Springs, Texas, on a visit to his mother, arriving at 10 o'clock p. m., November 30; that the next morning his mother urged

him to execute a deed to her for his interest in the property, assigning as a reason that he was going away to war and might never return; that, in case of his death, his father would inherit his interest and give her trouble; that, knowing it was the only patrimony he was to get from his father, he was reluctant to convey it away and resented the suggestion of his mother; that she began to weep and entreat, saying: "Yes, you will; yes, you will; I am in a position I have to have it;" that she continued to cry and beg until he saw no way out of it and yielded on condition she would convey his interest back to him when he returned from France; that he went to France soon afterward, returned in July, 1919, and, desiring to marry and engage in business, first requested, then entreated his mother to reconvey his interest to him, which she refused to do on the ground that his demand was inspired by his father; that he explained his father had nothing to do with it, but that he wanted the property back because it was his and he needed it, all to no avail.

Ada B. Shackleford, mother of appellants, testified that her attorney advised her to accept the joint deed from her former husband, John D. Shackleford, to the property in consideration that she pay him $350 in cash and assume the payment of the $4,000 mortgage thereon, if she had confidence in her children, the appellants, who were to receive, under the same deed, an undivided two-thirds interest in the property, unencumbered; but also advised that as she was going to put all her money in the property, it would be best to get a deed from them, conveying their interest to her; that she communicated the advice given her by her attorney to Ada Mae and asked Ada Mae what she thought about it; that Ada Mae told her it was all right, that she should have had the property from the beginning; that nothing more was said about the matter until they went to the attorney's office to execute the deed; that, before going, she told Ada Mae they had better go down and get it off their hands; that Ada Mae was in a happy mood and perfectly willing; that her at-

torney asked Ada Mae if she knew what she was doing and Ada Mae responded she did; that, after the deed was prepared, they walked across the hall to a notary's office, where Ada Mae signed and executed it; that she paid nothing to Ada Mae for it; that she was of opinion that John M. felt as Ada Mae did about it; that she wrote to him concerning the matter and he answered that when he came home they would talk the matter over; that when he came home, they did talk the matter over and he said, "Mother, that is all right, that is the best thing we can do;" that he remained a day or so, went to Fayetteville, and, when he came back, they talked over his trip to France; that, just after dinner, he started to town, at which time, she requested him not to forget the deed he was going to sign; that he said "All right," sat down and wrote it out and signed it at the dinner table; that, after signing it, he remarked that if his father knew that he had conveyed the property to her, he would turn over in his grave; that he instructed her to take it to A. Letzkus, who would acknowledge it; that, in accordance with instructions, she took it to Letzkus and then had it recorded; that she paid her son nothing for the property; that, before she obtained the deeds from her children, she paid $350 she owed her husband, and $1,000 on the mortgage indebtedness, and had since kept up the interest payments thereon; that, after obtaining the deeds, she expended $1,000 in improvements on the property and had collected and used the room rentals; that, while in France, John M. wrote a letter in which the following paragraph appears: "No, I have not heard a word from Dad in regard to the transaction between you and I concerning that place, and I don't expect to, either. I think he understands that I knew what I was about, although nothing has been mentioned about it. That is a matter, though, that will be adjusted between he and I when we see each other. I am perfectly satisfied, though, so he can not disagree. You are looking after the place, so that is all that is necessary. I have not forgotten by any means that you are my mother, and that we are per-

fectly congenial and understand each other better than those who have broken their ties of relationship. We will take care of that proposition, so don't worry. We are looking out for each other's interest—so we are satisfied;" that when her son returned from France in July, 1919, her son demanded a reconveyance of an undivided one-third interest in the property, insisting that it was so understood at the time he conveyed it to her; that he admitted nothing was said to the effect that she should reconvey it to him, but that he understood it that way; that she claimed there was no such understanding and refused to reconvey the property to the appellants. Appellee further stated that her reasons for wanting the deeds from her children were that, if she wanted to borrow money or make improvements, she did not want to ask them about it, and in order to prevent their father from influencing them to lose it.

Eva Shackleford testified that, after John M. returned from France, she heard a conversation between him and his mother, in which he claimed he had deeded it to her so that she, and not his father, might get it in the event he was killed, and that it was his understanding he was to have it back, whether anybody else understood it or not. His mother asked him how he could understand it that way when nothing was said about it, and he replied that he understood it that way, whether anybody else understood it or not. She also testified that, after the institution of this suit, she heard Ada Mae say that she deeded her property to her mother of her own free will and accord.

Mrs. H. B. Johnson testified that she was rooming at the house and Ada Mae came to the room, and, while there, told her she had given the place to her mother; that it was her mother's place to have it and that she did not want it; that, after the suit was instituted, she told her that "we want the place in our names, so if anything comes up we can use it," and, in that connection, said her father had told her in case the place was deeded back to her, he would see that her mother always had a home.

Evidence was introduced pro and con to show that after John D. Shackleford discovered that the children had deeded their interests in the property to their mother, he offered Ada Mae $1,000 to get her to deed it back. John D. Shackleford's explanation in this regard was that he offered to bet his daughter $1,000 she could not get her mother to deed it back, at a time when his daughter claimed that the mother would deed her interest back to her at any time she wanted it.

The record is voluminous and contains much evidence not attempted to be detailed in this opinion. An attempt has been made to glean such evidence only from the record as is responsive to the issue of whether undue influence was used by appellee in procuring the deeds in question from appellants.

The standard governing transactions between parents and children who have recently attained their majorities is a high one. This court said, in the case of *Giers* v. *Hudson,* 102 Ark. 232 (quoting syllabi 1 and 2), that: "Where a daughter, though of age, remains under her father's roof, any contract, conveyance or business transactions between them will be closely scrutinized by the courts." "A conveyance from a daughter to her father, made while she lived with him, will not be permitted to stand unless the transaction is characterized by the utmost fairness and good faith on the father's part." In that case, the language of Lord Chancellor Cranworth in the case of *Savery* v. *King,* 5 H. of L. Cases, 627, was approved as accurately stating the controlling principle in this class of cases. The language of the chancellor was as follows: "The legal right of a person who has attained his age of twenty-one to execute deeds and deal with his property is indisputable. But where a son, recently after attaining his majority, makes over property to his father without consideration or for an inadequate consideration, a court of equity expects that the father shall be able to justify what has been done; to show, at all events, that the son was really a free agent, that he had adequate independent advice, that he was not taking an imprudent

step under parental influence, and that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it." It follows from this language that the burden rests upon the parent in this class of cases to clear the transaction of every shadow of suspicion and to establish its fairness and good faith. The conveyances in the instant case were donations. No consideration was paid for them. They in no way benefited appellants. It is not contended that the consideration was other than love and affection. Such a consideration is sufficient to uphold conveyances, if thoroughly understood and voluntarily made. The conveyances were made only a short time after appellants attained their respective majorities and while they remained under the mother's roof. Ada Mae had never resided elsewhere, and John M. only when away at school or in a soldiers' training camp. The mother had been advised not to assume the indebtedness or make improvements without first obtaining a deed from her children. She wanted the deeds so that she would not have to consult them in case she wanted to borrow money or make improvements on the property, and for the additional reason that she did not want her husband to control or influence the children in the control or disposition of their undivided interest in the property. She communicated the advice she received from her attorney to each of the children and requested them to make deeds to their undivided interest to her. They received no independent advice concerning the transaction. The only advice or counsel they had was that of the mother. They both swear that she obtained the deeds through undue influence exercised over them by continuous entreaties accompanied by weeping; that, in making the deeds, they yielded unwillingly to the overpowering influence of their mother. She denies their statements, but has no corroboration save that of two witnesses who testify that Ada Mae had told them she voluntarily gave her interest in the property to her mother, and that John M. admitted no definite promise had been made by appellee to deed

the property back to him, but that it was only his understanding at the time. Appellee's testimony thus slightly corroborated, when viewed in the light of appellee's admission that she had been advised to get a deed from them to the property and that she wanted and asked them for their several interests, is not sufficient to overcome the positive evidence of appellants that they were induced to make the deeds through the constant entreaties and weepings of their mother. The letter written by John M., while in France, to his mother, does not necessarily indicate that he had irrevocably conveyed his interest to her. The letter contains expressions indicative of a contrary purpose, viz: "You are looking after the place, so that is all that is necessary." "We are looking out for each other's interest—so we are satisfied."

For the error indicated, the decree is reversed and the cause remanded with directions to cancel the deeds in question, and for such further proceedings as may be necessary to adjust the equities between the parties not inconsistent with this opinion.

HARGER v. HARGER.

Opinion delivered June 14, 1920.

1. EXCEPTIONS, BILL OF.—AUTHENTICATION.—The judge's certificate that "the above and foregoing is a true and perfect bill of exceptions in this cause" is a sufficient authentication of the bill, though the clerk's filing certificate and a blank for the judge's certificate precede the page on which the above certificate appears.
2. MASTER AND SERVANT—INDEPENDENT CONTRACTOR.—Where a coal mine lease required the lessee to operate the mine, keep it in good repair, sell the coal mined to the lessor, and keep the lessor protected by liability insurance, and requiring the owner to surrender the mine to the lessee, though the lessor reserved the right to send inspectors to see that the property was cared for and not injured, the lessor was not liable to an employee of the lessee for injuries received during the operation of the mine by the lessee; the latter being an independent contractor.

3. MASTER AND SERVANT—EVIDENCE OF EMPLOYMENT.—In an action for personal injuries by a miner against the lessor and lessee of a mine, testimony of the miner that he was employed by the lessor company, without giving facts and circumstances, *held* insufficient to require submission of the question whether the lessor was operating the mine through the lessee as agent; the undisputed testimony being that he was employed by the lessee.
4. MASTER AND SERVANT—LIABILITY OF COAL-MINING COMPANIES.—Acts 1907, p. 163, § 1, making every "company," whether incorporated or not, liable for injuries to an employee from negligence of the employer or of any agent or employee, applies to an individual operating a coal mine. as well as to associations of persons.
5. MASTER AND SERVANT—INSTRUCTION.—In an action for injuries to a mine employee, an instruction submitting the issue whether plaintiff had been employed by both owner and lessee of the mine was not erroneous as to the lessee, though there was no evidence tending to establish liability of the owner.
6. NEGLIGENCE—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.—In an action for injuries to the operator of a train of coal cars in a mine received in a collision with a detached car, an instruction to the effect that the operator could not recover if he was negligent in not discovering the car, was properly refused where it excluded the element of the foreman's duty to warn the operator of discovered peril.
7. TRIAL — INTRODUCTION OF REBUTTAL TESTIMONY — DISCRETION.—Permitting testimony not properly rebuttal to be introduced in rebuttal *held* discretionary with court.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran,* Judge; reversed as to Western Coal & Mining Company, affirmed as to Wallace Harger.

James B. McDonough, for appellants.

1. The court erred in not directing a verdict for the Western Coal & Mining Company. The evidence failed to show the relation of master and servant between it and plaintiff. The company had no right to select the employee, or remove or discharge him, and no right to direct what work he should do nor the way and manner it should be done, the relation of master and servant did not exist between them and the Western Coal & Mining Company was not liable. 20 A. & E. Enc. L., p. 12, and cases cited; 26 Cyc. 965-6; Labatt on Master and Servant,

§§ 2, 18, 19-27. The relation is one of contract. 20 A. & E. Enc. L., p. 13.

Under the lease Wallace Harger was an independent contractor as a matter of law. 53 Ark. 503; 105 *Id.* 477; 54 *Id.* 424; 77 *Id.* 551; 118 *Id.* 561; 111 *Id.* 247; *Ib.* 91. The evidence is positive that Herbert Harger was not in the employ of the employ of the appellant mining company.

2. The fellow-servant doctrine has not been destroyed as to individuals operating coal mines. Wallace Harger is an individual and not a corporation, and he alone operated the mine at the time of the accident as an independent contractor. He employed appellee, Herbert Harger, and paid his wages. The mining company had no dominion or control over Herbert. Act No. 69, Acts of 1907, did not make the mining company liable. See p. 163 of the act. The court erred in ruling that the word "company" used in that act referred to an individual and that the statute was valid and that the statute or act destroyed the fellow-servant doctrine as applied to an individual engaged in mining coal. 95 Ark. 560; 87 *Id.* 587; 94 *Id.* 27; 89 *Id.* 522. The act is invalid in so far as it applies to individuals. 92 *Id.* 502; 184 Pac. 567; 121 N. E. 215. A mine is not limited to a mere subterranean excavation or workings. 95 Pac. 53; 14 L. R. A. (N. S.) 1043. "Mine" includes a coal mine. 106 Pac. 452. See, also, 178 Pac. 57; 238 U. S. 56; L. R. A. 1915 E. 953; 89 Ark. 522; 222 U. S. 251. There exists no power under the law to make an arbitrary, unjust and unreasonable classification as here. 127 U. S. 205; 170 *Id.* 283; 6 L. R. A. 308; 175 U. S. 348; 49 Ark. 325; 183 U. S. 79; 165 *Id.* 150; 32 N. E. 624; 83 Am. St. 116; 48 L. R. A. 265. The statute as applied to Wallace Harger in the operation of a coal mine as an individual is invalid and that the fellow-servant law as it existed at common law is ni full force as to Wallace Harger, and the court should have given the requests for instructions by Wallace Harger.

3. It was error to permit counsel for plaintiff to read to the jury in his opening statement the answer of the mining company. 104 Ark. 1, 542; 154 Pac. 159; 86 S. W. 65; 154 *Id.* 1070.

4. It was error to refuse to permit counsel to withdraw the separate answer of the mining company. 64 Ark. 253; 70 *Id.* 170.

5. It was error to permit counsel for plaintiff to state to the jury what was done after the accident and the statements made by Sam Young. 105 Ark. 247; 111 *Id.* 337; 115 *Id.* 515; 125 *Id.* 186.

6. It was error to permit the introduction of the evidence of Jackson and Shipley. 116 Ark. 125.

7. The court erred in giving plaintiff's instructions and refusing those asked by defendants. 87 Ark. 243; 82 *Id.* 511; 55 *Id.* 510; 58 *Id.* 157; 87 *Id.* 576; 135 *Id.* 330. It was error to refuse No. 10 asked by defendants. 57 Ark. 503; 108 *Id.* 377; 116 *Id.* 56; 105 *Id.* 526; 102 *Id.* 640; 90 *Id.* 387.

8. It was error to refuse instruction No. 13. Under the statutes of Arkansas the foreman or superintendent or person in control is not liable unless the injury is due to his personal negligence. Kirby's Digest, §§ 5350-2; 5337 to 5357.

9. It was error to give instruction No. 2. 88 Ark. 454. Also error to give No. 3, defining negligence; it is abstract and misleading. 78 Ark. 87. There was reversible error in the other intsructions. See cases *supra,* and a case exactly in point, 174 Pac. 1139. A peremptory instruction should have been given for the mining company. Under the provisions of the lease the lessees are independent contractors and the lessor was not liable for any injury resulting from any negligence of the lessees in connection with the operation of the mine. 77 Ark. 551; 55 *Id.* 510; 3 Elliott on Railroads, § 1063, p. 1586; 21 Okla. 266; 1 Thompson on Negl., p. 631; 34 Okla. 424; 6 Ga. App. 147; 68 Ill. App. 219; 95 N. Y. Supp. 833; 33 Wash. 591; 14 R. C. L. 67-71; 65 *Id.* 455; 76 Me. 100; 80

Cal. (*Smith* v. *Belshaw*); 17 L. R. A. (N. S.) 370; 45 *Id.* 930; 43 Am. Rep. 456. If the contract is in writing and unambiguous, its construction is a question for the court and not the jury. 36 Okla. 358; 8 L. R. A. (N. S.) 896; 145 Cal. 96; 14 R. C. L., p. 78, § 16; 28 Ark. 550; 103 *Id.* 341. In view of these authorities a peremptory instruction should have been given.

Pryor & Miles, for appellant.

Evans & Evans, for appellee.

The verdict is sustained by the evidence and there is no error in the instructions. 136 Ark. 467; *Ark. Land Co.* v. *Fitzhugh*, 143 Ark. 122; 1 McMullen (S. C.) 385; 243 U. S. 188; 49 So. Rep. 395; 160 Ala. 644. In view of the testimony a directed verdict for defendant was properly refused, and the judgment is right on the whole case. See 135 Ark. 117, a case on all-fours with this.

McCULLOCH, C. J. Appellee, Herbert Harger, instituted this action in the circuit court of Franklin County against appellants Wallace Harger and the Western Coal & Mining Company, to recover compensation for injuries sustained while he was working in a coal mine as an employee of appellants.

It is alleged in the complaint that appellee was an employee of both of the appellants and certain acts of negligence are set forth in the complaint as having been committed by other employees of appellants and that the personal injuries received by appellee resulted from said acts of negligence. In the answer filed by appellants the Western Coal & Mining Company denied that appellee was its employee or that it was operating the mine at the time of appellee's injury. The answer of each of the appellants also contained a denial with respect to the alleged acts of negligence and pleaded contributory negligence on the part of appellee and the assumption of risk on his part. The trial of the issues resulted in a verdict in favor of appellee against both of the appellants for the recovery of the sum of $2,187.50.

Appellee's injuries were received on April 21, 1919, while he was working in a coal mine near Denning. The mine was owned and formerly operated by the Western Coal & Mining Company, a corporation, but at the time of appellee's injuries it was being operated by appellant Wallace Harger under a written contract between him and the Western Coal & Mining Company. The character of this contract will be shown later.

Appellee was employed as the operator of an electric motor used in hauling a train of coal cars from what is called the "parting" to the foot of the shaft and then hauling the empties back from the shaft to the "parting," the distance between those two points being about 2,500 feet. The cars loaded with coal were made up into a train at the "parting" and appellee would connect the motor car to the train and haul it to the foot of the shaft for the coal to be hoisted to the surface and then the empty cars would be made up into a train and hauled back to the "parting." This work was, of course, all under ground, and the track between the two points was uneven—uphill and down. The coal cars in the train were coupled together by a crude appliance called a gooseneck, and on the ccasion when appellee was injured the rear car became disconnected after the train left the "parting" en route to the foot of the shaft. This was caused by the coupling or gooseneck being too straight, and the rear car loaded with coal was allowed to become disconnected from the train. The train on this occasion was composed of seventeen cars, and appellee, without knowledge that the rear car had become disconnected, hauled the remainder of the cars to the foot of the shaft for the coal to be hoisted to the surface. The train arrived at the foot of the shaft just before noon, and one-half of the cars were hoisted before the dinner hour and the other half after appellee had returned from his meal. The trainload of empties was made up and turned over to appellee, and he proceeded on his journey hauling the train back to the "parting," and when he had proceeded about 1,500 feet his train encountered the coal car on the track and col-

lided with it. Appellee sustained serious personal injuries in the collision.

Five separate acts of negligence on the part of servants of appellants are alleged in the complaint as causing or contributing to appellee's injuries: First, that there was negligence in permitting the gooseneck or coupling attached to the rear car to become and remain straightened out so that it would not hold its connection in the train; second, that Sam Young, the pit boss and mine foreman, was guilty of negligence in failing to notify appellee that one of the cars had been disconnected and was standing on the track, it being alleged that Young saw the car standing on the track and failed to notify appellee when he started on the return trip with the train of empties; third, that the brake on the motor had gotten out of repair so that the train could not be stopped by means of the brake when danger was discovered; fourth, that the finger-board on the motor had become defective and out of repair, so that the electric current could not be cut off and the train thereby stopped when danger was discovered; and fifth, that there were no lights along the track so as to enable the operator of the motor car to discover obstacles on the track, it being alleged that lights had been provided, but that at the time of this occurrence the sockets were empty and had no lamps in them.

Each of these alleged acts of negligence were, as before stated, denied by appellants in their answer, and they also alleged and introduced evidence tending to prove that it was the duty of appellee himself to check the number of cars in the train when it started on the trip from the "parting" and also when he was ready to return with the empties leaving the foot of the shaft.

It is contended by learned counsel for appellee that there is no bill of exceptions in the transcript, or rather that what purports to be the bill of exceptions is so confused and disconnected that the certificate of the trial judge appears in such a way that there is no certainty about the authentication of the bill of exceptions as the

one filed with the clerk. Time was allowed for filing the bill of exceptions, and during that time it was prepared and the oral proceedings were certified by the court stenographer. There appears on one of the pages a blank certificate for the signature of the trial judge, but it is unsigned, and on the next page there appears the certificate of the stenographer and also an agreement of counsel for the respective parties to sign certifying that the foregoing bill of exceptions was correct, but this certificate was signed only by counsel for appellant and not by counsel for appellee. On this page there also appears the filing mark of the clerk showing that the bill of exceptions was filed on December 18, 1919. On several succeeding pages of the transcript there appears the instructions of the court and certain other proceedings, and finally there is attached the certificate of the judge properly signed and dated December 17, 1919, in which the judge certified that "the above and foregoing is a true and perfect bill of exceptions in this cause." We think that, while the bill of exceptions is in somewhat confused shape, there is sufficient to show that everything preceding the signature of the judge was treated as a part of the bill of exceptions, and that it was properly certified. The fact that the filing certificate of the clerk appears several pages ahead of the certificate of the judge is not sufficient to show conclusively that the purported bill of exceptions ended at the place where the clerk affixed his filing certificate.

The first assignment of error urged here is that the evidence is not legally sufficient to sustain a verdict against appellant Western Coal & Mining Company, in that it is not shown that said appellant was operating the mine at the time of appellee's injury. It is insisted that according to the undisputed evidence the Western Coal & Mining Company had leased the mine to its co-appellant, Wallace Harger, and that appellee was employed by the latter and that the Western Coal & Mining Company had no connection whatever with his employment or service. After carefully considering the evi-

dence, we think that this contention is sound and that the court erred in not giving a peremptory instruction in favor of the Western Coal & Mining Company, withdrawing the issue as to its liability from the jury.

The Western Coal & Mining Company owned the mine property, and had been operating it for a number of years, but entered into a written contract with Wallace Harger on February 16, 1915, whereby it was agreed that the mine should be leased to Harger to be operated as a coal mine, and the testimony is clear and undisputed that the mine was being operated by Harger under said contract at the time appellee was injured. According to the express terms of this contract, the mine was leased by the Western Coal & Mining Company to Wallace Harger and one Craig (Harger having subsequently succeeded to the rights of Craig), and the lessees undertook to operate the mine and to sell the coal mined therefrom to the Western Coal & Mining Company at a stipulated price on board cars at the mine. Under this contract the lessees agreed "to operate and keep in proper repair, all of the mining buildings, railway side tracks, mine workings and machinery, fans, pumps, pit cars and all other implements, equipment and tools as will appear on an inventory of such property attached hereto and made a part hereof at the signing of this agreement; to remove all mine rails and ties from entries and rooms exhausted and suspended during their operations on the premises, and at the termination of this contract to leave the property in as good condition as it was when received, less the depreciation of actual use, or, upon the failure of said first parties to return any portion of such machinery, personal property, etc., said first parties agree to pay for same at a reasonable price to be agreed upon, and no buildings, machinery, fans, boilers, pumps, pit cars or other personal property belonging to said mine shall be placed upon or taken from the premises of the second party, without the consent in writing of its representative." It was also agreed that the lessees should protect the lessor from any liability by reason of injury to persons or property and to "provide

such personal injury liability insurance as will indemnify and be satisfactory to the party of the second part."

The contract is, on its face, one for the leasing of the mine to be independently operated by Harger. There is nothing in the contract from which there can be gathered any intention to make the lessor responsible for the conduct of the lessees in the operation of the mine. The possession of the mine was completely surrendered to the lessee, and the agreement was that the latter should keep the same in repair. The only right reserved to the lessor was the right to send inspectors to see that the property was cared for and not injured. The reservation of this right did not make the lessor liable for the failure of the lessee to keep the premises in good repair, for one of the essentials of a contract to have work done independently is that the work is to be done in the course of an independent occupation according to the methods and under the direction of the contractor himself and that he represents the will of the owner only as to the result of the work done. *J. W. Wheeler & Co.* v. *Fitzpatrick,* 135 Ark. 117. In the contract the lessor was exonerated from any duty to keep the premises in repair, and this duty was cast upon the lessees. In this respect the contract does not resemble the one dealt with in the case of *Collison* v. *Curtner,* 141 Ark. 122. Nor does the fact that the lessor, in his contract with the lessee, exacted of the latter an undertaking "to provide such personal injury liability insurance as will indemnify and be satisfactory," create responsibility on the part of the lessor for the negligent acts or omissions of the lessee. Appellant coal company had the right to require indemnity against all loss under any contingency without committing itself to an obligation to become responsible for any injuries to persons or property. Outside of the contract itself, there is no substantial evidence that the relation of the parties was other than that created by the express terms of the contract itself. Each of the circumstances introduced in evidence were entirely consistent with the relations of lessor and lessee created by the contract. The lessor was to purchase the output

of the mine at a stipulated price, and the proof shows that it advanced money to the lessee on the pay roll and that Harger, the lessee, put himself on the pay roll covered by such advances. This circumstance is without any probative force to establish the fact that appellant Harger was a mere employee or agent of the coal company in the operation of the mine. It had the right to make advances under its purchases without the transaction being treated as a departure from the terms of the contract and as a change of its nature. The only other circumstance relied on is that the printed matter originally used by the coal company and left at its office when the property was turned over to the lessee was used by appellant Harger in making out his pay roll. Sufficient importance can not be attached to this circumstance to make it constitute substantive proof that the mine was being operated by Harger as the agent of the coal company.

It is contended that the testimony of appellee himself was sufficient to warrant the submission of the question as to whether or not the coal company was operating the mine and that appellant Harger was conducting the operations as the agent of the company. Appellee in his testimony made the statement that he was employed by the company, but this was a mere statement of a conclusion as he gave no facts or circumstances to base it on. The undisputed evidence was that appellant Harger was in charge of the mine and employed the men therein. Appellee did not testify that he was employed by any one acting for the company, and his bare statement that he was employed by the company amounted to nothing more than a conclusion of his without any evidence to support it.

In holding as we do that no liability is established against appellant coal company, the judgment must be reversed as to that appellant. Other assignments of error relating solely to the liability of the company are thus eliminated from the discussion, and the further consideration of the court is confined to the questions regarding the liability of appellant Harger.

According to the undisputed testimony, Harger, as lessee of the mine, was operating it for himself and not associated with any other person or corporation.

The first question presented with respect to his liability arises upon the interpretation of the statute enacted by the General Assembly of 1907 (Acts of 1907, p. 163), which reads as follows:

"Section 1. That hereafter all railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and every company, whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants, or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from the careless omission of duty or negligence of such employer, or which may result from the carelessness, omission of duty or negligence of any other agent, servant or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

Does this statute apply to the operation of a coal mine by an individual? We have upheld the validity of this statute as applicable to railroad companies, and in the case of *Ozark Lumber Co.* v. *Biddie,* 87 Ark. 587, we upheld that portion of it which relates entirely to corporations "of every kind and character." The succeeding part of the statute applies to "every company, whether incorporated or not, engaged in the mining of coal, etc." The plain purpose of the framers of the statute was to make its provisions applicable to those engaged in the mining of coal and the only question is whether or not the use of the word "company" is broad enough to include an individual engaged in that business. It being perfectly clear from the language used that the Legislature intended to regulate the business of coal mining, we should and ought to carry out that intention and give the language used a liberal interpretation in defining the

word "company," and we think that that word used in this connection was intended to include individuals and is not limited to associations of persons. The strictest interpretation of the word would confine its application to corporations alone, but it is obvious that the Legislature did not mean it in that sense, for they had already provided for the regulation of all corporations, irrespective of the kind of business conducted. If we depart from this strict construction; there is no reason discoverable why individuals could not come within the term, as well as association of individuals, such as partnerships. There is authority for this interpretation and we think it is a correct view of the matter.

In the case of *Atlantic Coast Line R. Co.* v. *State,* 135 Ga. 545, 32 L. R. A. (N. S.) 20, the court held that "the word 'company' does not necessarily mean a corporation, but may mean a firm, partnership or individual." There was a like holding in *Elfand* v. *Southern Ry. Co.,* 146 N. C. 135; *Keystone Pub. Co.* v. *Hill Dryer Co.,* 105 N. Y. Supp. 894; *Singer Mfg. Co.* v. *Wright,* 97 Ga. 114.

This question has never been before us for decision until the present case was presented, and the cases referred to on the brief of appellants did not go into this question, but, on the contrary, were decisive of other phases of the statute. We are of the opinion, therefore, that the statute applies to the operation of a coal mine by an individual, and that it abolished the common-law doctrine as to liability for acts of fellow-servants and made the operator of the mine responsible to an employee for the negligent acts of his fellow-servants.

The instructions given by the court were, we think, according to the well-settled principles of law with respect to relations between master and servant and the duties of one to the other. Those instructions are numerous, and the assignments of error in regard to them are equally numerous, and a discussion of those matters is unnecessary as no new question is presented.

It is contended that the first instruction was erroneous because it submitted to the jury the issue of the employment of appellee by both of the appellants. This assignment raises the question of the legal sufficiency of the evidence to sustain the verdict against the coal company, and that has already been disposed of in this opinion, but the elimination of the coal company from consideration does not make the instruction erroneous as to the other appellant.

Error of the court is assigned in refusing to give the following instruction requested by appellant: "If it was the duty of the plaintiff to count the cars when he started with a trip, or if it was his duty to ascertain how many cars he had in the trip when he started, and if it was his duty also to count or ascertain the number of cars at the completion of the trip so as to know whether any cars were left along the haulage way, then and in that event the plaintiff did not have the right to rely upon notice from the foreman, Sam Young. If the above are the facts, the defendant did not owe to the plaintiff the duty to warn plaintiff that he had left a car on the track, and in that event the jury will find for the defendants on the alleged negligence of defendant in failing to give notice of the presence of the car on the track."

This instruction was erroneous in telling the jury that appellee should be denied the right to recover because of his own failure to ascertain the fact that one of the cars had been lost on the trip, notwithstanding the actual knowledge on the part of the foreman that the car was standing on the track in a dangerous position and his failure to notify appellee of that fact.

There is abundant testimony that it was the affirmative duty of the pit boss to notify the men of any dangerous conditions existing, and the evidence shows that Young, the foreman, had actual knowledge of the presence of the car and failed to notify appellee as he started on his return trip. Even though appellee failed to discharge the duty of counting the cars before he started

on the return trip, yet the negligent failure of Young to notify him of the presence of the lost car on the track which created the danger was the intervening and proximate cause of the injury. It was a case of peril actually discovered by the representative of the employer, and his negligence in failing to guard against it or give warning concerning it was the proximate cause of the injury. This instruction was therefore incorrect in excluding that element from the consideration of the jury.

There are other assignments of error not of sufficient importance to consider. Several of them relate to matters to which no exceptions were saved, or which do not appear in the bill of exceptions. The question of permitting the appellee to introduce in rebuttal testimony which was not properly rebuttal testimony was a matter of discretion for the court, and we can not say that the court abused its discretion in that respect.

The judgment is therefore reversed, and the cause is dismissed as to the Western Coal & Mining Company, but as to appellant Wallace Harger the judgment is affirmed.

MYERS v. LINEBARGER.

Opinion delivered June 14, 1920.

1. BROKERS—FRAUDULENT REPRESENTATIONS.—A purchaser is not entitled to damages against a broker for misrepresentation as to land received in exchange where the purchaser relied upon her own investigation, and not upon the representations made by the broker.
2. APPEAL AND ERROR—CROSS-APPEAL.—Under Kirby's Digest, § 1225, providing for a cross-appeal against the appellant or any co-appellee, in a suit against a broker for damages for misrepresentation in which plaintiff has appealed, an intervener seeking damages for misrepresentations of the broker as to other property is not a "co-appellee," and a "cross-appeal" filed by him after expiration of the statutory time for original appeals is not available as an original appeal.

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

Walker & Walker, for appellant.

The representations made by appellee were false and fraudulent and known by him to be so. 101 Ark. 95-100; 182 S. W. 128; 24 N. Y. Supp. 333; 115 N. W. 1111.

W. N. Ivie and *H. L. Pearson,* for appellees.

Appellant has not abstracted the testimony, and the cause should be affirmed.

Before a principal can recover damages from an agent, it is necessary for him to allege and prove that he sustained actual damages from the injuries or wrongs committed by the agent and the amount required to compensate him. 95 Ark. 597; Tiffany on Agency 398; 1 Clark & Skyles on Agency 398. There is no evidence in the record showing that the court was wrong when it found there was no loss or injury to appellant from the alleged false representations of Linebarger, but if there was they were made upon the statements given to him by the owner of the land and the appellant, knowing at the time that appellee did not own the land she was trading for, she had no right to rely upon such representations or to demand of her agent or broker to ascertain the truth of same. 40 Minn. 404; 42 N. W. 205. The letter of appellant shows that appellant knew that the description of the land was not made of his own knowledge, but that she made an independent investigation through Kramer and made the deal on that investigation and was not deceived by any representations of Linebarger and sustained no loss or injury thereby. 2 C. J., § 353; 21 N. Y. Supp. 407. The testimony shows that Linebarger was a mere middle man in bringing about this deal for an exchange of property and the deal was consummated by the parties themselves through Kramer, and appellee was entitled to his $100 fee for his services, which was agreed to. 105 N. Y. 289; 11 N. E. 634.

On the cross-appeal we maintain that the general allegations of fraud as found by the chancellor are wholly contrary to the evidence. 2 C. J. 713, § 367; 4 R. C. L., §§ 23, 65; 154 Fed. 647; 24 L. R. A. (N. S.) 659. If the

broker merely brings together two parties who desire to exchange or sell lands and his employment then ends and the parties themselves settle the terms of the transaction, he is a mere middleman and may recover from each party if each has agreed to pay him. Walker on Real Estate Agency, § 475; 125 C. A. L. 276; 94 Mich. 100; 5 L. R. A. (N. S.) 112; 82 Ark. 381. The case is decisiv of this, and the case should be reversed on the cross-appeal.

McCULLOCH, C. J. Appellant Ellen Myers formerly resided in the town of Riviera, Texas, and owned several lots there, on one of which was situated a building used as a hotel. Mrs. Rosa E. Trone owned a farm in Washington County, Arkansas, containing 108 acres, of which about 36 acres were in cultivation, and on which there was an apple orchard containing 285 bearing trees. Each of those parties desired to sell or exchange their respective properties, and appellee Elmer Linebarger, who lived at Fayetteville, was authorized by each of the parties to negotiate a sale, and he finally brought the parties together on terms for the exchange of their properties. He was to receive from Mrs. Myers the sum of $100 as his commission, and was also to receive from Mrs. Trone, and did receive from her, as his commission a conveyance of one of the lots in Riviera, Texas, which Mrs. Trone had received in the trade with appellant.

This action was instituted by appellant against appellee Linebarger to recover damages sustained by reason of alleged misrepresentations by the latter to appellant concerning the farm which appellant received from Mrs. Trone in the exchange. The court sustained a demurrer to the complaint, but on appeal to this court the judgment was reversed and cause remanded for further proceedings. 134 Ark. 231. The cause was then transferred to the chancery court, apparently without objection, and Mrs. Trone filed an intervention, in which she, too, sought to recover damages from appellee Linebarger on account of alleged misrepresentations to her concern-

ing the property which she received from Mrs. Myers. The cause was heard by the court, and a decree was rendered in favor of appellant against appellee Linebarger to the extent of the commission he was to receive, namely, the sum of $100, which was ordered to be credited on the note executed by appellant to Mrs. Trone and assigned to appellee. In other respects, appellant's complaint was dismissed for want of equity. The court also rendered a decree in favor of Mrs. Trone against Linebarger for cancellation of her conveyance to the latter of the lot in Riviera which he received as compensation for negotiating the exchange. Mrs. Myers appealed from so much of the decree as dismissed her complaint against Linebarger and the latter appealed from the decree against him in favor of Mrs. Trone. Those appeals were granted by the chancery court at the time of the rendition of the decrees, but neither of them were perfected. A few days before the expiration of the statutory time allowed for obtaining appeals to this court Mrs. Myers lodged a transcript here, and was allowed an appeal by the clerk of this court. After the expiration of the statutory time for original appeals Linebarger prayed a cross-appeal, which was granted.

The chancery court in its decree recited findings to the effect that Linebarger had made misrepresentations to Mrs. Myers as to the condition of the tract of land she received from Mrs. Trone with respect to the number of apple trees and the number of acres in cultivation, and as to certain fencing and other matters to some extent material, and the decree also recited a finding that Mrs. Myers did not rely wholly on the representations of Linebarger, but that she made a separate investigation of the property through one T. J. Kramer, and relied on the facts thus ascertained in making the exchange.

Appellant has not abstracted the testimony, but relies for a reversal of the judgment on the contention that there should have been a decree in favor of appellant on the findings of the court. Appellee has abstracted the testimony deemed to be material to his side of the con-

troversy, and it appears therefrom that the representations which he made to appellant were upon information and purported to be such, and that she did not consummate the trade on the faith of those representations, but made investigation through Mr. Kramer, with whom she was acquainted, and that she relied on Kramer's judgment. In the state of the record presented to us we must presume that the evidence is sufficient to sustain the findings of the court that appellant pursued an investigation in her own way, and relied upon that, and not upon the representations made to her by appellee. This being true, she is not entitled to recover damages. In order to establish liability, either by way of rescission of a contract or recovery of damages, it must appear that the representations were such as the party had a right to rely on and did in fact rely on them. *Brown* v. *LeMay*, 101 Ark. 95. This disposes of the contention of appellant, and the decree dismissing her complaint will be affirmed.

Appellee Linebarger did not perfect his original appeal against Mrs. Trone, and the cross-appeal is not available as an original appeal, because it was asked for and allowed after the statutory time for granting appeals. A cross-appeal was not proper, because the controversy between Linebarger and Mrs. Trone was entirely separate, and the record of the controversy between them can not be brought up for review on cross-appeal obtained on the appeal of Mrs. Myers. *Shapard* v. *Mixon*, 122 Ark. 530. The statute provides for "a cross-appeal against the appellant, or any co-appellee." Kirby's Digest, sec. 1225. Mrs. Trone was neither the appellant nor was she the co-appellee with Linebarger on the appeal of Mrs. Myers. Linebarger's cross-appeal is therefore dismissed.

McCONNELL v. SEBASTIAN COUNTY, GREENWOOD DISTRICT.

Opinion delivered June 14, 1920.

TAXATION—UNMATURED RENT NOTES.—An instrument whereby a land owner leased land for a specified period under an agreement requiring him to execute a warranty deed to the lessee upon the latter's payment of the stipulated rental during all of such period *held* a lease with option to the lessee to purchase by continuing the payments for the full term, and not a contract for sale, and the rental notes until maturity are not taxable under Kirby's Digest, § 6902.

Appeal from Sebastian Circuit Court, Greenwood District; *John Brizzolara,* Judge; reversed.

A. M. Dobbs, for appellant.

The contract was nothing more than a lease creating the relationship of landlord and tenant and not that of vendor and vendee, as it is not a sale. The notes were rent notes and not taxable. 92 Ark. 324; 122 S. W. 1002; Kirby & Castle's Digest, § 6902. It is clear this was not a sale but a mere lease. 6 A. & E. Enc. L., p. 500, par. 4-5; 22 Wyo. 336; Am. Ann. Cases 1917 C. 120; 76 Ark. 378. Under the contract a mere lease and rent notes were executed and the rent notes are not taxable and the court erred in sustaining the demurrer.

McCULLOCH, C. J. Appellant began this proceeding in the county court by filing a petition praying for a correction of his personal assessment made by the township board of assessors. The assessment list, of which appellant complains, includes certain promissory notes executed to appellant by J. S. Woods and wife, and the assessors listed the property for taxation on the theory that the notes were executed for the purchase price of real estate. The contention of appellant is that they were immature rent notes and not subject to taxation for the year in which the assessors listed them. Appellant owned certain lots in the town of Hartford, and he entered into a written obligation with Woods and wife, as follows:

"Know all men by these presents: This indenture, made and entered into by and between Joseph A. McCon-

nell and Rachel S. McConnell, his wife, hereinafter called lessors, and J. S. Woods and Sarah E. Woods, husband and wife, hereafter called lessees, all of Hartford, Arkansas, this 10th day of October, 1918, which term, lessors and lessees, shall be taken to mean heirs, executors, and administrators, wherein the context will admit. Witnesseth:

"That, for and in consideration of the mutual agreements, conditions and covenants, hereinafter set out, the lessors hereby leases, lets and demises to the lessees for a period of seven years, beginning on the 1st day of October, 1918, all the following described lands lying in the Greenwood District of Sebastian County, State of Arkansas, towit:

"Lots seven, eight, nine, ten, eleven and twelve, in block thirteen, original town of Hartford, to have and to hold to the said lessees for the period of this lease, together with all privileges, improvements and appurtenances thereunto belonging, except the barn now located thereon which lessor may remove.

"The said lessees covenant with the said lessors that they shall cause to be paid the lessors the sum of twenty-five dollars per month for the period of this lease, commencing payment on the first day of each month after this lease date and promptly pay the said sum when due; that the said lessees shall keep said place in repair and pay all taxes of whatsoever kind that may be assessed by State, county or city and improvement taxes of all descriptions which may become due, and shall keep said premises insured against loss by fire in some reputable insurance company for the full period of the lease in such sum as may be deemed within the amount allowed by law and the value of the property, and shall further commit no waste nor sublet nor assign this lease without written consent of the lessors.

"The lessors hereby covenant with the lessees that they shall have quiet enjoyment of the said premises for the period of said lease upon prompt performance of the covenants and agreements made by them, and the said les-

sors further agree and bind themselves as a part of the consideration of this contract that if the said lessees shall well and truly perform their covenants, agreements and promises herein contained for the full period of this lease, that at the expiration thereof the said lessors shall cause a good and sufficient warranty deed to be executed to the said lessees, clear and free from all incumbrances and warranting and defending to the said lessees the title in fee to the aforesaid premises."

The question in the case is whether or not the notes executed pursuant to the above contract were rent notes or purchase money notes, for if of the former character they were not taxable according to the terms of the statute, which provides that a person shall not be required to list for taxation any obligation for the payment of rent, except that portion which has "accrued on the lease and shall remain due and unpaid at the time of listing." Kirby's Digest, sec. 6902. We are of the opinion that the proper interpretation of the contract is that it constitutes a lease with an option to purchase by continuing the payments for the full term. The parties had the right to make either a lease contract or a contract for sale, and they elected to put it in the form of a lease, so that the relation of landlord and tenant should subsist until the final payment when under the contract itself that relation should be changed into that of vendor and purchaser. *Ish* v. *Morgan,* 48 Ark. 413. The lawmakers, in the enactment of the statute referred to above, undertook to classify the property which should be subject to taxation and drew the line between immature rent notes and other obligations. Since the parties themselves in making the contract elected to create the relation of landlord and tenant, so that the notes executed pursuant thereto constituted rent notes, the State is bound by that election and can not exact the payment of taxes which would amount to a change in the nature of the obligation created by the parties themselves.

The circuit court was not correct in its decision upholding the assessment, and the judgment is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

RURAL SPECIAL SCHOOL DISTRICT NO. 11 *v.* BAKER.

Opinion delivered June 14, 1920.

1. SCHOOLS AND SCHOOL DISTRICTS—PETITION FOR DISSOLUTION.—A petition for dissolution of a rural special school district by a majority of the qualified electors at the time of filing of the petition and posting of the notices under Kirby's Digest, §§ 7548, 7549, was sufficient, though a subsequent addition of territory to the district made the petition contain fewer than a majority of the electors subsequent to such annexation, as the filing of the petition and posting of the notices fix the status of the district as to the action to be had upon the petition.
2. SCHOOLS AND SCHOOL DISTRICTS—DISSOLUTION OF DISTRICT.—In proceedings to dissolve a rural special school district, a compliance with Kirby's Digest, § 7548, as to filing of the petition of a majority of the qualified electors and giving the notice prescribed is essential to jurisdiction.
3. SCHOOLS AND SCHOOL DISTRICTS—DISSOLUTION.—In dissolving a school district, the county court should direct that the territory comprising that district be attached in whole or in part to adjoining districts.

Appeal from Union Circuit Court; *C. W. Smith,* Judge; reversed in part.

W. C. Medley, for appellant.

The law of this case is settled in 128 Ark. 129, and the court erred in its order of dissolution when it attempted to recreate the common school districts which had been absorbed in Rural District No. 11, because the petition does not contain a majority of the qualified voters of the entire district and because the judgment is contrary to the law as announced in 128 Ark. 129.

Mahoney & Mahoney, for appellees.

The petition for dissolution at the time it was circulated and filed and notice given contained a clear ma-

jority of all the qualified electors residing in the district. When so filed and notice given, the status was fixed and all petitions to annex new territory must be held in abeyance until that petition is heard. The date of the filing of the petition and posting notices governs as to the merits of the petition and the addition of new names, if that is done, does not affect the status of the petition. *School Dist.* 85 v. *Tatum,* 139 Ark. 1. Under this decision the judgment is right.

WOOD, J. On May 30, 1919, a petition was filed with the county clerk of Union County, signed by forty persons who alleged therein that they constituted a majority of the qualified electors of Rural Special School District No. 11 (hereafter for convenience called special district). They described the territory constituting the district, which comprised all of common school districts No. 11 and No. 34, and part of common school districts No. 56 and No. 79. They alleged that the children living in certain portions of the district had been done a grave injustice in that the distance of the proposed schoolhouse for the special district was so great that they would not be able to attend school and the district was not able to furnish them transportation. They prayed for an order of the county court dissolving the district and placing the territory back in the common school districts from which the territory constituting the special district was carved when the same was organized.

On July 22, 1919, the county court took up the petition for consideration and found that notice of the intention to file the petition was not posted until May 31, and that by an order of the Union County Court made on June 2, 1919, certain other territory was annexed to the special district, and that all the territory including the territory annexed to the district on the latter date should be considered.

The petitioners thereupon admitted that if the annexed territory were to be construed the petition did not contain a majority of the qualified voters within the spe-

cial district. Whereupon the court entered a judgment refusing the prayer of the petition. The petitioners appealed to the circuit court.

In the circuit court the district answered and denied that the petition for dissolution of the district was signed by a majority of the qualified voters residing therein and alleged that there were more than 80 qualified voters in the district; that the petition contained only 39 names; that six of the petitioners, naming them, had not paid their poll tax and therefore not qualified, and three others, naming them, did not live within the district.

There was testimony before the circuit court to the effect that when the petition asking for the dissolution of the district was filed May 30, 1919, it contained a majority of the qualified electors residing in the district as constituted at that time. That notices were posted, thirty days before the ensuing July term of the county court, in the district as then constituted, of the intention of the petitioners to ask for a dissolution. After the filing of the petition additional territory was annexed to the district. At the time the petition for the dissolution of the district was filed, there was something like 70 qualified voters residing therein. The petition contained the names of 40 men who were qualified electors which constituted a majority of the electors residing in the territory at that time.

It was admitted by the petitioners that they did not have a majority of the qualified electors in the district if the territory annexed by the order of the county court on June 2, 1919, were construed as a part of the district.

The circuit court, among other things, found that the petition to dissolve the district was filed with the county clerk of Union County on May 30, 1919, and that said petition contained the names of the majority of the qualified electors residing in Rural Special School District No. 11, as then established and formed, and that due notice of the filing and pendency of said petition was given as required by law and by the posting of four notices in said school district in public places, one of which was upon

the schoolhouse door used by that district. That on June 2, 1919, while said petition to dissolve said district was pending, a petition was filed before the county court to annex certain additional territory to said district No. 11 as then organized, which petition was by the county court granted on said date enlarging said district and taking in other qualified electors after the petition to dissolve said district No. 11 had been duly filed and notice thereof posted as required by law.

The court further found that the facts alleged in the petition as to the injustice and hardship upon a majority of the qualified electors residing in the district were true. The court thereupon entered a judgment granting the prayer of the petitioners, dissolving the district, and ordered that all territory therein embraced be placed back in the common school districts from which it was taken, and that the funds on hand be apportioned to the several districts as they existed prior to the organization of district No. 11.

This appeal is duly prosecuted from that judgment. The evidence was legally sufficient to sustain the finding of the trial court on the issue as to the necessity for the dissolution of the district.

The other questions for our consideration are: 1. Did the petition for the dissolution of the special district contain a majority of the electors residing in the district in compliance with section 1, act 66 of the Acts of 1905, p. 82; section 7548 of Kirby's Digest?

2. If the petition contained the required majority, did the court upon the dissolution of the special district err in the apportionment of the territory and funds constituting such district?

First. The filing of the petition to dissolve, and the posting of the notices, as required by sections 7548-49 of Kirby's Digest, is analogous to the bringing of a suit for the dissolution of the district against any one who may oppose the dissolution. It would be wholly impracticable to ascertain who might be opposed to the dissolution, so the Legislature adopted the method of posting

notices. The filing of the petition and the posting of the notice operates as a sort of *lis pendens,* upon all persons who may be interested in the affairs of the district. The filing of the petition for dissolution and posting the notices fixes the status of the district as to the action to be had upon the petition. No territory can thereafter be annexed to the district that will affect the merits of the petition. There was therefore no error in the ruling of the court that the petition contained a majority of the qualified electors residing in the special district as required by section 7548, Kirby's Digest.

A compliance with the statute as to the filing of the petition and giving the notice prescribed is essential to the jurisdiction to dissolve. *Hughes* v. *Robuck,* 119 Ark. 592-95.

Second. The decision of this court in *Curtis* v. *Haynes Special School District H,* 128 Ark. 129, is to the effect that "where all of the territory of a district is taken and annexed to another district, the former goes out of existence, and is no longer a school district." Under this decision when the court entered the judgment dissolving special district No. 11, it should have directed that the territory comprising that district be attached in whole or in part to adjoining districts as required by the statute, following the construction thereof in *Curtis* v. *Haynes Special School District H, supra.*

The judgment dissolving special district No. 11 is affirmed. The judgment apportioning the territory and the funds thereof for the error indicated is reversed and remanded for a new trial of that matter.

TERRY DAIRY COMPANY *v.* PARKER.

Opinion delivered June 14, 1920.

1. CORPORATION—VENUE—PLACE OF BUSINESS.—Where a defendant corporation employed an agent to purchase milk in a county other than that wherein it carried on its principal business, and provided a building for receiving the milk, process might be served on such agent within Acts 1909, No. 98, as this was "a branch office or other place of business."

2. NEGLIGENCE—QUESTIONS FOR JURY.—The question of the negligence of the driver of a motor truck which struck plaintiff, as well as the question of plaintiff's contributory negligence, *held* for the jury.

3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict supported by evidence legally sufficient to sustain the finding is conclusive on appeal.

4. MASTER AND SERVANT—PRESUMPTION—REBUTTAL.—Where the motor truck which injured plaintiff was owned by defendant company which also paid for its license, whether the *prima facie* case that the truck was operated for defendant was overcome by the evidence, was a question for the jury.

5. MASTER AND SERVANT—INDEPENDENT CONTRACTOR.—The fact that one sold a dairy company's milk and cream on commission and delivered same in the company's truck is not alone sufficient to prove as matter of law that he was an independent contractor; that being a question for the jury.

6. MASTER AND SERVANT—LIABILITY OF MASTER—BURDEN OF PROOF.—In an action against the owner of a motor truck for injuries occasioned by the driver's negligence, plaintiff has the burden of proving that the driver was the owner's servant.

7. MASTER AND SERVANT—RELATIONSHIP—PAYMENT OF WAGES.—In determining whether the driver of a truck was servant of the owner or of an independent contractor, the jury should consider in whose business the driver was engaged and who had the right to control and direct his conduct; and in determining this question they should consider not merely who paid the driver's wages but all the facts and circumstances in proof.

8. MASTER AND SERVANT—NEGLIGENCE OF SERVANT.—A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's acts or neglect, or even if he disapproved of or forbade it.

9. MASTER AND SERVANT—WHEN RELATIONSHIP EXISTS.—The relation of master and servant exists wherever the employer retains the right to direct the manner in which the business shall be done as well as the result to be accomplished.

10. TRIAL—ARGUMENTATIVE INSTRUCTIONS.—The refusal of prayers which were argumentative and calculated to mislead was proper.

11. TRIAL—IMPROPER QUESTION.—Where a question as to whether defendant was insured was ruled by the court to be incompetent, and in response to a request to instruct that the jury should not consider testimony as to insurance the court reiterated the ruling that the witness should not answer as to insurance, the prejudicial effect of the improper question was removed.

12. DAMAGES—EXCESSIVENESS.—An award of $10,000 to a physician for severe and permanent injury to the knee joint which necessitated the use of crutches and rendered him unable to earn more than a pittance was not excessive where he had earned $3,000 to $4,000 per annum.

Appeal from Prairie Circuit Court, Southern District; *G. W. Clark,* Judge; affirmed.

Buzbee, Pugh & Harrison and *Carmichael & Brooks,* for appellant.

1. There was no proper service on the appellant, a corporation organized and doing business under the laws of Arkansas. The case in 115 Ark. 272, is not in point. The motion to quash the service should have been sustained, as the court obtained no jurisdiction. The pretended service was upon a person who had no contract with appellant and was not in charge of any branch of appellant's business; his only duty was to take milk from the farmers, weigh and ship it to appellant at Little Rock. He was not an agent of appellant upon whom process could be served, even under the rule in 115 Ark. 272.

2. The truck which it is alleged injured plaintiff was operated by an independent contractor, Ellison, and appellant was not liable for his acts or those of his servant or employee. 105 Ark. 477-481; 77 *Id.* 551; 156 N. Y. 75; 111 Ark. 247; 90 Conn. 444; 97 Atl. 328. The court erred in giving and refusing instructions. 111 Ark. 247, and cases *supra.* 111 Ark. 483, 498. See, also, Babbitt on Motor Vehicles, § 559; 177 Mass. 530. The ownership of the truck and the printed name thereon did not prove anything as to ownership or liability.

3. Appellee was guilty of contributory negligence. The truck was moving at a very slow rate of speed and running in low gear. If appellee had exercised ordinary care, such as is demanded of every pedestrian, he would not have been struck.

4. There is no evidence to sustain the verdict and it is excessive. 79 Ark. 621.

5. There were many errors in the admission of testimony. 72 Ark. 409; 68 *Id.* 594-5.

6. It was error not to exclude the question as to insurance. 114 Ark. 542; 104 *Id.* 1; 114 Ark. 542.

Beloate & Anderson and *Pace, Campbell & Davis,* for appellee.

1. The service was lawful and proper. It was upon Kearns, the agent, servant and employee in charge of a branch office and place of business of defendant in Prairie County, Arkansas. Act 98, Acts 1909, p. 293; 115 Ark. 272.

2. The truck was not operated by an independent contractor. It belonged to appellant. It was painted TERRY DAIRY COMPANY, and the license number on the truck made a *prima facie* case that defendant owned the car and that the custodian of it was engaged in the owner's service. 214 N. Y. 249. Ellison was not an independent contractor. 135 Ark. 117; 61 S. E. 811; 52 Minn. 474; 157 Ky. 836; 84 N. J. L. 598; 124 Pac. 38; 49 La. Ann. 1465; 109 Fed. 732; 132 U. S. 523; 40 S.W. 309.

3. There was no error in the instructions given or refused. 135 Ark. 117; 133 *Id.* 334; 134 *Id.* 1; 37 *Id.* 580; 77 Ark. 551; 111 *Id.* 91; 118 *Id.* 561.

4. Appellee was not guilty of contributory negligence; he used ordinary care and looked and listened, as the evidence shows abundantly, and the finding of the jury is sustained by the evidence and is conclusive under the proof. 102 Ark. 351; 92 *Id.* 502; 94 *Id.* 246; 97 *Id.* 347; 101 *Id.* 424; 134 *Id.* 320; 85 *Id.* 479; 81 *Id.* 187; 110 *Id.* 495; 96 *Id.* 243.

5. There is ample evidence to sustain the verdict. 112 Ark. 607. The truck was going at twelve or fifteen miles an hour at a public crossing. 118 Ark. 506; 102 *Id.* 351; 134 *Id.* 320; 135 *Id.* 466.

6. There was no error in the admission of testimony. Kirby's Digest, § 3138; 68 Ark. 587. The record shows no prejudicial, adverse rulings against appellant and no proper exceptions were saved. 77 Ark. 238; 112

Id. 57; 131 *Id.* 121. Every proper objection made by appellant was sustained. There was no error about the question of insurance. 131 Ark. 6. The verdict is not excessive; his injury is permanent, and under the proof a much larger verdict would be sustained.

WOOD, J. This is an appeal from a judgment in favor of the appellee against the appellant.

The appellee filed a complaint in the Prairie Circuit Court against the appellant in which the appellee alleged, among other things, that the appellant was a corporation of the State of Arkansas, having its domicile and principal office and place of business in Little Rock, Arkansas; that it also keeps a place of business in the Southern District of Prairie County, Arkansas; that it uses automobile trucks to transport its products; that on May 23, 1919, the appellee was walking north along the west side of Main street of the city of Little Rock along the usual route used by pedestrians; that while crossing Fifth street he was struck by one of appellant's large trucks driven by its negro employee; that he was hit with such force that it knocked him down and seriously injured him.

The appellee further alleged that the employee was driving the truck at a high rate of speed in a negligent and reckless manner; that such employee did not give the appellee any warning of his approach; that he thus failed to exercise ordinary care to observe the appellee and avoid injuring him. Appellee then described the nature of his injuries and alleged that he had been damaged thereby in the sum of $40,000, for which he prayed judgment.

Summons was issued, and the return shows that it was served "by delivering a copy of the summons to G. J. Kearns, agent, at its branch office in the Southern District of Prairie County, Arkansas."

The appellant moved to quash the service and alleged in its motion that it was an Arkansas corporation with its principal place of business in Pulaski County, and that it could only be served in that county; that it

had no such branch office upon which service could be had in Prairie County.

The testimony adduced on the motion to quash was substantially as follows: The appellant maintained a frame building about 20 by 24 feet, on the railroad in the town of Hazen, on which was painted Terry Dairy No. 3. It was appellant's receiving station. G. L. Kearns was appellant's servant at this station. His duties were to receive the milk sent in to the station by the farmers. He was not paid to solicit anything. He was to weigh up the farmer's milk, put it in cans and ship it to appellant at Little Rock, but had no authority to employ or discharge anyone. His duties required his attention only a few hours a day, after that he could work for other people if he pleased. Appellant had an engine for cooling the milk before it was shipped. It was the duty of Kearns to operate this engine. Kearns bought the milk which appellant's customers brought into the station. Appellant would buy milk from anyone whose milk passed inspection. When appellant received from Kearns the name of the owner, the number of pounds of milk delivered by him at the station at Hazen, appellant would make out checks for each individual farmer, and the last of the month appellant sent the checks to Kearns for delivery. Kearns did not pay out or take in any money for the appellant. There was a desk in the building, and Kearns made daily reports of the business.

Appellant authorized its agent, Kearns, to pay for the milk down there whatever was the market price. Kearns did not have anything to do with making the price. The farmers would write to appellant at Little Rock asking what appellant was going to pay.

Appellant conducted its business through Kearns, at its station at Hazen, for its own convenience. It had had several agents down there before Kearns. Kearns shipped to the appellant about 100 gallons of milk daily, which was obtained and treated in the above manner.

At different times within the last two years appellant had shipped to its station at Hazen milk supplies and ma-

terials. Appellant paid Kearns $60 per month, for his services. Appellant maintained a receiving station similar to the Hazen station at Screeton.

The court overruled the motion to quash the service. Appellant contends that this was error, and this presents the first question for our consideration.

In *Fort Smith Lumber Co.* v. *Shackelford,* 115 Ark. 272, this court construed act 98 of the Acts of 1909, which provides the manner of obtaining service upon foreign and domestic corporations in this State. In that case was said: "But the term 'other place of business' designates a place where an established business of the company is carried on, regardless of whether the company has its principal or branch office situated there or not. The agent, servant, or employee in charge of a branch office, under the statute, must be one having authority to carry on the general business of the company, but not so as to the agent, servant, or employee in charge of the other place of business. His authority may be only limited and special, and confined to the particular business over which he has supervision. To be sure, the statute contemplates that there must be maintained a place where a well defined line of business is carried on with an agent in charge of that business."

The facts of the present case show that the appellant was maintaining at the town of Hazen a place where it was conducting a well defined line of its business. The appellant, as its name implies, is engaged in a business in which a supply of milk is indispensable. For its convenience it had a building, on the railroad equipped with machinery, which it designated as its plant No. 3. This building had in it a desk which the agent in charge used in making daily reports of the business. The agent was employed on a salary. The building was equipped with the necessary machinery for cooling the milk and the business of the company was that of obtaining from the farmers in that locality a supply of milk to be shipped to its principal place of business at Little Rock. The building was duly equipped and appointed, and the agent

was supplied with the necessary material for successfully conducting that part of appellant's business.

As was stated in the above case: "An agent competent to conduct such a business could be depended upon with reasonable certainty to apprise the corporation of the service had upon him. It was the design of the Legislature that service could be had upon an agent of this character, and that when so obtained it should constitute service upon the corporation itself."

The ruling of the court was correct in overruling the motion to quash the service.

After the motion was overruled, the appellant answered and denied all material allegations of the complaint and set up the defense of contributory negligence.

Appellee testified substantially as follows: That he lived at Walnut Ridge, Lawrence County, Arkansas; that he was in the city of Little Rock on May 22, 1919. He was crossing Fifth street where it joins with Main street. He was going north on Main street on the west side. When he approached the crossing, he checked momentarily at the curbing, saw that the coast was clear, and when he was about the center of Main and Fifth streets he glanced to his right and did not see anything, he then glanced to his left and someone hollered "Look-out!" He turned his head to the right and the front of the car struck him. He was walking on the right-hand side of the foot crossing which was about ten or twelve feet wide and was picked up on the left-hand side of that crossing. After he fell the car stopped on his right foot. He then hollered to the driver who backed the car off. Then appellee discovered that he was not able to walk to the hotel. Appellee described and exhibited his injuries to the jury, which will be referred to later. The appellee did not hear the negro driver blow the horn.

M. L. Brewer, who was standing at the northwest corner of Fifth and Main streets, saw the truck a few seconds before it struck appellee. It was perhaps 15 feet from him coming toward the Capitol on Fifth street. It was coming fast, at possibly 15 miles an hour. The radi-

ator of the truck hit the appellee and knocked him four or five feet. If the negro driver blew his horn, the witness did not hear it.

Giving the above testimony its strongest probative force in favor of the appellee, the issues of negligence and contributory negligence were for the jury.

The appellant does not complain of the instructions under which the issues were submitted; and since there was evidence legally sufficient to sustain the finding of the jury on these issues, the verdict is conclusive.

The appellant contends that the undisputed evidence shows that the injury to appellee was caused by an independent contractor. On this issue, Will Terry, president of the Terry Dairy Company, testified substantially as follows:

The appellant is engaged in selling milk and manufacturing and selling ice cream. It buys milk from dairy farmers and distributes it to its customers in Little Rock. During the summer months it contracts with drivers to sell what the stores want. Appellant starts running its wagons about the first of March. It gets good men who take it on commission, and it gives 10 per cent. a gallon for the first 30 gallons and 5 per cent. a gallon over that. It had three men running like that. Bob Ellison was one of them. He was using appellant's truck at the time of the injury. Appellant paid the license on the truck. The truck had painted on it in big letters "Terry Dairy Company." Appellant did not have any control over Ellison as to the quantity of cream he should sell or dispose of or to whom he should sell. He would come in in the morning and write out his order for what he wanted, and then he would sell to whomsoever he pleased and turn in what he sold. He got whatever he wanted, and it was loaded on the wagons and the company had no more control of it. Appellant had a verbal contract with Ellison by which he would take out his cream and sell it and account to appellant for the price of the cream. He turned back the cream he did not sell and got credit for that. He was charged with the amount he got in the

morning and had to account for that amount of cream, either by turning in charge tickets or turning in cash for what he sold. He had been working for the company four or five years. Appellant paid Ellison's commissions once a week. Did not pay him anything except the commission. Appellant did not furnish Ellison any help; if he hired any help, appellant did not have anything to do with it. John Freeman, the negro driver who was driving the truck at the time of the injury was not working for appellant although he had previously worked for appellant in the capacity of truck driver and anything else that came up. At the time of the injury his name was not on appellant's pay roll, but when he had worked for appellant his name was on the pay roll.

Ellison testified that he had worked for appellant company 3 1-2 years. He took a route about three years ago. He was asked whether or not he had a contract and if so with whom and answered: "Wasn't any contract, you might say, they paid me on a commission basis, so much a gallon." His testimony as to the way the cream was handled is substantially the same as that of Terry. John Freeman was his help at the time of the injury. He was hired by witness. Witness never turned in the amount of wages to the company. Witness discharged him. Witness directed Freeman when to go and where to go. Witness was asked on cross-examination if he had not had a conversation with one Anderson, on the day when the negro driver, John Freeman, was convicted before the police judge for reckless driving, in which he said that he and Freeman were employees of the Terry Dairy Company. He answered that he had not made any such statement.

Witness Anderson testified, on behalf of the appellee, that on the day above mentioned he had a conversation with Ellison in which the latter stated that he and Freeman were employees of the Terry Dairy Company.

John Freeman testified that he was in the employ of Ellison at the time of the injury. That Ellison paid his wages and the fine assessed against him by the police

court. On cross-examination he testified that he had been in the employ of the Terry Dairy Company as driver of its trucks. It was paying him $15 per week. That the Terry Dairy Company had turned over the route on which he was driving to Ellison. He believed he was working for the company until Ellison started to pay him off. That he had worked for the company nearly all his life. When he would come in off the trip, the company would ask him to help them to put up orders and he would do whatever they asked him to do. They had something for him to do all day.

Appellant owned, and paid the license for running the motor truck. This was *prima facie* evidence, at least, that the truck was being operated for appellant at the time appellee was injured. It was a question for the jury as to whether the *prima facie* case had been overcome by evidence to the contrary. *Ferris* v. *Sterling,* 214 N. Y. 249.

Under the above testimony it was an issue for the jury as to whether or not Ellison was an independent contractor at the time of the injury to appellee, and as to whether or not John Freeman was in his employ or in the employ of the appellant. The fact that Ellison was paid for his services or worked on a commission basis is not alone sufficient to prove that he was an independent contractor. *Nyback* v. *Champagne Lbr. Co.,* 109 Fed. 732, and other cases on brief of appellee.

The testimony, viewed in its most favorable light for the appellee, justified the finding that both Ellison and Freeman, at the time of the injury, were employees of the appellant.

On this issue the court instructed the jury that the burden was upon the appellee to prove that John Freeman was under the direction and control of the appellant at the time of the injury to the appellee.

The court further instructed the jury as follows: "In determining whether the negro driver of the truck was the servant of the defendant Terry Dairy Company or the servant of Ellison, you should determine from the

evidence in the case in whose business the negro was engaged and who had the right to control and direct his conduct; and in determining this question you should take into consideration not merely who paid the negro's wages but all the facts and circumstances in the proof in the case."

These instructions were in conformity with the previous decisions of our court and correctly declared the law in determining whether the relation existing between John Freeman and the appellant at the time of the injury was that of master and servant or whether at that time he was the servant of an independent contractor.

In the recent case of *J. W. Wheeler & Co.* v. *Fitzpatrick,* 135 Ark. 117, we defined what constitutes a relationship of an independent contractor and it is not necessary to repeat it here.

In *Singer Mfg. Co. v. Rahn,* 132 U. S. 523 (33 U. S. Law Ed. 440), it is held: "A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's acts or neglect, or even if he disapproved of or forbade it. The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done." This is also the doctrine announced by our own decisions.

If Ellison was an independent contractor, under *Wheeler v. Fitzpatrick, supra,* and he had the right of direction and control over Freeman at the time of the injury, then the appellant was not liable. On the other hand, if Ellison was not an independent contractor but himself a servant of the appellant, and if both he and Freeman at the time of the injury were employees or servants of the appellant and it had direction and control over them in the business of delivering cream, then appellant was liable.

The instructions were correct declarations of law to guide the jury in determining these issues. *St. L., I. M. & S. Ry. Co.* v. *Gilliham,* 77 Ark. 551; *Ark. Natural Gas Co.* v. *Miller,* 105 Ark. 477; *St. L., I. M. & S. Ry. Co.* v. *Cooper,* 111 Ark. 91; *Ark. Land & Lumber Co.* v. *Secrist,* 118 Ark. 561.

Appellant presented certain prayers for instructions which were refused and which ruling of the court appellant here contends was error. It would unduly extend this opinion to set them out and comment upon them in detail. We have carefully examined them and find that such portions of them as are correct were covered by the instructions given. The refused prayers, taken as a whole, were argumentative and were calculated to confuse and mislead the jury. The court did not err, therefore, in refusing them.

Witness Ellison was asked on cross-examination by the appellant the following question: "I will ask you if you did not go on further and talk about this injury and in this connection did not you tell him the negro was working for the Terry Dairy Company and did not you further state that the Terry Dairy Company carried insurance that covers this matter and did not care anything about it?"

The appellant objected to the question, and the court ruled that that part of the question which applies to the insurance was not competent and could not be answered.

The appellant asked the court to instruct the jury not to consider the testimony relating to the appellant carrying liability insurance.

The court in response stated: "As the court has already held, that part which relates to the insurance the witness will not be allowed to answer."

The ruling of the court in the presence of the jury was tantamount to an instruction to the effect that that part of the question which applied to the insurance was not competent and would not be considered by the jury. The court did not permit the witness to answer the question, and the prejudicial effect, if any, of the improper

question was removed by the decided ruling of the court holding that the question was incompetent.

There was no error in allowing the daily report sheets and pay rolls of appellant to be exhibited to the jury. This testimony was competent and was introduced under what was equivalent to an agreement on the part of counsel for the appellant in open court to the effect that counsel for the appellee might introduce any of the sheets from appellant's books that he might desire.

The verdict was not excessive. Appellee was a physician and surgeon and at the time of his injury was enjoying a practice which netted him from three to four thousand dollars a year. Appellee was severely injured in the knee joint. The knee joint was torn apart and twisted as he went down which resulted in the big muscle being torn entirely loose from the knee cap. There was an opening left from which the semovial fluid oozed out and ran down his limb. The injury was permanent. Appellee had to use crutches when he moved about in his office. Since his injury appellee had been able to earn only a mere pittance. Appellee has an expectancy of thirteen years.

The jury were justified under the evidence in returning a verdict in the sum of $10,000.

Since there is no reversible error in the record, the judgment for that sum in favor of the appellee must be affirmed, and it is so ordered.

HART, J. (dissenting). I think the court should have sustained appellant's motion to quash the service in this case. Our statute provides, in effect, that all foreign and domestic corporations who keep or maintain in any of the counties of this State a branch office, or any other place of business shall be subject to suits in any of said counties.

In *Fort Smith Ltr. Co.* v. *Shackleford,* 115 Ark. 272, the court said that the term "branch office" refers to a place where the company may conduct its general business in the same way that it carries on its business at its

principal office. The court further said that the term "other place of business" designates a place where an established business of the company is carried on regardless of whether the company has its principal or branch office situated there.

The court further said that the statute contemplates that there must be maintained a place where a well defined line of business is carried on with an agent in charge of that business. In that case the company operated and maintained a storehouse at one of its logging camps. It is true that the business was located in some box cars and was moved when the logging camp was moved, but the company carried on the business of selling merchandise in the cars the same as it did at the place where it operated its general store.

Here the facts are essentially different. The Terry Dariy Company was engaged in the wholesale and retail milk and ice cream business in the city of Little Rock, Arkansas. At Hazen, in Prairie County, Arkansas, it rented a building for the purpose of receiving and cooling milk preparatory to being shipped to it at Little Rock. On the walls of the house there were painted the words, "Terry Dairy Company No. 3, Receiving Station." The agent of the company there received milk and shipped it in to the company at Little Rock. He never bought any milk, nor had anything to do with fixing the price. His duties were to receive the milk and send in to the company a list of names from whom they received it and the quantity received. The company fixed the price at Little Rock and sent back the checks to the agent for the price of the milk, and he then delivered them to the persons who had brought in the milk to be shipped to the company at Little Rock.

I do not think that this constitutes conducting or carrying on a well defined line of business by the appellant with an agent in charge of it. It seems to me that it is an unwarranted, as well as unwise, extension of the

rule in the Shackleford case. Therefore I think the motion to quash the service should have been sustained.

I also think the court erred in refusing to give instruction No. 11 requested by the appellant. The instruction reads as follows: "You are instructed that if you find from the evidence that the defendant, Terry Dairy Company, furnished a truck to one Ellison, and that the said Ellison used the truck for the purpose of delivering cream, and that the said Ellison's compensation for the handling and delivering of the cream was a certain commission, and that the said Ellison had the right and authority to employ drivers for his wagon or truck, and if you find that he did hire the driver, Freeman, and had the right to hire him and discharge him, and the said Freeman was not employed or controlled by the defendant, Terry Dairy Company, then you will find that the said Ellison was an independent contractor, and your verdict should be for the defendant, Terry Dairy Company."

Appellant had a right to have its theory of the case presented to the jury in a concrete form, and I do not think that the instruction is in any sense argumentative, as stated in the majority opinion.

Where the defendant lets out work to a contractor, and the work is not in itself unlawful and intrinsically dangerous, and no negligence is committed in the selection of the contractor, and the company only exercises control over the work to the extent of general supervision and inspection, to the end that it may determine whether the work is being done according to requirements and specifications of the contract, but has no other control over the work nor the power to choose, direct and discharge the employees of the contractor, the defendant is not liable for injuries due to negligence of the contractor or his servants. *J. W. Wheeler & Co.* v. *Fitzpatrick,* 135 Ark. 117.

The facts in the present case call for an application of the rule announced in the *W. T. Rawleigh Med. Co.* v. *Holcomb,* 126 Ark. 597. The court made a mistake in

stating that they (referring to the Terry Dairy Company) had something for Freeman to do all day. Freeman was under the exclusive direction and control of Ellison, and the record shows that he only did occasional jobs for the company when the wagon came in from its day's work in the evening. If the medicine company had been sued for damages caused by Holcomb negligently running over someone, and the facts had been as stated in the opinion, the court would doubtless have held as a matter of law that the medicine company was not liable.

So here the only thing that would prevent the court from declaring as a matter of law that the defendant was not liable would have been that the testimony of the witnesses, Ellison and Freeman, with regard to the accident was contradicted by the plaintiff, and for that reason it could not be said that their testimony was undisputed on the phase of the case relating to Ellison being an independent contractor.

JENKINS v. JENKINS.

Opinion delivered June 14, 1920.

1. WILL—PROBATE IN COMMON FORM—RIGHT OF APPEAL.—A judgment admitting a will to probate in common form is a final order or judgment, from which an appeal lies within twelve months after rendition thereof.
2. WILLS—PROBATE IN COMMON FORM—APPEAL BY INFANT.—An infant heir will not be permitted to appeal from the probate in common form of his ancestor's will after the year provided by the statute (Kirby's Digest, § 1348) has expired; the statute containing no saving clause in favor of infants.

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

STATEMENT OF FACTS.

This is a proceeding by Edith Jenkins and John Brunson Jenkins, Jr., minors, by their next friend, N. T. Jenkins, to be allowed to appeal from the probate of the will of P. G. Jenkins, deceased.

As grounds therefor, they allege that they are children of Brunson Jenkins, deceased; that Brunson Jenkins and P. G. Jenkins were brothers; that Brunson Jenkins died before P. G. Jenkins; that the will of P. G. Jenkins was probated in common form, and that the petitioners were not notified of the probate thereof; that, but for the will and probation of the same, they would have shared in the estate of P. G. Jenkins, deceased.

The will of P. G. Jenkins, deceased, was probated in common form on the 10th day of January, 1916, and the present proceeding was instituted in the probate court on June 13, 1919.

The petition of Edith Jenkins and John Brunson Jenkins, minors, to be allowed to contest the probate of the will of P. G. Jenkins, deceased, was denied by the probate court, and it was adjudged that their petition be dismissed. They prosecuted an appeal to the circuit court, and it was there adjudged that the cause be dismissed. The case is here on appeal.

Arthur D. Chavis and *Carmichael & Brooks*, for appellant.

The infants as well as all other persons are cut off by the statute of limitation of one year from the judgment of the probate court. There is no exception in favor of infants. 70 Ark. 415. Infants have until twelve months after attaining full age to make themselves parties and appeal from the probate of a will. 70 Ark. 415.

Taylor & Jones, for appellee.

Appellants are barred and can not appeal. Art. 7, § 35, Constitution. The statute makes no exceptions in favor of infants. Acts 1909, p. 956; 53 Ark. 421; 108 Ark. 220; 59 *Id.* 242; 89 Ark. 334; 134 *Id.* 280; 132 *Id.* 309. The disability of a party does not stop the running of limitation. 2 Enc. Pl. & Pr. 255; 64 Ark. 350; 51 *Id.* 284. Appeal is the only remedy. 70 Ark. 88; 34 *Id.* 451; 89 *Id.* 334.

HART, J. (after stating the facts. The record shows that Edith Jenkins and John B. Jenkins were minors at the time P. G. Jenkins died and his will was admitted to probate in common form, that is without notice. They seek to contest the will on the ground of undue influence in its execution, and claim that on account of their minority they have the right to have the will probated in solemn form, or, in other words, to contest it, although more than one year has elapsed since the will was probated.

Under our statute, the judgment admitting a will to record is a final order or judgment from which an appeal lies within twelve months after the rendition thereof. *Hogane v. Hogane,* 57 Ark. 508. The appeal in that case was dismissed because it was not taken within the time limited by the statute.

In *Ouachita Baptist College* v. *Scott,* 64 Ark. 349, it was held that where a will is admitted to probate in common form in the probate court, the persons interested may make themselves parties by perfecting an appeal to the circuit court within twelve months, and that this, under our practice, amounts to a contest of the will. The court said:

"If the will has been probated in the more solemn form (that is, upon notice to all interested to appear in the probate court at the probation), then, of course, this particular question does not arise. If, however, as in the present case, the probation is in the common form, and parties interested have not been summoned to appear and make objection, then we think it but a fair and reasonable construction to put on the statute that parties interested may file the affidavit provided in the statute within the twelve months allowed, and thus make themselves parties to the probate proceedings for the purpose of taking an appeal from the order of probation to the circuit court, wherein, in such case, the real contest of the will may be made on the grounds set forth in their petition, which, of course, will necessarily show their relationship to the deceased. This ruling is one of first impres-

sion in this court, but is in harmony with the suggestion contained in all of our more recent decisions, although these decisions contain mere suggestions or intimations on the subject, and nowhere decide the particular question. *Petty v. Ducker, supra; Hogane v. Hogane,* 57 Ark. 508. Furthermore, since the decisions of this court have left no other remedy to the contestant, who has not been given a day in court, this ruling meets the requirements of the constitutional provision which declares that "every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive, in his person, property or character." Const. Ark., art 2, § 13. The contestants having filed their affidavit within one year from the probation of the will, as required by statute, the circuit court properly exercised jurisdiction to hear and determine the appeal, which in such matters amounts to the contest of the will."

The statute under construction in that case is the one applicable here, and it contains no saving clause in favor of infants, and the court can make none. A saving from the operation of the statute for the disability of minority must be expressed or it does not exist. Hence it has been held that where the time for contesting probated wills is limited by statute and there is no saving clause in favor of infants, none exists. 40 Cyc. pp. 1257, 1258; *Cleveland* v. *Lyne,* 5 Bush (Ky.) 383; *Folmar's Appeal,* 86 Pa. 482; and *Warfield v. Fox,* 53 Pa. 382.

With regard to other statutes by which the rights of minors and *femme coverts* are affected, the court has held that a law general in its nature binds them, although they are not specially named, and that their disability does not relieve them from the limitation of the statute unless there is a saving clause showing that they were intended to be excepted. *Nelson* v. *Cowling,* 89 Ark. 334; *Collier* v. *Smith,* 132 Ark. 309, and *Hogg* v. *Nichols,* 134 Ark. 280.

Section 8041 of Kirby's Digest provides that when the proceeding to probate a will upon notice is taken to the

circuit court all necessary parties shall be brought before the court.

Section 8043 provides that any person interested, who at the time of the final decision in the circuit court resided out of this State, and was proceeded against by order of appearance only, and any other person interested who was not a party to the proceeding by actual appearance, or being personally served with process, may, within three years after such final decision in the circuit court, by a bill in chancery impeach the dicision and have a retrial on the question of probate. The concluding part of the section provides that an infant, not a party, shall not be barred of such proceedings in chancery until twelve months after obtaining full age.

In the construction of this statute the court has held that a court of equity has no jurisdiction to review a decision of the probate court upon the probate of a will where there was no appeal to the circuit court within the time prescribed by the statute. The court held that if the appeal to the circuit court be barred, then no final decision of the circuit court can be had on the probate or a rejection of the will, and that the section is wholly inapplicable. *Mitchell* v. *Rogers,* 40 Ark. 91.

The Court of Appeals of Kentucky reached the same conclusion upon a precisely similar statute. *Cleveland v. Lyne,* 5 Bush (Ky.) 383.

It follows that the petitioners fall within the operation of the statute, and, more than one year having elapsed from the date of probating the will and the time of filing their petition to contest the will, the circuit court properly dismissed their cause of action. Any other holding would make the statute an enlarging rather than a restraining one.

Therefore the judgment will be affirmed.

LILLY v. BARRON.

Opinion delivered June 14, 1920.

1. APPEAL AND ERROR—FINDING WITHOUT JUDGMENT—TIME FOR APPEAL.—Where the court made a finding that plaintiff was entitled to a judgment, but did not enter judgment thereon until a later date, the time for taking an appeal runs from the date of entry of judgment.
2. BANKRUPTCY—PROVABLE CLAIM.—Where a vendor of land required an assignee of the purchaser to execute a second note for the purchase money, claiming that the original note had been lost, and subsequently transferred such original note to an innocent purchaser, the assignee's claim against the vendor for reimbursement was a provable debt and not a contingent claim, and was released by vendor's discharge in bankruptcy.
3. FRAUD—ACTIONABLE REPRESENTATIONS.—As a general rule, actionable representations must be relative to existing facts.

Appeal from Mississippi Chancery Court, Chickasawba District; *Archer Wheatley,* Chancellor; reversed.

STATEMENT OF FACTS.

On the first day of August, 1916, Mrs. S. B. Driver sued C. B. Rodgers and others to recover judgment against them for the sum of $1,650 and to foreclose a vendor's lien on certain property which had been sold to the defendants by O. R. Lilly. She alleged that the $1,650 was a balance of the purchase price of said property, and that the parties had given O. R. Lilly a note for $1,650 and that Lilly had duly assigned the note to her.

J. W. Barron was allowed to become a party defendant and filed his answer to the action and also a cross-complaint against O. R. Lilly. In his cross-complaint Barron alleged that he had paid Lilly the amount of the note sued for, and that Lilly had transferred it to the plaintiff for the purpose of defrauding him out of the amount so paid. The facts are as follows:

J. W. Barron and O. R. Lilly originally purchased a tract of land and platted the same as the Barron and Lilly Addition to the city of Blytheville, Ark. Later Lilly sold his undivided one-half interest in the addition to C. B. Rodgers, and Rodgers in turn sold it to J. W.

Barron. Barron paid Rodgers $1,600 for his half interest in the lots, and as part payment he assumed the balance of the purchase price of the lots. Before Barron purchased the lots from Rodgers, Lilly advised him that Rodgers had made payments upon the note until there was a balance due on it of $935. This was about March 6, 1911; and Lilly executed a deed releasing his lien upon the lots, and Barron executed to Lilly a note for $1,600. Lilly was to surrender the old note, but was not able to find it. In a short time afterward, Barron was in Lilly's office again and asked him about the old note, and Lilly said that he could not find it. Barron then asked him if he had put the note up with anyone as collateral, and Lilly said that he had not. Lilly never delivered the note to Barron, and it is the note here sued on. At the time Lilly told Barron that he had credited the note with the payment Rodgers had made and that this left a balance of $935 due on it. Barron executed the new note for $1,600 to Lilly in order to get Lilly to execute a deed of release to the lots.

According to the testimony of O. R. Lilly, he had a settlement with J. W. Barron in 1914. Barron went to Lilly's office with a lot of notes that they jointly owned. The notes amounted approximately to $10,000. Nearly all of them were worthless, but Barron thought that he could collect some of them, and Lilly transferred his interest to Barron to indemnify him against loss on the transaction involved in this lawsuit. O. R. Lilly was duly adjudged a bankrupt on the 16th day of January, 1916, and was ordered to be discharged from all debts and claims which are made payable by the bankruptcy acts against his estate. The claim of Barron involved in this suit was not proved against his estate.

The cause was heard on the 4th day of September, 1918, and a decree in favor of the plaintiff was entered of record on that day. The court found that on the 6th day of March, 1911, O. R. Lilly assigned the note for $1,650 sued on to the plaintiff, and that no part of the principal or interest on the same has been paid, and that

there is now due on said note the sum of $2,666.72, which is declared to be a lien on the lots involved.

The court further found in favor of Barron on the cross-complaint, and "that the said Lilly was guilty of specific fraud practiced upon the said Rodgers and Barron and that Lilly is primarily liable to the said Rodgers and Barron and that if the said Barron and Rodgers pay the amount due the plaintiff as recited above, then, by virtue of the said payment, the said Rodgers and Barron, or either of them making said payment, shall be entitled to judgment for said amount, and the costs thereof, against the said Lilly."

It was therefore by the court decreed that if the sum adjudged to be due plaintiff was not paid within thirty days, the vendor's lien should be foreclosed and that the lots be sold for the payment thereof.

On September 22, 1919, J. W. Barron filed his motion in the cause, alleging that he had paid the amount of the judgment, towit: $2,757.42, and asked that he have summary judgment against O. R. Lilly for that sum. Lilly resisted the motion, and the court rendered a decree in favor of Barron against Lilly for said amount. The case is here on appeal.

O. R. Lilly having since died, the case has been revived in the name of his administratrix.

J. T. Coston, for appellant.

1. Barron's cause of action was barred by limitation in the cause, alleging that he had paid the amount of new note *eo instanti*. If Lilly induced him by false representations to execute a new note, he had his choice of remedies, either to cancel the new note, or an action of damages against Lilly. An appropriate proceeding would have been an action to rescind and cancel the new note with an alternative prayer for damages in case the note had passed into the hands of an innocent purchaser. 57 S. W. 1106; 77 *Id.* 199.

Barron did not have to wait until he was compelled to pay the original note or until the new note became

due. He could commence action at once. 10 Ind. 431; 45 N. W. 338.

Barron's cause of action accrued instantly upon the execution of the new note by him to Lilly, May 8, 1911. It was payable two years after date and Barron's action against Lilly was commenced six years after the new note was executed and was barred. 64 Ark. 165; 60 S. W. 231. The right of action on the new note was barred because Barron's action against Lilly is based solely upon the fact that he was *damaged* by the fraud of Lilly. No matter how fraudulent the representations of Lilly to Barron were Barron can not recover *if he has not been damaged.* Fraud which does not result in injury does not give rise to a right of recovery. Barron has not been damaged, as he never paid the new note, and it is barred by limitation. Barron's damage by the socalled fraud of Lilly is measured by the amount he has paid on the new note, and *that is nothing.* The claim of the Citizens Bank against Barron is also extinguished (even if he were solvent). His claim against Lilly is analogous to the law of subrogation. If the bank waived or lost its right to recover of Barron, he thereby lost his right to recover of Lilly. 112 S. W. 382. Barron was never entitled to judgment against Lilly for inducing him to sign the $1,600 note. If he had sued Lilly before the action was barred, Lilly would have shown that he was insolvent, and that his note was worthless, and that he had not been damaged in the least. 46 Ala. 497; 16 Iowa 120-1. Insolvency of the maker of a note is a good defense, and insolvency and the statute of limitation make a complete defense. Barron is insolvent; he never paid the note, and it is barred, and he is not entitled to recover. 4 Keys 226.

2. Lilly was discharged in bankruptcy, and Barron's claim was a provable one in bankruptcy. 236 U. S. 556-7. Lilly's discharge was a valid bar to the action. 195 U. S. 194. Lilly did not *obtain* any property from Bar-

ron by false pretenses or false representations. 164 Fed. 262; 56 Atl. 1089.

3. Barron and Lilly had a settlement in 1914 and Barron agreed to release Lilly from all liability on the Rodgers note.

4. The summary proceedings was illegal; there was no final judgment, only a finding by the court, but no final judgment on the finding. 196 U. S. 813. If Barron's right of action did not accrue until after he paid the decree, then it was prematurely brought. 21 Ark. 190. Lilly was not required to appear and answer Barron's "notice of intention." A summons was necessary. The relation of principal and surety can not arise out of a tort. It can be created only by agreement. 141 S. W. 760; 75 Atl. 1030; 53 S. E. 431. Lilly was not liable as a surety but as a tort feasor. The summary proceeding fails. 155 S. W. 497.

Buck & Lasley, for appellee.

1. The suit was not barred. The statute does not begin to run in cases of fraud until the fraud is discovered. The chancellor found that the suit was not barred by the three years' statute, and his finding is sustained by the proof. Barron was damaged by reason of the fraud of Lilly.

2. Lilly's discharge in bankruptcy was no bar to a recovery by Barron. 236 U. S. 556 is not applicable, as the claim was a contingent one and the contingency was known at the time of Lilly's discharge. Barron knew nothing of the fraud and could file no claim. Evidence of what the schedule contains must be given by the records themselves and not by verbal testimony. 148 Ill. App. 295. The burden was on Lilly to show that this particular debt was scheduled, but there is nothing in the schedule or record to show that Barron's name was included in the schedule.

3. The original judgment on September 4, 1918, fixed Lilly's liability and was a final judgment, and there

was no appeal, and it is *res judicata.* The decree is in accordance with law and is sustained by a clear preponderance of the testimony.

HART, J. (after stating the facts). It is claimed that appellant is barred of relief because no appeal was taken from the decree rendered on the 4th day of September, 1918, within the time prescribed by the statute. In that decree the court found that O. R. Lilly was guilty of fraud practiced upon Barron and was primarily liable to Barron, and that if Barron should pay the amount due the plaintiff, towit, $2,666.72, the said Barron should be entitled to judgment for said amount against O. R. Lilly. No judgment for that amount, however, was rendered against Lilly in favor of Barron.

The finding of the court was for the plaintiff, but there was no judgment on the finding. This being true, there was nothing to appeal from. A finding of fact does not constitute a judgment. The judgment of the court must be pronounced in some form. The finding of the court is not final in its character and does not terminate the litigation between the parties. It does not determine the issues in the case. The effective action of a court is by its decree or judgment, and not by its finding. *Reynolds* v. *Craycraft,* 26 Ark. 468; *State* v. *Jones,* 25 Ark. 375; *Moss* v. *Ashbrook,* 15 Ark. 169; *Sennett* v. *Walker,* 92 Ark. 607; *Chappell* v. *Chappell,* (Md.) 33 Atl. 650; *Green* v. *Probate Judge,* 40 Mich. 244; *Baum* v. *Currituck Shooting Club,* 94 N. C. 217; *Kilmer* v. *Bradley,* 80 N. Y. 630; and *Judge* v. *Powers,* Ann. Cas. 1915 B (Iowa) 280.

The case, therefore, remained within the jurisdiction of the chancery court. Subsequently the chancellor, on motion of appellee, rendered a decree in his favor against the appellant. In apt time appellant prosecuted an appeal from that decree. One of the grounds relied upon by counsel for appellant for a reversal of the decree is that Lilly was adjudged a bankrupt and a discharge in bankruptcy granted him in January, 1916, and that appellee Barron failed to prove his claim against Lilly in the bank-

ruptcy proceedings. Barron did not prove his claim in the bankruptcy proceedings. He now contends that his claim was not discharged by the bankruptcy proceedings because it was a contingent one and therefore not provable under the bankrupt act. The claim was not a contingent one. All the facts necessary to fix liability upon Lilly in the matter had already occurred. Rodgers had executed a note to Lilly for $1,650 for the purchase price of certain town lots, and Lilly had a vendor's lien upon the lots. Rodgers sold his interest to Barron, and Barron assumed the purchase price which Rodgers owed to Lilly. It was agreed between Lilly and Barron that the latter should execute his note to the former for $1,600 in lieu of the $1,650 note. The $1,650 note could not be found at the time the transaction occurred, but it was understood that it should be canceled and delivered to Barron. Consequently Lilly's liability to Barron existed at the time the bankruptcy proceedings were had, and the liability of Lilly to Barron was a provable debt under the bankruptcy laws. Remington on Bankruptcy (8 ed.), vol. 1, sec. 641. See also *Williams* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 549.

Again, it is contended that the liability was not a provable claim in the bankruptcy proceedings because of the fraud of Lilly, and that this was not known by Barron at the time of the bankruptcy proceeding. The fraud contended for is that Lilly deposited the $1,650 note as collateral security for a debt of his own, and that he had told Barron that it could not be delivered to him because he had lost or mislaid it. It is true that Barron testified that Lilly told him that the $1,650 note had not been deposited with anyone as collateral security; but it must be remembered that this conversation occurred after the transaction had been completed. At the time of the transaction it does not appear that Lilly represented to Barron that the note had not been deposited by him as collateral security to any of his creditors. Indeed, when Lilly's whole testimony is read and considered together, it is fairly inferable from it that the note was not de-

posited as collateral security until sometime after his transaction with Barron. His testimony in this regard is not disputed by Barron. Indeed, Barron frankly admits that he has not yet suffered any loss by reason of the transaction. In other words, the payment of the balance of the original purchase money note of $1,650 and the accrued interest was made by the various purchasers of the town lots.

As a general rule, in order for false representations to be the basis of fraud, such representations must be relative to existing facts. An exception to the general rule is, that if the promise is accompanied with an intention not to perform it, and is made for the purpose of deceiving the person to whom it was made and inducing him to act in the premises, the same constitutes fraud. No such state of facts exists here however, and the liability of Lilly to Barron does not accrue on account of fraud or false representations, but because Lilly converted the note to his own use at some period of time after the transaction with Barron had been completed. Therefore he should have proved his claim in the bankruptcy court. See *Crawford* v. *Burk,* 195 U. S. 176.

It follows that the decree must be reversed and the cause will be remanded for further proceedings according to the principles of equity and not inconsistent with this opinion.

MURPHY *v.* MURPHY.

Opinion delivered June 14, 1920.

1. WILLS — HOLOGRAPHIC WILL — UNIMPEACHABLE EVIDENCE.—Under Kirby's Digest, § 8012, requiring "the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of the testator" upon the probate of a holographic will, an unimpeachable witness is one whom the jury find to have spoken truthfully, and whose conclusion they find to be correct, though there was other evidence tending to contradict them.

2. WILLS—PROBATE—CREDIBILITY OF WITNESSES QUESTION FOR JURY. In proceedings to probate a holographic will under Kirby's Digest, § 8012, the credibility of the witnesses was for the jury.
3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict will be upheld on appeal if there is any substantial evidence to support it.
4. APPEAL AND ERROR — CONCLUSIVENESS OF VERDICT.—Appellate courts will take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics; and, where by applying such laws to the facts it is demonstrated beyond controversy that the verdict is based upon what is untrue, the appellate court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict.
5. EVIDENCE—EXPERT WITNESSES AS TO HANDWRITING.—Expert witnesses may be introduced to prove the genuineness of a disputed handwriting.

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

STATEMENT OF FACTS.

On June 15, 1918, P. J. Murphy, a resident of Hot Springs, Arkansas, died there, leaving surviving him his widow, Minnie Murphy, and some collateral heirs, but no lineal descendants. After his death a search was made for a will, but none could be found. In the latter part of January, 1919, Mrs. Minnie Murphy went to South Dakota on business. While she was there in February, 1919, Anna Feeney, her sister, had occasion to examine a trunk containing the books and papers of the deceased and found the following: "i wont my wife Mrs. Minnie Murphy to have all My real eal estate, Money and personal property which i own or interest in at My Death. P. J. Murphy."

Mrs. Minnie Murphy offered this writing for probate as the last holographic will of her deceased husband. It was first presented to the clerk of the probate court in vacation and five disinterested witnesses testified that they had examined the writing in question and that the body of the writing as well as the signature thereto was in the genuine handwriting of P. J. Murphy, deceased. The collateral heirs of P. J. Murphy, deceased, made

themselves parties to the proceeding and contested the will. The probate court admitted the instrument to probate and record as the holographic will of P. J. Murphy, deceased.

Appellants appealed to the circuit court where a trial was had before a jury. The jury returned a verdict in favor of appellee, and from the judgment rendered, appellants have duly prosecuted an appeal to this court.

R. G. Davies, A. B. Belding and *L. E. Sawyer,* for appellants.

The verdict can not be upheld because evidence was introduced tending to contradict the evidence introduced by the proponent, and thus the will was not established by the unimpeachable evidence of at least three disinterested witnsses to the handwriting and signature as required by law. Kirby's Digest, § 8012. The best evidence is wanting, but the next best was introduced. 1 Wigmore on Ev., §§ 99, 383. It is shown by all the physical facts—the letters, checks, etc., style, lettering, etc.—that the will was not the last will of the deceased. The finding of the jury is against and contrary to the physical facts and human understanding and against the clear preponderance of the testimony, the best obtainable. 50 N. J. 397. it is plain that it was not established and that it was a forgery and not genuine. The burden was on the proponents of the will and they have failed.

A. J. Murphy, for appellee.

The great weight of the evidence sustains the validity of the will. The witnesses for appellants are in hopeless conflict with each other. Only a question of fact is involved—a question for the jury—and this verdict is conclusive. All the physical facts show the will to be genuine and the last will of the deceased. 10 R. C. L., p. 1008, § 198; 133 A. S. R. 1069; 137 Ark. 10; 123 *Id.* 435. The verdict is sustained by the great weight of the evidence and the physical facts. Our witnesses are not perjurers, and our client is not a criminal. The jury decided

that the will was genuine, the judge approved the verdict, and it should not be disturbed.

HART, J. (after stating the facts). Subdivision five of section 8012 of Kirby's Digest provides that where the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator, such will may be established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of such testator.

In the case at bar the proponent introduced seven disinterested witnesses who had been closely associated with P. J. Murphy, deceased, during the last five or six years of his life, and who by correspondence and by examination of his handwriting in their social and business intercourse with him, were perfectly familiar with his handwriting. They testified that the entire body of the will and the signature thereto were in the genuine handwriting of said P. J. Murphy. Five experienced bank officials, who qualified as experts in handwriting, also testified that they had made a careful comparison of the purported will with other writings of said P. J. Murphy, which were admitted to be genuine, and all of them stated that such a comparison showed the entire body of the purported will and the signature thereto to be in the genuine handwriting of said P. J. Murphy. These expert witnesses were examined and cross-examined in detail as to their reasons for the opinion that the entire body of the will and the signature thereto were in the genuine handwriting of P. J. Murpy. They had observed the peculiarities and characteristics of his admitted genuine writings and testified that it was their opinion, from a comparison of these writings with the purported will, that the entire body of the will and the signature thereto were in the genuine handwriting of said P. J. Murphy.

On the other hand, witnesses were introduced by the contestants who testified that they were perfectly familiar with the handwriting of P. J. Murphy, and it was their opinion that the purported will was a forgery. Expert witnesses were also introduced by the contestants, who,

after a comparison of the purported will with other admittedly genuine writings of said P. J. Murphy, testified that it was their opinion that the purported will was a forgery. They called attention to the spelling and also the characteristics of the genuine handwriting of said P. J. Murphy which caused them to believe that the purported will was a forgery.

The purported will and the admittedly genuine writings of said P. J. Murphy were also submitted to the jury for their inspection.

It is first contended by counsel for the contestants that the verdict cannot be upheld because evidence was introduced by them tending to contradict the evidence introduced by the proponent of the will, and that on this account the will was not established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of the testator as required by section 8012 of Kirby's Digest. In other words, they contend that the evidence of the proponent is not unimpeachable within the requirements of the statute where there was any evidence of a substantial character introduced which tended to contradict it, no matter whether such evidence was introduced by the proponent of the will, or by the contestants.

We cannot agree with this contention. In *Arendt v. Arendt,* 80 Ark. 204, the court held that by "unimpeachable witness" is meant one whom the jury find to have spoken truthfully, and whose conclusion they find to be correct. See also *Mason v. Bowen,* 122 Ark. 411.

In the case at bar seven disinterested witnesses testified that for five or six years prior to the death of said P. J. Murphy, by reason of social and business intercourse with him, they were perfectly familiar with his handwriting, and that the entire body of the purported will and the signature thereto were in his proper handwriting. They testified in detail as to their opportunities for knowing his handwriting, and it is plain that their opportunities for knowing his handwriting were such as to qualify them to testify with regard to the genuineness of the pur-

ported will. Their testimony was consistent in itself, and the witnesses were not impeached, either by contradictory statements made by themselves, or by the testimony of other witnesses introduced for that purpose in the manner provided by the statute.

It is true that the contestants introduced evidence tending to contradict their testimony. The contestants opposed the probate of the will on the ground that it was a fraud and a forgery. This presented an issue which must be determined under the rules of evidence governing all contests in courts. Under the issue presented, the doors of justice were opened for the introduction of all legal evidence relative to the question. So the contestants introduced evidence tending to show that the purported will was a forgery. This was done by witnesses who testified that they knew the handwriting of said P. J. Murphy. Expert witnesses were introduced by both sides. After all the credibility of the witnesses was a question for the jury. The jury has said by its verdict that it believed the witnesses for the proponent of the will. Therefore, the jury has found that the seven witnesses who testified that the entire body of the will as well as the signature thereto was in the proper handwriting of said P. J. Murphy and that their evidence is unimpeachable.

Again, it is contended by counsel for the contestants that the verdict of the jury is contrary to the physical facts. We cannot agree with counsel in this contention. Under the settled rules of this court we must uphold a verdict on appeal if there is any substantial evidence to support it. Of course where the facts are undisputed, and by applying to them the well known laws of nature and the physical facts, it is demonstrated beyond controversy that the verdict is based upon what is untrue, and cannot be true, this court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict. *St. L. & S. F. Ry. Co.* v. *Stewart,* 137 Ark. 6. The reason for the rule is stated in *St. Louis S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, and need not be repeated

here. The court has repeatedly held the law to be that if, after consideration of all the evidence, the trial court is of the opinion that the verdict of the jury was contrary to the weight of the evidence, it is the duty of that court to set aside the verdict. Upon appeal we must uphold the verdict if there is any substantial evidence to support it. As said in that case, appellate courts will take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics, and where, by applying such laws to the facts, it is demonstrated beyond controversy that the verdict is based upon what is untrue and what cannot be true, this court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict.

It is well settled that expert witnesses may be introduced to prove the genuineness of a disputed handwriting. 11 R. C. L., sec. 41, p. 620. The opinion of handwriting experts may be of great assistance to the jury. Their experience and studies have so qualified them, that from the comparison of the disputed writing with other writings admitted to be genuine, they can detect peculiarities in the writing which might escape the observation of those less experienced.

The record shows that the deceased was a man of but little education and that he was a poor speller. The purported will contains one word which was misspelled and which in the admittedly genuine writings of the deceased was never misspelled. The personal pronoun "I" is a small letter in the purported will, while in the admittedly genuine writings it is always a capital letter. Other peculiarities in the handwriting and spelling of the testator are pointed out. We need not go into details about these matters, however. While they are strong evidence that the document is not genuine, such evidence is not conclusive. It cannot be said that the testimony of the witnesses for the proponent of the will is contradicted by physical facts or is opposed to any unquestioned law of nature. The issue to be determined by the jury was the genuineness of the handwriting of P. J. Murphy. The tes-

timony of many witnesses who were familiar with his handwriting was heard by the jury and was in direct conflict. The testimony of the experts was also in conflict. The jury had before it the purported will and several admittedly genuine writings of P. J. Murphy as a standard of comparison. The question of the genuineness of the handwriting depended upon the truth or falsity of the testimony of the witnesses. Their testimony related to matters and conditions which might or might not be true. The testimony of none of the witnesses is contrary to any law of nature. It is beside the question that the evidence is conflicting. The jury passed upon the credibility of the witnesses, and the trial court did likewise in overruling the motion for a new trial. There was evidence of a substantial character to support the verdict, and to hold otherwise would be to substitute our judgment for that of the jury and of the trial court. This, under the settled rules of this court, we cannot do, and the judgment must be affirmed.

FLETCHER v. SIMPSON.

Opinion delivered June 14, 1920.

1. APPEAL AND ERROR—REVIEW OF CASE IN EQUITY.—A case in equity is heard *de novo* on appeal on the record made below.
2. APPEAL AND ERROR—INCORPORATION OF ORAL EVIDENCE IN RECORD.—Oral evidence introduced in chancery cases may be made a part of the record by having it taken down in writing in open court and by leave filed with the papers in the case, or by bill of exceptions, or by embodying it as a recital in the decree.
3. APPEAL AND ERROR—TRANSCRIPT NOT CONTAINING ALL THE EVIDENCE.—Where a decree recites that it was heard, *inter alia,* upon the exhibits to certain depositions, and such exhibits do not appear in the transcript, the decree will be affirmed.

Appeal from Ashley Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellant to enforce the specific performance of a contract for

the sale of certain land and personal property by C. M. Simpson to R. M. Fletcher. The complaint alleges that appellant is insolvent, and that the property is being neglected and deteriorating in value. The prayer of the complaint is that if the appellant is unable to perform his contract by reason of his insolvency, the land and personal property be sold and the proceeds be applied to the payment of the purchase price, and that appellees have judgment for the residue against appellant.

Appellant filed an answer and cross-complaint in which he alleged that he was induced to enter into the contract by reason of the false representations of C. M. Simpson; that Simpson represented the farm purchased to contain more cleared land than it had; that he represented that part of the land was across the bayou and that it was similar in character to the main body of the land which had been viewed by appellant; that appellant was induced thereby not to go on the land across the bayou and examine it; that the land across the bayou comprised 140 acres and was practically worthless; that there was a large deficiency in the amount, kind and value of the personal property sold.

The prayer of the cross-complaint is that appellee be required to deliver to appellant all the property sold to him and that in the event delivery cannot be made, that appellant be given credit for the value of all property not delivered.

On the 28th day of September, 1918, Claude M. Simpson and R. M. Fletcher entered into a written contract for the conveyance of 1,280 acres of land near the town of Morrell, in Ashley County, Arkansas, and all the personal property on said place consisting of mules, cattle, wagons, farming tools and machinery, stock of merchandise and all the feed and grain on hand. W. J. Simpson, brother of C. M. Simpson was in charge of the place as his agent. Fletcher was not able to make the initial payment at the time the contract was executed, and W. J. Simpson continued in charge of the place and gathered and sold the greater part of the crop before R. M. Fletcher

entered into possession of the place. By the terms of the contract a cash payment was to be made, and the balance of the purchase money was on deferred payments. Later on in the fall R. M. Fletcher took possession of the place through his agent, A. G. Russell.

Appellees introduced testimony tending to show that R. M. Fletcher did not comply with the contract on his part in meeting the deferred payments for the purchase money; that Fletcher was insolvent and was allowing the personal property on the place to greatly deteriorate in value.

On the other hand, Fletcher introduced testimony tending to show that there was a material deficiency in the quantity of cleared land on the farm as represented to him by Simpson to induce him to make the contract; in addition, that 140 acres of the land was situated across a bayou, and that Simpson represented to him that it was of the same kind and character of land as that shown to Fletcher and examined by him; that the 140 acres of land turned out to be situated some distance from the bayou; that it was in the edge of the hills and was practically valueless; that Simpson gave him a list of the quantity, kind and value of the personal property on the farm; that the list of such property so shown to Fletcher was greatly in excess of the quantity and value of the personal property on the place and actually turned over to Fletcher. Evidence was also introduced by appellees tending to show that no false representations were made by Simpson nor fraud perpetrated by him to induce Fletcher to make the contract.

The chancellor found the issues in favor of appellees, and a decree was entered accordingly. The decree, after reciting that the cause was heard upon the pleadings and exhibits thereto, continues as follows: "and upon the depositions of W. J. Simpson, Robert Raines, W. E. Waddell, Fred A. Snodgress, C. M. Simpson, C. L. Willis, A. G. Russell, Walter Edwards, and R. M. Fletcher, and upon the exhibits to the depositions of said witnesses filed with their testimony and upon oral explanation by

the witnesses, A. G. Russell and R. M. Fletcher and C. M. Simpson to the court of certain of the exhibits filed, and upon the oral argument of counsel for the respective parties, and upon written briefs filed by counsel for the respective parties, and the court, being well and fully advised in the premises, doth find."

To reverse that decree appellant has prosecuted this appeal.

Mehaffy, Donham & Mehaffy, for appellant.

Argue the merits of the case, citing 71 Ark. 91; 129 *Id.* 498; 112 *Id.* 500; 73 *Id.* 542; 81 *Id.* 347; 116 *Id.* 212; 30 *Id.* 535; 26 *Id.* 506; 27 *Id.* 292; 43 *Id.* 163; 38 *Id.* 78. The judgment is clearly against the clear preponderance of the evidence.

The transcript contains all the evidence upon which the decree was based and the exhibits were never filed as exhibits and were not before the lower court. The court erred in holding that the sale was *en masse.*

Williamson & Williamson, for appellee.

The transcript does not contain all the evidence. The principal contest was over the exhibits filed with the depositions, and these have not been brought into the record, nor is the oral testimony brought into the record. 98 Ark. 521; 80 *Id.* 74-5; 45 *Id.* 240. It will be presumed that the decree was sustained by the missing evidence. 77 Ark. 195; 72 *Id.* 185; 38 *Id.* 477; 58 *Id.* 134; 63 *Id.* 513; 109 *Id.* 1; 83 *Id.* 424; 98 *Id.* 266; 126 *Id.* 460; 136 *Id.* 376, 378.

HART, J. (after stating the facts). Appellees move the court to affirm the decree for the reason that the transcript does not contain all of the evidence in the case upon which the decree of the chancery court was based.

A case in equity is heard *de novo* by the appellate court on the record made below. Under our practice oral evidence introduced in chancery cases may be made

a part of the record by having it taken down in writing in open court and by leave filed with the papers in the case, by bill of exceptions, or by reducing the testimony to writing and embodying it as a recital in the record of the decree. *Casteel v. Casteel,* 38 Ark. 477; *Benjamin v. Birmingham,* 50 Ark. 433; *Jones v. Mitchell,* 83 Ark. 77; *Beecher v. Beecher,* 83 Ark. 424; *Rowe v. Allison,* 87 Ark. 206; *Bradley Lumber Co. v. Hamilton,* 109 Ark. 1; *Phillips v. Jokische,* 117 Ark. 221; *Weaver-Dowdy Co. v. Brewer,* 129 Ark. 193, and cases cited, and *Alston* v. *Zion,* 136 Ark. 376.

As shown by the statement of facts, the decree recites, among other things, that it was heard upon the depositions of W. J. Simpson, Robert Raines, W. E. Waddell, Fred A. Snodgress, C. M. Simpson, C. L. Willis, A. G. Russell, Walter Edwards, and R. M. Fletcher, and upon the exhibits to the deposition of said witnesses filed with their testimony and upon oral explanation by the witnesses, A. G. Russell, R. M. Fletcher and C. M. Simpson to the court of certain of the exhibits filed.

As will appear from the cases above cited as well as numerous other decisions of the court, where it is shown on the record that witnesses were examined in open court, this court cannot say how much the opinion of the chancery court was influenced and ought to have been influenced by their testimony. Therefore, a conclusive presumption in favor of the decree must prevail if the evidence sustains the decree, so far as it is possible for a decree based on the complaint to be sustained by the evidence.

In the case at bar the decree is within the issues made by the complaint and the answer and cross-complaint. It is therefore responsive to the issues.

It appears from the record that on August 20, 1919, the court ordered the stenographer to file the depositions taken at Little Rock with the exhibits thereto. None of the exhibits referred to in these depositions appear in the transcript.

W. J. Simpson, a brother of C. M. Simpson, was in charge of the place when Fletcher examined it with a view of purchasing it. He showed Fletcher all the real and personal property on the place except the cotton. He continued in charge of the place for several months after the contract of sale was executed. He had a sales book of the cotton grown on the place which was gathered and sold by him after the contract of purchase was executed. He agreed to file as an exhibit to his deposition a statement of the sale price of all the cotton and cotton seed sold by him together with the expense account against the same.

C. L. Willis was the real estate agent who made the sale, and he said that he would file as an exhibit to his deposition a list of all the personal property which was to be embraced in the contract of sale, together with the value thereof. Other exhibits were also to be attached to the depositions. As above stated, none of them appear in the transcript. It will be readily seen that their contents might be very important to a proper determination of the issues. The decree shows at least inferentially that these exhibits were before the chancellor. We refer to that part of the decree which recites that the case was heard upon oral explanation by the witnesses, A. G. Russell, R. M. Fletcher and C. M. Simpson to the court of certain of the exhibits filed.

The record of the decree does not recite which of these exhibits were explained by the witnesses. It will be remembered that C. M. Simpson sold the farm of R. M. Fletcher. A. G. Russell was the agent of R. M. Fletcher and took charge of the place within a few months after the contract was executed. The record does not disclose which of these exhibits the court desired to be explained by the witnesses; nor what explanation of them was made by the witnesses. This court cannot know what effect this omitted testimony had or ought to have had upon the chancellor. What was there said by the witnesses might have had, and should have had, a material bearing upon the decision of the chancellor.

These witnesses had already testified in the case. Two of them were the principal parties to the suit, and it can be readily seen how their explanation of the exhibits might have caused the chancellor to find the issues in favor of appellees. The exhibits and the explanation of them might have had a very important bearing upon the determination of the issues of fraud and false representations alleged to have been made by C. M. Simpson to R. M. Fletcher.

Since all the evidence upon which the decree was rendered has not been brought into the record and is not now before us, we cannot properly review the evidence for the purpose of ascertaining whether or not the same supports the decree. Therefore the decree must be affirmed.

CONOLLY v. ROSEN.

Opinion delivered June 14, 1920.

1. LANDLORD AND TENANT—ESTOPPEL TO DISPUTE LANDLORD'S TITLE.—The rule which forbids a tenant to dispute his landlord's title and right to possession without delivering possession has no application where defendant in possession denies that a tenancy ever existed.
2. DEEDS—CERTAINTY IN EXCEPTION.—Under the rule requiring the same certainty of description in an exception out of a grant as in the grant itself, an exception in a deed of six acres in a certain southeast quarter of the northeast quarter as having been sold to C., and which refers to C.'s deed for a description of the part excepted, is void for uncertainty where C.'s deed described the land as the fractional southeast quarter of the northeast quarter aforesaid, containing six acres.
3. APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT.—A decree refusing to reform a deed will not be reversed as against the preponderance of the evidence where the abstract is insufficient to establish that fact.
4. QUIETING TITLE—SCOPE AND EXTENT OF RELIEF.—Where, in a suit by a grantee to quiet his title, a mortgagee, whose claim was assumed by the grantee as part of the consideration, was made a party, and disclaimed any desire to have his mortgage fore-

closed, it was not error to quiet the grantee's title as against the grantor without foreclosing the mortgage, since the grantee took subject thereto.

Appeal from Garland Chancery Court; *S. W. Leslie,* Special Chancellor; affirmed.

R. G. Davies, for appellants.

According to the law and undisputed facts defendants either took possession of the six acres as tenants at will of the plaintiffs or they took same against their will, and in either event they were tenants at will of plaintiffs or they took forcible possession and unlawfully detained the same and they can not dispute plaintiff's possession as long as they held the possession and could only do so after surrender. Any verbal license would only be good for one year. The clear preponderance of the evidence shows no fraud was practiced, that they were fully advised, and agreed to except the six acres after full investigation. 114 Ark. 121; Minor's Institutes, vol. 2, pp. 99, 109. A tenant can not dispute his landlord's title. 6 Michie's Digest, 454-6. It is no defense to an action of forcible entry where defendant entered into possession by means of threats amounting to force that he was entitled to possession under a lease of the owner; the remedy in such case being designed to protect the possession whether right or wrong. 53 Ark. 94. Fraud on part of defendants is clearly proved by the undisputed testimony. Their claim to the six acres was an afterthought, and their failure to comply with their agreement to pay the consideration does not look well in a court of equity. It was a holdup, pure and simple. The court below did not adjudicate what was before it, and the decree is manifestly erroneous. If there was a defective description in the deed to appellees, what right have they to have their title quieted, their deed reformed and then refuse to pay anything they owed and still owe? He who asks equity must do equity. Where property is conveyed by mistake, a court of chancery will correct the mistake, whether it arose from misap-

prehension of facts or the legal operation of the deed. 50 Ark. 179; 42 *Id.* 362; 76 *Id.* 43. See, also, 91 *Id.* 162; 60 *Id.* 304, 306; 48 *Id.* 498; 98 *Id.* 23.

George P. Whittington and *H. P. Chappell*, for appellees.

1. Appellant has failed to comply with rule 9.

2. The exception in the deed is void for uncertainty. 30 Ark. 640; 41 *Id.* 495; 95 *Id.* 253. Under the deeds the whole tract passed by the deeds, as there was no valid exception.

SMITH, J. This suit was begun as an action in unlawful detainer by appellants, who were plaintiffs below, and it was alleged by them in their complaint that they had sold appellees a certain tract of land, reserving therefrom the six acres which forms the subject-matter of the litigation, and that appellees had unlawfully and wrongfully taken possession of said six acres and were forcibly and fraudulently detaining the same after demand therefor had been made in writing. There was a general denial of the allegations, and a prayer that appellees' title be quieted. By consent the cause was transferred to equity, and upon the trial there appellees' title to the land in question was quieted, and this appeal is from that decree.

It is first insisted that appellees should not have been heard to deny appellant's title to the land and their right of possession thereof unless, and until, appellees had delivered to appellants the possession of the land. This insistence is based upon the assumption that a tenancy existed on appellees' part, and may be disposed of by saying that the existence of this tenancy is one of the disputed questions of fact in the case. According to appellees, that relationship never at any time existed.

Appellants had title to an eighty acre tract of land by inheritance from their father, and by separate deeds conveyed the land to appellees except a certain seven acres which their father had previously conveyed to one Gibson Mills, and, as there is no question in regard to

this seven acre tract it passes out of the case. In the granting clause of the deed the following exception is found: "Excepting also six acres in the southeast quarter of the northeast quarter of said section 18, township 3 south, of range 19 west, sold to C. C. Cooley, for a description of which reference is had to the record of the deed for the same in the office of the Recorder of Garland County, Arkansas." It thus appears that the attempt to except six acres, in addition to the seven acres, was made by referring to a prior deed for a particular description of the six acres thus excepted. This Cooley deed was offered in evidence, and the description there employed reads as follows: "The fractional southeast quarter of the northeast quarter in township 3, section 18, range 19, containing 6 acres, more or less, in the County of Garland and State of Arkansas."

It is quite obvious that this description is void for uncertainty, and that uncertainty is not removed by reading the two deeds together.

In the case of *Mooney v. Cooledge,* 30 Ark. 640, it was decided that "The same certainty of description is required in an exception out of a grant, as in the grant itself." In that case there was an attempt to except an acre from the grant, but there was nothing in the exception, or the evidence, to locate it upon any particular part of the tract, and the court held that the exception was void for uncertainty, and that the grantee took the entire tract, including the one acre. See, also, *Scott v. Dunkel Box & Lumber Co.,* 106 Ark. 83.

The case as submitted in the court below was in effect one to reform the deed, and it is insisted by appellants that the testimony shows an intent to except six acres, and, further, that the six acres are sufficiently identified for the court to give effect to the intention of the parties by reserving the six acres from the deed and awarding the possession thereof to appellants and quieting their title thereto.

No opinion was rendered or finding of facts made by the court below, but the decree indicates that the

court found the facts against appellants' contention, as the decree rendered quieted appellees' title, and the testimony is not sufficiently abstracted for us to say that the chancellor's finding is clearly against the preponderance of the evidence.

So far as the testimony is abstracted, it appears that an irreconcilable difference of opinion exists as to the meaning and purpose of the exception set out above. It is undisputed that Patrick Conolly and his wife (father and mother of appellants), on April 3, 1880, executed a deed to one Calvin Cooley, purporting to convey the six acres under the description set out above, this being the deed to which reference was made in the deed from appellants to appellees. Cooley for a time occupied a part of the land under his deed, but he went away, and no account was given of his whereabouts at the time of the trial. After Cooley left appellants paid taxes on the entire tract and occupied the six acres as a portion of the whole.

Appellees testified most unequivocally that it was represented to them that they were getting all the land except the seven acres owned by Mills, and that they bought under this representation and would not have purchased otherwise, and that the exception was put into the deed because appellants did not want to warrant title to land which their father had previously conveyed, but upon the delivery of the deed possession of all the land was delivered to appellees except the Mills' seven acres, and for several months no question was raised about their being entitled to all the land except the Mills' seven acres.

The testimony on appellants' behalf sharply contradicts the testimony just recited, but the record in the case has not been sufficiently abstracted for us to say that the decree is based upon a finding of fact clearly against the preponderance of the evidence.

Much testimony was offered concerning the damages claimed; but this question passes out of the case upon the affirmance of the decree below.

Complaint is also made against the decree that it does not adequately protect the interests of appellants against a certain mortgage executed by them to one Stearns, the payment of which was assumed by appellees as a part of the consideration for their deed. Stearns was made a party, and filed an intervention in which he disclaimed any desire to have a decree entered ordering the foreclosure of his mortgage unless that action was necessary to protect his interests. The court made no order in regard to this Stearns mortgage, and we find it unnecessary to do so.

The court quieted appellees' title as against appellants to the six acres, but that decree did not free any portion of the land from the Stearns mortgage. Appellees have title to all the land, but they have it subject to the Stearns mortgage; and, as its foreclosure is not asked, it is unnecessary to make any order in regard to it. Decree affirmed.

ROYAL NEIGHBORS OF AMERICA v. MCCULLAR.

Opinion delivered June 14, 1920.

1. INSURANCE—PAYMENT OF PREMIUM QUESTION FOR JURY.—In an action on a benefit certificate, *held,* under the evidence, that whether the certificate had been involved by a failure to pay a premium was for the jury.
2. EVIDENCE—RES INTER ALIOS ACTA.—In an action on a benefit certificate, defended on the ground of forfeiture for nonpayment of a premium, it was error to permit insured's husband to testify that he sent her money and insisted on her paying up her lodge dues for the remainder of the year, for the purpose of showing that her attention was called to the importance of paying the dues and that she had the money with which to make the payment.

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

Hawthorne & Hawthorne, for appellant.

1. There was no evidence in the record to base the interrogatory propounded by the court to the jury, and the peremptory instruction requested by defendant

should have been given. The court erred in allowing W. H. McCullar to testify in reference to sending his wife $50 and instructing her to pay the premiums on her insurance policy in advance. Parol evidence as to the contents of writing is inadmissible, and is not the best evidence; further, there is no evidence showing the deceased ever received such a letter or that she paid any dues in advance as requested to do. 86 Ark. 538; 17 Cyc. 471.

2. The evidence clearly shows that assessment No. 9 was not paid and the policy lapsed.

Lamb & Frierson, for appellee.

There is no question of law in this case—only one of fact. Was the September assessment paid? The jury found that it had been paid, and that is conclusive.

SMITH, J. This suit was brought to recover the sum named in the benefit certificate issued by appellant company on the life of Mrs. Nora McCullar, who died October 27, 1918. The certificate was payable to her infant children, and this suit was brought by appellee as next friend to collect the insurance.

The premiums or assessments were payable monthly and the constitution and by-laws of appellant provided that the failure to pay any one of these assessments would invalidate the certificate, and the defense interposed to the suit is that Mrs. McCullar failed to pay the premium falling due in September, 1918. There was a verdict and judgment for the face of the certificate, and this appeal is from that judgment.

It is first insisted by appellant that there is no competent testimony that the premium was paid, and that a verdict should, therefore, have been directed in its favor.

We think, however, there was sufficient testimony to take the case to the jury upon that issue, and the testimony tending to support the verdict may be summarized as follows. John McCullar testified that he was the grandfather of the beneficiaries named in the certificate, and that his son's wife (the insured) and his

nephew's wife were both named Nora, and that they both lived near Jonesboro, and that the mail of each woman was frequently delivered to the other, and that on September 7, 1918, he received a letter from his niece enclosing a receipt for dues paid appellant by his daughter-in-law, and that he gave this receipt to Orlin Turner, a son-in-law, with the request that he mail it on the following Monday morning to Mrs. Nora McCullar, the insured. His daughter, Mrs. Turner, remembered the incident and testified that the receipt was for two dollars and some odd cents, and was dated in September. J. W. Nelms, a disinterested witness, testified that he was present when the conversation between John McCullar and Turner occurred, and that he saw the receipt at the time, and remembers that it was dated in September. Mrs. Alice Riggs testified that a lodge of the appellant company once existed at Lake City, but no meetings had been held since 1915, and that she was the recorder at Lake City, and that the assessments were payable to her. These assessments were payable from the 20th of one month to the 15th of the next. Mrs. Riggs' testimony makes it very apparent that she was not expert nor experienced in keeping accounts, and she testified that she did not always mail out the receipts the day she received the money, as she was frequently too busy to do so. The testimony also shows that at about the time in question Mrs. Riggs had a spell of sickness herself, and that a member of her family became sick and died. Payments to Mrs. Riggs were made by check, by cash, and sometimes by money order, and she kept these payments at her home until she went to town, when she remitted them to appellant. The receipts for admitted payments made to Mrs. Riggs which were produced at the trial were not signed by her.

A receipt dated September 18th was produced; but this was for August. Mrs. Riggs' testimony in regard to this receipt shows that her accounts were not accurately kept. She testified that she had advanced the money covered by that receipt, and that it was not re-

paid to her until after Mrs. McCullar's death, and that the last payment made by Mrs. McCullar was $2.50, at a time when she only owed $2.35, and that this left 15 cents in her hands which she had forgotten about. Each assessment had a separate number, and it is insisted that the receipt about which John McCullar, Turner and his wife and Nelms testified was a receipt dated September 17th. But this cannot be true, as that receipt covered assessment No. 8, and was for only 50 cents and was not actually issued until November or December, when Mrs. Riggs met W. H. McCullar, the husband of the insured, and told him that she had previously paid and remitted that assessment for his wife. The officers of appellant testified that no remittance had been made covering the disputed assessment.

From this testimony the jury might have found that the receipt which had been misdirected to the niece of John McCullar covered the assessment in question. Indeed, if there was such a receipt, it could have covered no other assessment.

We would, therefore, affirm the judgment as being supported by testimony legally sufficient for that purpose but for the fact that certain incompetent testimony was admitted which may have influenced the jury in arriving at the verdict which was returned. W. H. McCullar, the husband of the insured, was permitted to testify that he was in the army from April 27, 1918, to January 12, 1919, and that he was not at home when his wife died; but that in August 1918, he sent her $50 and insisted on her paying her lodge dues up for the remainder of the year.

An objection was overruled to the question which elicited this testimony, and in making that ruling the court stated: "That would be no evidence, gentlemen of the jury, that the wife paid the dues, however." But this is the inference to be drawn from that testimony, and the court's ruling is defended upon the ground that the letter was merely offered to show that the attention of Mrs. McCullar was called to the importance of paying the dues, so that it could not be urged that she had for-

gotten to do so, and to show that she had the money with which to make the payment."

The maxim, *Res inter alios acta alteri nocere non debet,* excludes this testimony.

"Of maxims relating to the law of evidence, the above (*Res inter alios acta alteri nocere non debet*) may be considered as one of the most important and most useful; its effect is to prevent a litigant party from being concluded or even affected, by the acts, conduct, or declarations of strangers. On the principle of good faith and mutual convenience, a man's own acts are binding upon himself, and are, as well as his conduct and declarations, evidence against him; yet it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorized strangers; and if a party ought not to be bound by the acts of strangers, so neither ought their acts or conduct to be used as evidence against him." Broom's Legal Maxims (8 ed.), 748.

This maxim was applied in the case of *Hamburg Bank* v. *George,* 92 Ark. 472, in which it was held incompetent to corroborate a witness in this manner. See, also, *Fechheimer-Kiefer Co.* v. *Kempner,* 116 Ark. 482, 486; *Carter* v. *Younger,* 123 Ark. 266, 267, 272; *Donaghey* v. *Williams,* 123 Ark. 411, 425, 426; *Raymond* v. *Raymond,* 134 Ark. 484, 490.

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

FORREST CITY BOX COMPANY v. LATHAM.

Opinion delivered June 14, 1920.

1. APPEAL AND ERROR—INSTRUCTIONS NOT ABSTRACTED—PRESUMPTION. —Where the instructions are not abstracted, it will be conclusively presumed that the jury was correctly instructed on the questions of law in the case.

2. LOGS AND LOGGING—DAMAGES FOR BREACH OF CONTRACT—EVIDENCE. —In an action against a box company for breach of a contract of employment of plaintiff to cut and deliver logs, where defendant gave the same contract to another at the same price, and plaintiff offered testimony tending to show the profit he would have made under the contract if allowed to perform it, it was error to exclude testimony of the person who took the contract that he lost money in carrying it out, although he was an experienced logger and employed approved methods.

Appeal from Union Circuit Court; *C. W. Smith,* Judge; reversed.

W. E. Patterson, for appellant.

1. There was no legal evidence to support the verdict. 25 Ark. 49; 42 *Id.* 528; 103 *Id.* 58; 219 S. W. 323.

2. It was prejudicial error in refusing to permit defendant to show the actual cost of delivering the logs in controversy and that the cost of delivery was to be actually more than plaintiff was to be paid. The question was proper.

SMITH, J. Appellee recovered judgment for damages on account of an alleged breach of a contract which he claims to have had with appellant company to cut and deliver certain logs. The existence of the contract was denied, but on appellee's behalf one Reynolds testified that he had been engaged in logging for appellant for two years, when Mr. Girard, the superintendent of appellant, asked him to include in his contract the logs which form the subject-matter of this litigation. Reynolds was unable to do so, but promised Girard that he would find him a man who would take the contract. Reynolds testified that he was authorized to offer $4 per thousand for cutting and floating out the logs, and pursuant to this authorization he employed appellee to do the work.

On appellant's behalf it was denied that Girard made any such contract, or that he had the authority to do so, and it is contended by appellant that the logs in question were included in Reynolds' contract. Girard knew appellee was at work but supposed he was employed by Reynolds. On appellee's behalf the testimony tends to

show that Girard had the authority to make the contract, or to authorize Reynolds to do so, and that he knew the contract had been made, and that appellee was engaged in its execution.

According to appellant, Reynolds abandoned his contract, and it became necessary for appellant to employ another party to get out the logs, and that this contract was given to one Bunn Robinson at $4 per thousand.

The instructions are not abstracted, and it will, therefore, be conclusively presumed that the jury was correctly instructed on the questions of law in the case, including the circumstances and conditions under which Girard could bind appellant, and, without discussing the various discrepancies pointed out in the testimony, it may be said that, if the testimony offered on appellee's behalf is accepted as true, it is legally sufficient to support a finding that Girard had the authority to make the contract for the company, or, rather, that it was within the apparent scope of his authority to do so.

Appellee offered testimony tending to show the profit he could and would have made under the contract if he had been allowed to perform it. Bearing upon this question of profit, Bunn Robinson testified that he took the contract to float and raft the logs in question for $4 per thousand, and that he had experienced men working for him. That in floating the logs he used the methods ordinarily employed by himself and other experienced men, but that in rafting the logs he used chain-dogs, instead of pins, as that method was less expensive, took less time, and was easier done.

After stating that he had logged and rafted with his father, who was an experienced rafting and logging man, Robinson was asked this question: "Under this contract or arrangement you had for taking out these logs at $4 per thousand, delivered, managed in the way your father had managed and others with whom you had had experience, what was the cost in this instance of delivering the logs from the brake to the mill more than $4?" Objection to this question was made on the ground that "That is not

the criterion." This objection was sustained, whereupon counsel for appellant offered "to show by this witness that he took the contract from defendant to float and raft the logs in controversy from the brake to the mill at $4 per thousand, and did in the usual way float and raft the logs to the mill, and that the cost of so doing exceeded $4 per thousand, and that witness lost money on the operation." The court declined this testimony offered, and exceptions were saved to that ruling.

We think the offered testimony should have been admitted. It was competent to show that no profit could be made out of the contract, and that was the purport of the excluded testimony. The witness proposed to testify about the identical logs which form the subject-matter of this litigation, and that, notwithstanding the fact that he was an experienced logger, and employed approved methods, he sustained an actual loss, although he was paid the price claimed by appellee.

It is finally insisted that the verdict is excessive; but as the judgment is to be reversed on another ground, we do not pass upon that question.

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

KANSAS CITY SOUTHERN RAILWAY COMPANY v. LEINEN.

Opinion delivered June 14, 1920.

1. COMMERCE — EMPLOYEE ENGAGED IN INTERSTATE COMMERCE.—A brakeman employed on a train hauling ballast to be used on the main track of an interstate carrier, was engaged in interstate commerce, and the Federal Employer's Liability Act (U. S. Comp. Stat., §§ 8657-8665) applied in an action for personal injuries.
2. MASTER AND SERVANT—NEGLIGENCE IN STOPPING TRAIN.—In an action by a brakeman for injuries received when the train made an emergency stop, evidence *held* to make a case for the jury.
3. APPEAL AND ERROR—CONFLICTING INSTRUCTIONS—HARMLESS ERROR. —Where there were a general verdict and four special verdicts in a negligence case, and the jury specifically found against de-

fendant on a number of allegations of negligence, defendant was not prejudiced by a conflict in the instructions relating to one of the allegations of negligence, as a finding upon the other allegations was sufficient to support the general finding of liability.

4. TRIAL—SPECIAL FINDING AND GENERAL VERDICT.—Under Kirby's Digest, § 6208, where a special finding of fact is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

5. APPEAL AND ERROR—HARMLESS ERROR.—In a personal injury case, where the jury made specific findings against the defendant on several allegations of negligence, defendant can not complain of a judgment in favor of plaintiff if there was sufficient evidence to sustain any one of the findings.

6. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.—Where plaintiff, a brakeman 28 years old, earning $100 per month and in line for promotion, received permanent injuries consisting of a crushed skull, his kidneys, eyesight and sexual powers being affected, rendering him unable to perform labor of any kind or to enjoy any outdoors sports, a verdict of $53,333 was excessive and will be reduced to $35,000.

7. APPEAL AND ERROR—REDUCTION OF VERDICT.—The Supreme Court, on appeal by defendant in an action under the Federal Employer's Liability Act (U. S. Comp. Stat., §§ 8657-8665) is authorized to reduce a verdict as in any other case if it finds it excessive.

Appeal from Little River Circuit Court; *James S. Steel,* Judge; modified and affirmed.

F. H. Moore, J. R. Bell and *J. B. McDonough,* for appellant; *S. W. Moore,* of counsel.

1. Plaintiff at the time of his injury was not engaged in interstate commerce, and hence not entitled to recover under the Federal Employer's Liability Act, and the judgment based on that act should be reversed. 232 U. S. 248; 218 Fed. 748; 233 U. S. 473; 241 *Id.* 177; 238 Fed. 95; 253 *Id.* 736; 261 *Id.* 760; 159 N. W. 14; 157 *Id.* 616; 154 *Id.* 516.

2. The negligence charged was not proved, and the peremptory instruction requested by defendant should have been given. In the absence of an unusally violent stop, there is no negligence. The employee assumes the risk. 269 Mo. 464; 165 *Id.* 612; 195 *Id.* 105; 259 *Id.* 109;

130 *Id.* 132; 93 Mo. App. 289; 98 *Id.* 494; 272 Mo. 350. This accident happened in Missouri, and the decisions of that State are in point. See, also, 93 N. E. 575. The injury was an accident, purely, and there was no negligence. 98 Mo. App. 494, 502. The proximate cause, ordinarily, is a question for the jury. 86 Ark. 289; 110 S. W. 1037; 69 Ark. 402; 64 S. W. 226; 29 Sup. Ct. Rep. 321.

3. The court erred in giving plaintiff's instruction No. 1. It is not supported by any evidence. 87 Ark. 243; 88 *Id.* 594; 86 *Id.* 91; 85 *Id.* 390; 77 *Id.* 567. It conflicts with other instructions properly given. 84 Ark. 233; 72 *Id.* 440; 76 *Id.* 69.

4. The court erred in giving instruction No. 2½ for plaintiff. 135 Mo. 414. Plaintiff was barred by contributory negilgence. 2 Cyc. 507 and note 47; 240 U. S. 444; 36 Sup. Ct. Rep. 406; 162 Mo. 463; 38 Cyc. 1608, note 1608. The instruction is ambiguous and misleading. 229 U. S. 114; 63 Ark. 477.

5. It was error to give instruction No. 3 for plaintiff. 63 Ark. 477; 39 S. W. 359; 55 Ark. 588; 119 *Id.* 295.

6. It was error to give No. 6 for plaintiff. 241 U. S. 229.

7. It was error to give instruction No. 7 for plaintiff. 96 Ark. 614; 150 S. W. 863.

8. The court erred in admitting certain depositions taken by plaintiff. See Bellus and Long, 32 S. E. 266.

9. The judgment is grossly excessive. 241 U. S. 485, 494; 100 Ark. 107; 114 *Id.* 224; 118 *Id.* 49; 105 *Id.* 533.

10. A remittitur will not cure the error, and the judgment should be reversed. 184 S. W. 1051; 161 U. S. 397; 158 *Id.* 41-53; 91 *Id.* 646-656; 91 N. E. 431; 141 Mo. App. 453.

A. D. Dulaney, Chas. Stephens and *John H. Curran,* for appellee.

1. This case comes within the provisions of the Federal Employers' Liability Act. 1 Roberts, Fed.

Empl. Act, p. 847; 201 S. W. 128; 124 C. C. A. 565; 204 Fed. 751; 196 U. S. 1; 229 *Id.* 146; 33 Sup. Ct. Rep. 648; 238 U. S. 439; 155 N. W. 504; 129 Ark. 211, etc.

2. There was no error in the instructions given for plaintiff. 97 Ark. 198; 98 *Id.* 227; 88 *Id.* 233; 115 S. W. 175; 67 *Id.* 594; 62 *Id.* 65; 86 Ark. 76; 77 *Id.* 458. The verdict and judgment are right on the whole case, even if there was slight error in the instructions. 142 Ark. 302; 143 S. W. 106; 113 Ark. 380; 85 *Id.* 127; 97 *Id.* 576. No specific objections were made to the instructions; the objections were general. 96 Ark. 531. Proper instructions should have been suggested and offered to the court. 61 Ark. 613.

3. The verdict is not excessive. 79 Ark. 137; 137 S. W. 1109. But, if so, a remittitur will cure this, the only error. 15 Ark. 345; 127 *Id.* 429; 3 Am. Law Rep. Anno. 605; 183 Ala. 138; 62 So. 679; 5 Ga. App. 402; 63 S. E. 299; 121 N. W. 186; 46 So. Rep. 929; 39 L. R. A. (N. S.) 202; 130 La. 66; 67 Minn. 260; 1 Am. Negl. Rep. 93; 167 S. W. 656; 13 Hun (N. Y.) 4; 103 Kan. 655.

4. The jury have passed on the amount of damages, and the evidence sustains the verdict and is conclusive. 184 S. W. 1957; 141 Mo. App. 453.

SMITH, J. Appellee, plaintiff below, brought this suit to recover damages on account of injuries received by him while employed as a brakeman by appellant railway company near Joplin, in the State of Missouri. There was a verdict and judgment in his favor for $53,-333, and this appeal is from that judgment.

The train on which appellee was employed at the time of his injury consisted of an engine and a caboose and about sixteen empty Rogers ballast cars, which were being transported from Lanagan, Missouri, to Webb City, Missouri. This train with its crew had for some weeks been engaged in transporting ballast from Webb City to points on appellant's railway in southwest Missouri, and in transporting the empty ballast cars back to the chat

piles in order that they might again be loaded with the chats, which were being used for ballast.

The train crew consisted of the following men. Murphy, the engineer; Hazen, the fireman; Harriman, a brakeman; Hayes, the conductor, and appellee, another brakeman. The train was exclusively employed in hauling and distributing the ballast on the main line of appellant's railway. On arriving at the place where the ballasting was being done, the chats were allowed to run out of the middle of the hopper-shaped cars which were being used on to the tracks while the train moved along at the rate of about two and one-half miles per hour. The method employed resulted in actually distributing the chats between the rails, and a part of every train load was unloaded on the main line of the railroad over which interstate trains ran. This point is of importance because appellee elected to rely upon the count of his complaint in which he alleged that he was within the provisions of the Federal Employers' Liability Act at the time of his injury.

The negligence complained of is indicated by the interrogatories submitted to the jury and the answers returned thereon.

"Do you find from a preponderance of the evidence that Engineer Murphy was guilty of negligence in not keeping a proper lookout and thereby failing to observe the first signal given by Harriman?

"Answer: He was guilty.

"Was Harriman negligent in not using the conductor's brake valve in the cupola of the caboose after he had failed for two or three signals to get the engineer to respond?

"Answer: He was guilty.

"Was Hayes, under all the surrounding circumstances, negligent in saying to Leinen what caused Leinen to start back on to the car when he said Hayes knew that the danger of a stop still existed?

"Answer: He was guilty.

"1. State upon what act or acts of negligence you base your verdict?

"1. We, the jury, base our verdict on the negligence of the Engineer, Murphy, in not keeping the proper lookout and applying the emergency brake at the proper time.

"2. The negligence of Brakeman Harriman in not applying conductor's brake valve after giving the third signal to Engineer Murphy.

"3. Also the negligence of Conductor Hayes in saying, come back Nick, everything is all right, before countermanding the emergency signal.

"Frank Williams, Foreman."

At the time of the injury the train was moving north from Joplin to Webb City, Missouri. The engine was at the rear of the train and was backing up, which would put the engineer on the west side of the engine and the fireman on the east side. The caboose was next to the engine, and the cars were in front of the caboose. The brakeman, Harriman, was in the cupola of the caboose for the purpose of passing signals from the head-end of the train to the engineer. Conductor Hayes and appellee were on the front end of the head car in the direction in which the train was moving for the purpose of keeping the lookout and of passing signals back to brakeman Harriman, for transmission to the engineer.

As the train was passing through a cut and was approaching a private road crossing, appellee and the conductor saw the heads of a team of horses approaching the track from the east along this private road. There was a four per cent. curve in the road at that point, which made it impossible for the engineer to see the front end of the train. When first observed, the team was, according to appellee, between 250 and 275 feet and, according to Hayes, the conductor, from 160 to 240 feet, away, and the train was moving at the rate of ten miles per hour. A number of witnesses testified as to the distance and time within which the train could have been stopped after the emergency signal was given. When the team was first observed, it appeared certain that the train would

strike it if it attempted to go upon the track, as it was apparently about to do, and appellee himself gave the emergency stop signal. This emergency signal, which is also called a washout signal, is given by elevating the arm and allowing it to fall rapidly to the side. The conductor and appellee yelled at the driver of the team and attracted his attention to the impending danger just in time to avert it. But, after giving the washout signal for the emergency stop, in order to avoid being injured in case the train collided with the team and wagon, the conductor got up on the east side of the head car in order to be able to get off the train if the collision could not be avoided, and the appellee crossed over to the west side of the car and got down by means of the hand-holds with his foot on the stirrup or lower step in order that he could get off in case the collision occurred. Hayes could see that the team had stopped; but appellee could not, and as soon as Hayes saw there would be no collision he called to appellee. Hayes testified that he called out to appellee, "It's all right; we never hit them." But, according to appellee, the conductor said, "It's all right, Nick; come on up." Testimony was offered as to the meaning of the last quoted remark in railway parlance, and, according to the testimony offered in appellee's behalf, the remark meant that the emergency signal had been annulled and that the emergency stop would not be made; and appellee testified that in reliance upon this assumption he relaxed in the vigilance he would otherwise have used, and that the emergency stop—which was made—caught him unprepared, as he was climbing back into the car, so that he was thrown violently from the car, and that his head struck against the end of a tie, inflicting the injury to compensate which this suit was brought.

It is insisted on behalf of appellant that the stop made was not an unusual one, and that brakemen must be prepared to expect emergency stops to be made at any time, and that they are, in fact, frequently made by engineers without any signal therefor being given, and

that this hazard is, therefore, one of the usual and ordinary risks of the service which appellee assumed when he accepted his employment. But this insistence leaves out of account appellee's contention that the conductor's remark misled him and caused him to be in a position of unusual danger and helplessness when the impact resulting from the emergency stop came.

It is also insisted that the testimony fails to show any negligence on the part of the engineer in failing to promptly receive and execute the signal to stop; or that brakeman Harriman was negligent in failing to promptly receive and transmit the emergency signal to the engineer. Upon this feature of the case the testimony showing the distance which the train ran after the washout signal was given, and the distance within which it could have been stopped at the speed it was moving, was relevant, as appellee insists that it shows negligence in transmitting and executing the emergency signal.

The injury occurred on the 23rd day of November, 1916, and the testimony shows that the day was pleasant and the sun was shining brightly. There was a window on each side of the cupola of the caboose, and it was necessary for Harriman, who was riding in the cupola, to raise this window before he could signal the engineer. He testified that he promptly communicated the signal to the engineer, yet the testimony shows that he could not communicate this signal without first opening the window of the cupola. The testimony also shows that there was a conductor's brake valve in the cupola of the caboose, which he might have used when he saw there would be some delay in transmitting the signal to the engineer, and the testimony shows that the train could thus have been stopped. This valve in the caboose would have applied the air to the entire train except the engine and, with this exception, would have given practically the same braking power as would have been exercised had the air been applied in the engine.

The engineer testified that a proper lookout was being kept by him and that the washout signal was promptly

responded to by an immediate application of the air. The engineer did not see the signal given by appellee on account of the curve in the track; but there appears to be no testimony imputing negligence to the engineer.

An instruction numbered 1 presented appellee's theory of the case. It reads as follows: "1. If you believe from a preponderance of the evidence that Brakeman Harriman negligently and carelessly failed to promptly transmit the emergency signal to Engineer Murphy as soon as he should, or that said Murphy negligently and carelessly failed to keep a proper lookout and see said Harriman when he transmitted the said signal, and then apply the air brakes as promptly as he should have done, or that said Harriman carelessly and negligently failed to apply the air brakes by the use of the valve in the cupola of the caboose, when he should have done so, if you find the facts so to be, or that said Hayes carelessly and negligently induced and caused said plaintiff to leave a place of safety, and carelessly and negligently caused plaintiff to believe that no emergency stop was going to be made, or that said Hayes, after he knew that said danger of the team had passed, carelessly and negligently induced plaintiff to leave a place of safety when he, said Hayes, knew that he had not recalled said signal, and knew that all danger of striking the team was passed, if you find the facts so to be, and if you further find from a preponderance of the evidence that said acts of negligence, if any, caused said train to come to a sudden, unusual and unnecessary stop at an unusual and unnecessary place, under all the facts and circumstances shown by the evidence, by reason of which plaintiff was injured, and if you further find that any one or more of said acts of negligence, if any, was in whole or in part the proximate cause of injury to the plaintiff, then you must find for plaintiff herein, and assess his damages as in these instructions directed."

Under this instruction a verdict in appellee's favor was authorized if the jury found (a) that Harriman negligently failed to promptly transmit the emergency sig-

nal; or (b) that Engineer Murphy failed to keep a proper lookout or to execute the signal after he saw it; or (c) that Harriman failed to apply the brakes by the use of the valve in the cupola when he should have done so; or (d) that Conductor Hayes negligently induced appellee to leave a place of safety by causing him to believe that no emergency stop would be made.

It is earnestly insisted that the instruction was abstract in that there was no competent nor sufficient testimony to support a finding upon any one of the issues there submitted. It is also insisted that the instruction was in conflict with instructions numbered 10 and 15 given on motion of appellant. Instruction numbered 10 told the jury that appellee "is not entitled to recover on the negligence to the effect that Hayes, the conductor, ordered the plaintiff to get back into the car." Instruction numbered 15 told the jury that appellee "is not entitled to recover by reason of the alleged negligence of Harriman in failing to repeat the signal to the engineer."

It is finally insisted that the judgment is grossly excessive, and that, if this is true, the judgment must be reversed, as this court has no power to reduce it.

The applicability of the Federal Employers' Liability Act is a close question, indeed, but we have concluded that appellee is within its provisions and was entitled to maintain his action under it.

Through the industry of counsel many cases on this subject have been collected and reviewed, all of which profess to follow and to apply the decision of the Supreme Court of the United States in the case of *Pedersen* v. *D. L. & W. Ry. Co.,* 229 U. S. 146, 57 L. Ed. 1125, Ann. Cas. 1914 C, 153.

In volume 1 of Roberts' Federal Liabilities of Carriers, section 470, it is said of this case that it stands as a landmark in the extension of Federal control and the elimination of State authority over railway employees.

In the discussion of the statute in the case of *Pedersen* v. *Railway Company, supra,* Mr. Justice Van Deventor, speaking for the majority of the court, said:

"Indeed, the statute now before us (Federal Employers' Liability Act) proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But, independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined, regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is, Is the work in question a part of the interstate commerce in which the carrier is engaged?"

In 1 Roberts' Federal Liabilities of Carriers, section 481, the law is stated as follows: "Employees engaged in assisting in moving ballast to be used in the repair of an interstate track are within the terms of the Federal act. Thus, an engineer on an extra train running between two points in the same State and containing only gravel to be used in repairing and improving a roadbed over which interstate commerce regularly passed, was employed in interstate commerce."

Authority for the statement of the law quoted is found in the case of *Holmberg* v. *Lake Shore & M. S. R. Co.*, 155 N. W. 504. That was a decision by the Supreme Court of the State of Michigan; and, while the court was not unanimous in the opinion delivered, there was no difference of opinion among the judges as to the point now under consideration. It was there said: "Plaintiff's train was engaged in hauling gravel for use in repairing or improving the roadbed over which interstate commerce regularly passed. While there is unusual conflict and contradiction in both the State and Federal au-

thorities upon the question of when an employee of an interstate commerce road is or is not working under the provisions of the act, and even upon this direct question of track repair or improvements, it must be conceded the Federal authorities are controlling. The greatest number and latest decisions from that source have, we think, made a distinction between rolling stock, tools, and other appliances of a railroad which may or may not be used in its interstate service and its tracks, and settled the proposition that track maintenance or repairs not only facilitate, but are imperatively necessary to, all interstate commerce passing over the line; and the work of one engaged in such repairs is so directly connected and immediately beneficial to all commerce which uses the road that he must be regarded as covered by the act. *Pedersen* v. *L. & W. Ry. Co.,* 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914 C, 153; *Zikos* v. *Oregon R. & N. Co.* (C. C.), 179 Fed. 893; *Thompson* v. *Columbia & P. S. R. Co.* (D. C.), 205 Fed. 203; *Tralich* v. *Chi., Minn. & St. P. Ry. Co.* (D. C.), 217 Fed. 675."

We are unable to agree with counsel for appellant that no case was made for the jury, and although it does appear that instructions 10 and 15, given at the request of appellant, are in conflict with instruction numbered 1, given at appellee's request, the majority of the court are of the opinion that the reversal of the judgment is not called for on that account. The majority do not hold that it was proper to have given either instruction 10 or 15; but it is the opinion of the majority that, even though they were properly given, no prejudice resulted, although they are in conflict with appellee's instruction numbered 1.

We have here both a general and four special verdicts. There is a general finding of liability, and, in addition to the finding against appellant upon the allegations of negligence covered by instructions 10 and 15, the jury has specifically found against appellant upon other allegations of negligence submitted in appellee's instruction numbered 1 and not excluded by instructions

10 and 15; and that finding is sufficient to support the general finding of liability.

By the statute it is provided that where the special finding of fact is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly. Kirby's Digest, sec. 6208; *Jones* v. *Bank of Commerce,* 131 Ark. 362.

A majority of the court reach the conclusion that there was sufficient testimony to support the submission to the jury of the question of negligence of the conductor, Hayes, and since the jury made a specific finding on that issue, which supports the judgment, all questions as to the sufficiency of the testimony in support of the allegations of negligence against the engineer and the brakeman, and to the instructions of the court on those issues, are eliminated as being nonprejudicial. It is, therefore, unnecessary, according to the view of the majority, to determine whether or not the testimony was legally sufficient to support a finding that either the engineer or brakeman was negligent, and, if so, whether or not this negligence was, in a legal sense, the proximate cause of appellee's injury.

In the opinion of Mr. Justice WOOD and the writer, this action of the court may have tended to confuse the jury, and we think it prejudicial to have given instructions which were conflicting.

It is finally insisted that the verdict is excessive, and that, if that fact appears, that error can not be cured by a remittitur, but can be cured only by the reversal of the judgment and the remand of the cause for a new trial. This contention is based upon the theory that the doctrine of comparative negligence applies in these cases, and that, as the court can not know to what extent the jury reduced the recovery on account of the contributory negligence shown by the testimony, the court can not review the jury's verdict and finding on this question except to remand if the verdict appears to be excessive.

Assuming, however, that there was no finding of contributory negligence, and that there was no diminution

of the recovery on that account, and reviewing the judgment as we would review one in which the doctrine of comparative negligence did not apply, we conclude that the verdict is excessive. In the case of *Southern Ry. Co.* v. *Bennett,* 233 U. S. 80, 58 L. Ed. 860, a recovery under the Federal Employers' Liability Act was affirmed by the Supreme Court of South Carolina, and, among other errors assigned, was that of the excessiveness of the verdict. But the Supreme Court of the United States disposed of that assignment by saying: "But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error."

It is unquestionably true that appellee sustained a very serious injury; but he has a verdict for a larger sum than has ever yet been sustained by this court. It does not appear to us that the injury in the instant case is more serious, or that the testimony supports any larger recovery, than was sustained by this court in the case of *St. L., I. M. & S. Ry. Co.* v. *Webster*, 99 Ark. 265, where the court, with manifest reluctance, affirmed a judgment for $35,000, but, in doing so, said that the limit in such cases had apparently been there reached.

According to the testimony, appellee, at the time of his injury, was a young man of good health and good habits, and was twenty-eight years old, with an expectancy of 36.73 years. He was a brakeman, and was earning at the time of his injury the sum of $100 per month, and was in line of promotion with an accompanying increase of salary. Since his injury the salaries of brakemen have been increased, so that appellee would have had an increase even though he had obtained no promotion; but since his injury he has been unable to perform labor of any kind. Appellee was rendered unconscious by his fall when his head struck the corner of the tie. His skull was cracked, and his life was saved only by a most delicate and skillful operation, in which the surgeon entered the brain and removed a blood clot. Since his injuries appellee's head pains him more or less,

and his right ear always buzzes and rings, and heat from a stove or from the sun increases the pain in his head, and makes him dizzy and feel like he was going to faint. He speaks slowly, and his sight is affected and impaired. His sexual powers are gone, and his kidneys act too frequently, and at times he is very irritable, and any kind of labor, either physical or mental, tires him, and increases his headaches, and makes him more nervous and irritable. He is unable to look at moving pictures for any length of time, as this makes him dizzy, and he is unable to enjoy hunting, fishing, or any other indoor or outdoor sports. His ability to sleep was also impaired, and at times he lays awake all night. His hair began to fall out in April or May, 1917, and he became partially bald.

The operating surgeon testified: "I trephined the skull at the seat of the depression, raised and took out all the crushed bone there, cut a seam in the skull, forward to, and through, the frontal bone to the frontal sinus. I cut another seam through the temple bone to the mastoid portion. I cut another seam back through the parietal bone, back through the occipital bone until I could free the brain at the base." This physician testified, and he was corroborated by six other physicians and surgeons who at various times had treated or examined appellee, that appellee's injuries were serious and permanent, and that his capacity to perform labor and earn money was destroyed. But a study of appellee's testimony makes it apparent that his mentality is not destroyed, although it is said that he thinks slowly and speaks slowly, for his answers are responsive to the questions, and it is clear from his testimony that he fully comprehended the issues being developed before the jury.

Figures are submitted in appellant's brief, which are apparently correct, showing that $22,880 would, on a 6 per cent. basis, provide $1,200 per year for 36.73 years, that being appellee's expectancy. In addition to this loss of earning capacity, there must be taken into account the probability of promotion, and the pain, suffering and

disfigurement, and the other elements of recoverable damages which have been mentioned. But when these things have been taken into account, we think an additional allowance of $12,120 would fairly compensate appellee's injury insofar as compensation can be awarded in money for an injury so deplorable, and the verdict will, therefore, be reduced to $35,000, and as no error appears except that of the excessiveness of the verdict, judgment will be entered here for that sum with interest from the date of trial.

Mr. Justice HUMPHREYS dissents from the modification.

JOHNSON v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered June 14, 1920.

1. ATTORNEY AND CLIENT—LIEN.—In an action by an administrator for damages for wrongful death, under Kirby's Digest, § 6290, the recovery does not become assets of the estate, but is held by the administrator as trustee for the widow and next of kin, and a contract by the administrator as to counsel fees falls within the attorney's lien act (Acts 1909, No. 293).
2. ATTORNEY AND CLIENT—LIEN.—Where the administratrix of a decedent employed attorneys, agreeing that they should receive one-half of the recovery, such contract was binding, though signed by her individually, and not as administratrix, and the lien of the attorneys might be enforced against the defendant which made a settlement with the administratrix.

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

Allyn Smith, for appellants.

1. Appellants were entitled to a lien and the administratrix was personally liable. K. & C. Dig., § 225, Acts 1913, p. 511, has not changed the rule in 61 Ark. 410, 33 S. W. 530.

2. The suit having been brought by Jo Johnson and Sizer & Gardner, attorneys of record, the railroad company was bound to know that Kathern King was liable for the fee, and extrinsic evidence was admissible to

show how she signed and in what capacity she did sign. 50 Kan. 96; 127 U. S. 597; 105 *Id.* 416; 104 *Id.* 93; 5 Wheaton (U. S.) 326; 2 Iowa 77.

3. It appears from the complaint that Kathern King was the surviving widow and that there were no children and she waged this suit for her sole benefit and that the suit as administratrix was for her sole benefit. 38 Ark. 139-150. The contract was binding on the railroad company. 38 Ark. 147, 150.

Troy Pace, for appellee.

The railroad was not liable under the act, 293, Acts 1909, for the fee in a suit by the administratrix, King. 120 Ark. 394; 69 *Id.* 406; 127 U. S. 597; 105 U. S. 416; 102 *Id.* 658; 104 *Id.* 30, 93. The case in 61 Ark. 410 has no application. An exhibit is not a part of the pleading, and a demurrer does not admit the truth of the statements contained in the exhibit. 53 Ark. 479; 37 *Id.* 543; 34 *Id.* 554. A person suing in a representative capacity is in law a different person from one in a personal capacity. 5 Ark. 52. The petition was properly dismissed.

HUMPHREYS, J. Kathern King, administratrix of James E. King, deceased, by appointment of date August 4, 1917, instituted suit, through her attorneys, Jo Johnson and Sizer & Gardner, against appellee on June 6, 1918, in the Baxter Circuit Court, to recover damages in the sum of $50,000 for the sole benefit of herself as surviving widow, there being no children, on account of the alleged negligent killing of her husband, James E. King, in August, 1917, by appellee, while in its employ, as engineer.

On August 29, 1918, the appellants filed an intervention in the suit, alleging that appellee settled with their client for $8,500, and that, by the terms of their contract, attached to the intervention, they were entitled to a lien for one-half the amount, or $4,250, with interest, against appellee's railroad, under act 293, Acts of the General

Assembly of 1909. The contract attached to the intervention as "Exhibit A" provided in substance, for the employment of Jo Johnson and such assistants as he might deem necessary, to collect Kathern King's claim, by settlement or suit, against appellee, on account of injuries received by her husband while in its employ, which resulted in his death, for one-half of the amount recovered, after deducting expenses incident to the collection. The contract was signed at Cotter, Arkansas, by Mrs. Kathern King. It was alleged in the intervention that, while the contract was signed by Mrs. Kathern King, individually, the employment was by her in her capacity as administratrix, as shown by the correspondence with her attorney, Jo Johnson.

A demurrer to the intervention was filed, sustained, and the intervention dismissed, from which judgment an appeal was duly prosecuted to this court.

The first question presented by this appeal is whether the Attorney's Lien Statute, act 293 of the Acts of the General Assembly of 1909, has application to a suit by an administrator for the benefit of the next of kin. It was ruled in *Carpenter* v. *Hazel,* 128 Ark. 416, that "this statute has no application to suits by an administrator for the benefit of an estate of the decedent, for to give it that effect would constitute an invasion of the exclusive jurisdiction vested in the probate courts by the Constitution," referring to the exclusive jurisdiction of the probate courts to authorize contracts for and distribute funds of the estate. The rule there announced has no bearing in a suit by an administrator for the benefit of the next of kin, brought under section 6290 of Kirby's Digest, fashioned after Lord Campbell's Act, because the funds collected do not become assets of the estate. Such funds are in the nature of trust funds held by the personal representative in trust for the next of kin, and not subject to distribution by the probate court. In construing section 6290 of Kirby's Digest, this court said, in the case of *Little Rock & Fort Smith Railway* v. *Townsend,* 41 Ark. 382, that "the judgment, though recov-

ered in the name of the personal representative of the deceased, does not become assets of the estate. The relation of the administrator to the fund, when recovered, is not that of the representative of the deceased, but he is a mere trustee for the widow and next of kin." This construction of the statute was approved in the later case of *Davis* v. *Railway,* 53 Ark. 117. It follows that the Attorney's Lien Statute applies to suits by administrators for the benefit of the next of kin. Attorneys may, therefore, make binding contracts with administrators representing the next of kin for fees, enforceable by a lien proceeding under act 293, Acts of the General Assembly of 1909.

The sole remaining question to be determined is whether appellee can be held liable under the Attorney's Lien Statute aforesaid by Kathern King's attorneys, the appellants herein, on account of a settlement of the case brought by them for her, in her capacity as administratrix, for the benefit of the next of kin of the deceased, under a contract or agreement for fees, signed by Mrs. Kathern King. It is contended by appellee that such a contract did not, and could not, bind Kathern King in her representative capacity; that it only bound her in her individual capacity; that appellee's settlement with her was in her representative capacity and that her outstanding contract for fees with her attorney, in her individual capacity, could not render appellee liable on account of a settlement with her in her representative capacity. Kathern King was appointed administratrix of James E. King, deceased, on August 4, 1917. The contract in question was entered into on October 18, 1917, and the suit, which was settled, was brought by the attorneys in the name of Kathern King, as administratrix of James E. King, deceased, on June 6, 1918. The subject-matter covered in the contract was a cause of action in favor of Mrs. Kathern King against appellee for personal injuries received by her husband, James E. King, while in its employ, resulting in the loss of his life. She had no individual cause of action against the railroad. Her only cause

of action was on account of her kinship to the deceased. She had been appointed administratrix of her deceased husband at the time she made the contract. The contract, therefore, could only have been made in reference to her cause of action as administratrix for her benefit as widow. Not having any right to sue except in her capacity as administratrix, the contract she made must necessarily have been made in reference to her cause of action in that capacity. If she had had a cause of action in her individual capacity as well as her representative capacity, then there would be much in the contention of appellee. Having a right to sue in one capacity only, and that being her representative capacity, her contract to bring the suit was necessarily referable to the institution thereof in her representative capacity. The suit was brought by her attorneys for her in that capacity, and appellee, in settling with her in that capacity, recognized whatever rights her attorneys had in the subject-matter of the litigation growing out of the institution of the suit.

For the error in sustaining the demurrer to the intervention and dismissing same, the judgment is reversed and the cause remanded with direction to overrule the demurrer to the intervention and for further proceedings not inconsistent with this opinion.

HOYT v. ROSS.

Opinion delivered June 14, 1920.

1. ACTION—JOINDER OF CAUSES.—The maker of a note and an indorser of it without recourse, and who subsequently promised the maker to pay the note are not jointly liable on the note, and causes of action against them are inconsistent and improperly joined; if the holder accepted the indorser in lieu of the maker, he thereby released the maker.
2. VENUE—SERVICE IN ANOTHER COUNTY.—In order to obtain judgment on service upon a defendant in a county other than that in which a suit is brought, service must be obtained in the county where the suit is brought on a codefendant jointly liable with the nonresident defendant, and it should appear from the face of the complaint that plaintiff was entitled to recover judgment against both defendants.

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

Sam T. Poe, Malcolm W. Gannaway and *Tom Poe,* for appellant.

1. The court erred in holding that appellees were not jointly indebted to appellant in the sum of $250 and interest. There was novation because the assent to hold Oilar-Overland Company solely and release E. B. and J. B. Ross is lacking an essential to a novation. 125 Ark. 9. The Rosses are liable and so is the Oilar-Overland Company. 93 Ark. 346; 46 *Id.* 132; 91 *Id.* 367; 31 *Id.* 155; 6 R. C. L. 890 (ff); 13 C. J. 705 (ff); 65 Ark. 29; 121 *Id.* 414-418. The court erred in sustaining the motion to quash the service. 93 Ark. 436.

Carmichael & Brooks, for appellees.

1. The judgment quashing the service was not a final and appealable judgment.

2. The appeal is premature, and (3) the order quashing the summons as to E. B. and J. B. Ross was proper. Kirby's Digest, § 6074; 63 Ark. 40; 92 *Id.* 101; 15 *Id.* 401; 117 *Id.* 360; 101 *Id.* 210; 129 Wis. 84; 81 Wash. 442; 42 L. R. A. (N. S.) 177. See also 2 Tenn. C. C. A. 366; 55 Am. Dec. 56; 21 Am. Rep. 209; 11 Bush 180; 165 Pac. 508; 46 L. R. A. 732; 131 Ark. 516; 62 *Id.* 595. The appeal should be dismissed because the judgment is not final and the appeal is premature and the judgment is right on the merits.

HUMPHREYS, J. Appellant instituted suit against appellees in the Third Division of the Pulaski Circuit Court, to recover $250 and interest. It was alleged in the complaint that E. B. and J. B. Ross, husband and wife, executed a series of notes, including the $250 note sued on, to the Oilar-Overland Company, to cover the unpaid purchase price of a certain automobile; that the notes contained a provision that upon failure to pay any one of them, or the interest thereon, all should become due; that they also contained a provision retaining

the title to the automobile in the Oilar-Overland Company until the notes were paid; that, before the maturity of the $250 note aforesaid, the Oilar-Overland Company, for a consideration, transferred said note to appellant, without recourse; that, before the maturity of the note in question, without the consent or knowledge of appellant, the Rosses returned the automobile to the Oilar-Overland Company in payment of the balance due on the purchase price, under agreement that it would pay the $250 note and accrued interest, which it had theretofore assigned to appellant.

The Oilar-Overland Company was, and is, a corporation domiciled in Pulaski County. E. B. Ross and J. B. Ross were, and are, residents of Lonoke County. A judgment was sought against all of them, based upon personal service had on the Oilar-Overland Company in Pulaski County and the Rosses in Lonoke County, under section 6072 of Kirby's Digest, which provides that "every other action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned."

The Rosses appeared specially and filed a motion to quash the service upon them, for the reason that they were not jointly liable with the Oilar-Overland Company on the obligation sued upon.

The court sustained the motion to quash the service and dismissed the action against them, from which judgment of dismissal an appeal has been duly prosecuted to this court.

Appellant insists that the court erred in holding that appellees were not jointly indebted to appellant in the sum of $250 and interest thereon. Appellant contends that E. B. Ross and J. B. Ross are indebted to him in the sum of $250 by virtue of a promissory note signed by them to the Oilar-Overland Company, and by it endorsed to him, without recourse, before maturity, for a valuable consideration; and that the Oilar-Overland Company is indebted to him for the same amount, because it agreed with the Rosses for a consideration

to pay the note to him. Under the allegations of the complaint, two wholly inconsistent causes of action are pleaded. On the one hand, the note, signed by the Rosses and indorsed, without recourse, by the Oilar-Overland Company, is made a basis of the action. The indorsement without recourse clearly exempts the Oilar-Overland Company from joint liability with the Rosses on the note. On the other hand, the contract made by the Oilar-Overland Company with the Rosses, for a new consideration, to pay the note to appellant, is also made a basis of the action. The effect of this agreement, if ratified by appellant, was to release the Rosses as makers and accept in their stead the Oilar-Overland Company. Appellant could not ratify the contract in part and reject it in part. It was made for his benefit, and an acceptance in part amounted to a ratification *in toto*. There was no joint liability on either cause of action, and the causes of action, being inconsistent, were improperly joined.

In order to obtain service upon a defendant, or defendants, in a county other than the county in which a suit is brought, service must be obtained on a codefendant jointly liable with him, or them, in the county where the suit is brought. It should appear from the face of the complaint that the plaintiff was entitled to recover a judgment against both defendants. Section 6074 of Kirby's Digest. *Stiewel* v. *Borman,* 63 Ark. 30. No joint liability appearing on the face of the complaint in the instant case, the judgment is affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* ROAD IMPROVEMENT DISTRICT NO. 1 OF CLEVELAND COUNTY.

Opinion delivered June 14, 1920.

HIGHWAYS—ASSESSMENT OF TELEGRAPH COMPANY'S RIGHT-OF-WAY.—A contract between a telegraph and a railroad company granted an exclusive right to the telegraph company to maintain a telegraph system along the railway right-of-way, and permitted a termination of the contract on one year's notice after the expiration

of twenty-five years, but without requiring removal of the lines. The system was shown to be a permanent construction, and the telegraph company could acquire a permanent easement. *Held* that the property of the telegraph company is real property and subject to assessment for road district benefits, under Road Laws 1919, No. 612, § 5.

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

Bridges & Wooldridge and *Harry T. Wooldridge,* for appellant.

Act 612 evidently proceeds under the theory that the property of a telegraph company is real estate and assessable for improvement taxes, but it is personal property and not taxable for local improvements. 129 Ark. 542; 119 *Id.* 254; 121 *Id.* 105. The telegraph company has only a lease for a term of years, revocable in the manner designated in the contract. The property of the telegraph company is personal property and not subject to local improvement taxes, and the act is invalid. Cases *supra;* 119 Ark. 254; 71 So. Rep. 118; 238 Fed. 26; 125 Fed. 67; 50 *Id.* 494; 118 *Id.* 497; 27 A. & E. Enc. L. 1011; 11 Fed. 1; 1 *Id.* 745; 238 Fed. 26. The Legislature in this act did not attempt to classify the property of the telegraph company as real property, but was laboring under the delusion that it was real property when it was personalty, and the chancellor erred in his decision.

Rowell & Alexander and *Coleman, Robinson & House,* for appellee.

If under the laws of this State the property is personal and not real, it can not be taxed for local improvements, but our contention is that it is real property and subject to assessment. It is an "easement" or interest in land. 73 Ark. 296; 112 *Id.* 572. It is more than an easement, it is real property. 227 Fed. 276. The company had a permanent interest in the land itself. *Ib.* 285; 175 Fed. 321; 20 Anno. Cases 1097; 7 Wall. 482; 144 U. S. 47; 143 *Id.* 457. Under the decisions of Arkansas the poles and wires are real estate and taxable. 26

Ark. 55; 73 *Id.* 427; 9 Baxter (Tenn.) 509; 80 N. Y. 408. The Legislature has classified it as real property and the legislative will is supreme. 102 Ill. 655; 88 Ill. 615; 1 Page & Jones on Taxation by Assessment 872; 27 A. & E. Enc. L. (2 ed.) 635-6; 81 Ark. 562. The Legislature has acted and has classified telegraph property as realty, and as such taxable. Cases *supra.*

HUMPHREYS, J. Appellant instituted suit against appellee in the Cleveland Chancery Court to set aside the benefits assessed and fixed against its property by the board of commissioners of appellee district, on the ground that the property owned by it in said Road Improvement District No. 1 is personal, instead of real, property.

Appellee filed answer, denying that its property in said district, against which benefits were assessed, is personal property.

The cause was submitted upon the pleadings and an agreed statement of facts, to which a contract between appellant and the St. Louis Southwestern Railway Company was attached as "Exhibit A" and made a part of the evidence in the case, from which the court found that the property in question was real estate, and decreed that the petition of appellant be dismissed for want of equity. From the decree of dismissal an appeal has been duly prosecuted to this court.

The appellee, Road Improvement District No. 1 of Cleveland County, was organized under act 612 of the Legislature, approved April 1, 1919. The benefits to the property in question were assessed by the board of commissioners of said district under section 5 of said act, which is as follows:

"Said commissioners shall proceed to assess the lands within the district and shall inscribe in a book each tract of land and shall assess the value of the benefits to accrue to each tract by reason of such improvement, and shall enter such assessment of benefits opposite the description together with the estimate of the probable cost to the land owner. Their assessment shall

embrace not merely the lands, but all railroads, tramroads, telegraph, telephone and pipe lines, and other improvements on real estate that will be benefited by the improving of the roads; and wherever the word 'lands' is used in this act, it shall be construed to embrace all property subject to taxation herein. The commissioners shall place opposite each tract the name of the supposed owner as shown by the last county assessment list. The commissioners shall also assess all damages that will accrue to any land owner by reason of the proposed improvement, including all injury to lands taken or damaged; and where they return no such damages as to any tract of land, it shall be deemed a finding by them that no damages will be sustained."

The agreed statement of facts is as follows: "That the above road district was created under act No. 612 of the General Assembly of the State of Arkansas, approved April 1, 1919, that the commissioners, as provided in said act have assessed the benefits against the lands within the district and have filed the same in the office of the clerk of the county court of Cleveland County.

"That there are five and one-half (5½) miles of telegraph line within the boundary of said district; that benefits to said telegraph line have been assessed by the assessors of said district at twenty-five dollars ($25) per mile for said five and one-half miles, aggregating benefits in the sum of one hundred, thirty-seven and 50/100 ($137.50) dollars:

"That the property of said telegraph company within said district consists of one hundred and sixty-five (165) white cedar poles, upon which are strung various wires, that these poles are guyed on curves with standard anchor rods and guy wire, that two cross-arms are attached to these poles with through bolts and arm braces to support the wire, that these wires are on standard steel pins and insulators, that the only office of the telegraph company in the district is at Rison, Arkansas, at which station the company has a standard switch-

board with three common sets of Morse instruments, etc. The wires enter the depot of the St. Louis Southwestern Railway Company through one hundred and twenty-five (125) feet of ten pair rubber-covered cables.

"That the five and one-half miles of the telegraph line of the complainant is located on the right-of-way of the St. Louis Southwestern Railway Company, the company furnishing all labor to maintain the wires, the telegraph company furnishing all material for maintenance. For furnishing the labor to maintain the telegraph lines the railway company gets free use and joint use of certain wires owned by the telegraph company.

"That the complainant, telegraph company, owns no real estate within said improvement district, unless the rights obtained under contract hereto attached constitute an easement which is taxable under the law as real estate.

"That the poles upon which the wires are strung are placed in the ground on the right-of-way of the St. Louis Southwestern Railway Company under a contract between the said telegraph company and the St. Louis Southwestern Railway Company. A copy of which is attached hereto, as "Exhibit A" and made a part of this statement of facts, which contract is now in force between said telegraph company and railway company, and has been since its execution.

"That under said contract said telegraph company has the privilege and right of placing its telegraph poles upon which its wires are strung along and upon the right-of-way of said railway company; that the poles and wires of said telegraph company are so placed and maintained upon the right-of-way of said St. Louis Southwestern Railway Company through the county of Cleveland, Arkansas.

"That the telegraph line and property of the complainant in Arkansas are assessed for the purpose of taxation by the Tax Commission in Arkansas; that the said Tax Commission has assessed the telegraph line and property of the complainant for the year 1919, and for

several years past, as personal property, and has not and does not assess any part of the line and property of complainant as real estate.

"That said Tax Commission certifies out from its office to various county clerks through which complainant's telegraph line may run its assessment of complainant's property as personal property, and that the assessment of complainant's property in Cleveland County is so certified to the county clerk of said county, which assessment includes the mileage of complainant's telegraph line within said improvement district.

"That said Tax Commission directs the assessors of the various counties to place the amount of the assessment of complainant's property on the personal property tax record, and that complainant pays taxes on its property and so certified upon same as personal property."

The contract attached as an exhibit and made a part of the evidence is of such great length that it is impractical to set it out in this opinion *in toto.* The three clauses of the contract relating more directly than any others to the question to be determined on this appeal are the preamble, a part of the ninth and all of the thirteenth clause, which are as follows:

PREAMBLE. "That whereas, the telegraph company owns lines of telegraph along the railway company's railroad from Birds Point, Mo., opposite Cairo, Ill., to Gatesville, Texas, and along the various branches thereof, which telegraph lines are now operated under the provisions of an agreement dated the second (2d) day of July, 1888, made by and between the telegraph company and the St. Louis, Arkansas & Texas Railway Company in Arkansas and Missouri, whose property has been sold under foreclosure of mortgages; and it is desirable in the interest of both parties hereto that a new agreement be entered into between them superseding and taking the place of said agreement hereinbefore mentioned, and extending to all railroads now owned, leased or controlled, and to all railroads hereafter owned,

leased or controlled by the railway company, party hereto, and extensions or branches thereof."

PART OF NINTH CLAUSE.

"The railway company, so far as it legally may, hereby grants and agrees to assure to the telegraph company the exclusive right-of-way on, along and under the line, lands, and bridges of the railway company, and any extensions and branches thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public telegraph and telephone uses or business, with the right to put up or construct, or cause to be put up or constructed from time to time, such additional wires and such additional lines of poles and wires and underground or other lines as the telegraph company may deem expedient, and the railway company agrees to clear and keep clear said right-of-way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the railway company will not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or other line in competition with the lines of the telegraph company party hereto, except at and for the railway company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations."

THIRTEENTH CLAUSE.

"The provisions of this agreement shall supersede said agreement hereinbefore mentioned, and shall extend to all railroads now owned, leased, controlled or operated and to all railroads hereafter owned, leased, controlled or operated, by the railway company or by any company or corporation, in which the railway company may own a majority of the stock, or whose action it may be able to control by the ownership of stock or otherwise, and the provisions of this agreement shall be

and continue in force for and during the term of twenty-five years from the thirtieth day of July, 1901, and shall continue after the close of said term until the expiration of one year after written notice shall have been given after the close of said term by either party to the other of an intention to terminate the same, and in case of any disagreement concerning the true intent and meaning of any of said provisions, the subject of such difference shall be referred to three arbitrators, one to be chosen by each party hereto and the third by the two others chosen and the decision of such arbitrators or a majority thereof shall be final and conclusive."

The other sections of the contract relate to the duties and requirements of each party in the construction and maintenance of the telegraph lines, the use of certain wires to transmit railway messages, the employment of joint employees, management of joint offices and other reciprocal services necessary for the operation of the lines.

It is contended by appellant that the occupation of the right-of-way of the St. Louis Southwestern Company by appellant was only permissive, and subject to termination at the expiration of the contract, or upon one year's written notice, twenty-five years after the date of the contract. On the other hand, the occupancy of said right-of-way by appellant is characterized by appellee as an interest or permanent easement in the land. After a careful reading of the entire contract and a consideration of all its parts in the light of the situation of the parties and the facts and circumstances surrounding them at the time of its execution, we are convinced that the parties to the contract intended a permanent, and not a limited, occupancy, or easement. By reference to the preamble of the contract, it will be seen that appellant owned lines of telegraph on the right-of-way of said railroad company from Birds Point, Missouri, to Gatesville, Texas, which lines were being operated, under a contract of July 2, 1888, at the time this contract was signed. The contract of 1888 was not exhibited nor is

it disclosed how or when the telegraph company acquired the ownership of the lines, whether by prescription or conveyance. The fact of ownership of such lines by the telegraph company was regarded of sufficient importance to recite it in the contract. It is also disclosed by the preamble that the telegraph lines, so owned, constitute a telegraphic system covering parts of three States, which system was in actual operation at the time the new contract was signed. The agreed statement of facts revealed that the construction was of a permanent character. The poles, upon which the wires were strung, are cedar, set in the ground and guyed on curves with standard anchor rods. Two cross-arms were attached to each pole with through bolts and armed braces. The wires are on standard steel pins and insulators. The wires enter the depots through cables and the system is equipped with standard switchboards and Morse instruments. Section 9 of the contract, in express words, grants an exclusive easement to the appellant over the right-of-way for the purpose of enlarging and extending the telegraph system. No provision was incorporated in the contract for a removal of the lines or system from the right-of-way at the expiration of twenty-five years or on one year's written notice thereafter. The contract contained no forfeiture clause. Telegraph companies are invested with the power of eminent domain in this State, and, in the exercise of the power, may acquire an easement along a railroad right-of-way. This being true, and the telegraph company being in possession, the railroad company could not eject it at the expiration of the time limit in the contract. All these things point unerringly to the conclusion that the parties intended a permanent, and not a temporary, easement. It is almost inconceivable that a party owning a large system of telegraph over a railroad right-of-way, presumptively by grant, would give it in exchange for an occupancy for years, even though the time be for twenty-six years certain, and, after that, uncertain, dependent on a year's written notice by the railroad company. The thirteenth paragraph

of the contract, containing provisions to the effect that the new agreement shall supersede the agreement made in 1888 and shall be and continue in force for and during the term of twenty-five years from the 13th day of July, 1901, and, after the term, until either party shall give one year's written notice of an intention to terminate same, does not necessarily conflict with a permanent easement or interest in the land. These clauses may be very reasonably attributed to the method and reciprocal duties of the parties incident to the operation of the system, and not as relating to the right of the telegraph company to remain upon the right-of-way and construct its lines along and under the lands and bridges of the railway company. This is the construction placed upon a contract of like tenor and effect in the cases of *Western Union Tel. Co.* v. *Georgia Railroad & Banking Co.*, 227 Fed. 276; and *Western Union Tel. Co.* v. *State*, 9 Baxter (Tenn.) 509. We regard the reasoning in those cases as accurate, and the conclusions based thereon as sound. We therefore, adopt the construction of those courts placed upon contracts of similar import as the one now before us for interpretation. Under this interpretation of the contract, the property of the telegraph company is real estate, and the commissioners of the road district had a right, under section 5 of act 612, Acts of the General Assembly of 1919, to assess benefits against it.

The decree of the chancery court is therefore affirmed.

O. T. DIXON PRINTING & STATIONERY COMPANY *v.* PLANK.

Opinion delivered June 21, 1920.

1. GARNISHMENT—FUNDS LIABLE.—A fund in a bank belonging to a corporation can not be subjected to garnishment for the purpose of enforcing debts of third persons.
2. JUSTICE OF THE PEACE — CONSOLIDATION OF CAUSES — EFFECT.—Where appellant intervened in an action before a justice of the peace, and in another action consolidated therewith, claiming ownership of a fund in bank, and appealed from an adverse judg-

ment, the justice had no jurisdiction thereafter to render an independent default judgment against such intervener in the latter action.

3. JUSTICES OF THE PEACE—COLLATERAL ATTACK ON JUDGMENT.—While a judgment of a justice of the peace within his jurisdiction is as conclusive as the judgment of a superior court, such judgment does not import incontrovertible verity, and the want of jurisdiction over the person of the defendant may be shown collaterally.

Appeal from Benton Circuit Court; *W. A. Dickson*, Judge; reversed.

E. P. Watson, for appellant.

1. The judgment of the circuit court is not supported by the evidence. The funds paid into court were paid to the bank to the credit of appellant, pursuant to its contract with Cloe and Peeler, with express directions when said funds were paid over. The funds belonged to appellant, and there is no testimony to show that appellant owed anything to either of the appellees. If appellant is liable to the Harper Directory Company at all, the appellees pursued the wrong remedy. All the evidence shows that the directories and contracts were turned over to the bank and by the bank to Peeler and Cloe; they were the absolute property of appellant.

2. The court erred in refusing to find that the bank received the directories and contracts under instructions of appellant and the bank received the $150 by the consent of appellant and turned over the directories and contracts by appellant's consent. It was error to refuse to find these facts as requested by in its second declaration of facts.

3. The appellant, not being a party to the suit by Haney and Plank against the Harper Directory Company, a partnership, no judgment was rendered by the justice of the peace against this appellant, nor was there a judgment in the circuit court against appellant on the claims sued upon. The Dixon Stationery Company was a foreign corporation and its domicile in Oklahoma. The bond filed in the garnishment proceeding does not comply

with the law. Kirby's Digest, § 3694. The warning order is defective and void.

4. On the trial of the consolidated case in circuit court there was no evidence that appellant owed Haney or Plank anything whatever, but the record shows that appellant was not sued by either of them. The judgment of the circuit court sustaining the garnishment was wholly without evidence to support it.

5. The court erred in refusing the declaration of law asked by appellant and in failing to find specifically any facts, but its finding was only general and there was no personal service on appellant. The warning order was void on its face, and there was no entry of appearance. The garnishment was issued before judgment. Kirby's Digest, § 3694. An intervener may present his claim as an independent proceeding. 38 Ark. 329; 10 S. W. 644. The garnishment was null and void. The intervener appeared solely to contest the garnishment, as it was null and void. This was not an appearance in the principal suit. 5 Ark. 384; 6 C. J. 477; 217 U. S. 718. The court had no jurisdiction. 98 U. S. 476; 156 *Id.* 518; 164 *Id.* 271; 203 *Id.* 164; 1 Ark. 376; 95 *Id.* 302; 39 *Id.* 347; 35 *Id.* 331; 59 *Id.* 58.

6. There being no personal appearance of the intervener to the original suit, the personal judgment against the intervener was void, both in the original suit and the garnishment suit. A judgment on constructive service is a nullity. 38 Ark. 181; 54 *Id.* 137; 42 *Id.* 268.

7. The court erred in holding that the pretended judgment against appellant in the justice's court was conclusive on appellant on the trial in circuit court. A justice's judgment can be attacked collaterally for want of jurisdiction. 51 Ark. 34; 47 *Id.* 131; 48 *Id.* 476; 66 *Id.* 282. Garnishment is a proceeding not in accordance with the common law and must be strictly pursued. 12 Ark. 158; 11 *Id.* 180; 14 A. & E. Enc. L. 753. Want of jurisdiction in a justice of the peace's court may be

shown by parol evidence in collateral attack. 52 Ark. 373; 57 *Id.* 317; 54 *Id.* 137; 66 *Id.* 282.

8. The judgment of the justice is void, because after the consolidation the justice lost jurisdiction in the Trusty case. Kirby's Dig., § 4668; 42 Ark. 283. The judgment in the Trusty case is void on its face and so shown by parol evidence. 17 A. & E. Enc. L. 925; 29 Ark. 31; 16 *Id.* 575; 41 *Id.* 53.

Jeff R. Rice and *J. T. McGill,* for appellees.

1. Judgment was rendered against appellant in the justice's court when he was party defendant and no appeal was taken. The intervener was a party defendant when it filed its interevention. Judgments are not subject to collateral attack. 47 Ark. 131. The presumption is that the court had jurisdiction and its judgment can not be collaterally attacked. Freeman on Judg., §§ 524-6. A judgment of a justice when he has jurisdiction is conclusive. 33 Ark. 475; 44 *Id.* 482.

2. Appellant entered its appearance by its action. 6 Ark. 459; 46 *Id.* 251; 116 *Id.* 307. The justice of the peace's judgment was properly entered on his docket. 12 Ark. 670; 35 *Id.* 278; 43 *Id.* 233.

McCULLOCH, C. J. The facts are as follows: The Harper Directory Company was engaged in the business of publishing and circulating directories of cities and towns. That concern was unincorporated, and there is a conflict in the testimony as to what individuals comprised or were interested in the concern. Appellant's testimony was to the effect that T. M. Harper was the sole individual interested in the concern. The testimony of appellees tended to show that it was a partnership composed of T. M. Harper, O. T. Dixon and Mrs. Harper. The Harper Directory Company published a directory of the city of Rogers in Benton County, and the printing was done by appellant O. T. Dixon Printing & Stationery Company, a foreign corporation domiciled at Miami, Oklahoma. Later the Harper Directory Company prepared

for publication a directory of the city of Bentonville, and the manuscripts was delivered to appellant to be printed. Appellant held the manuscript for reimbursement for balance due for printing the Rogers directory, and the project was abandoned by Harper Directory Company. E. T. Cloe and S. T. Peeler then applied to appellant to have the directory published for them, and a written contract was entered into between appellant and Cloe and Peeler whereby appellant agreed to print the directory for the last named parties for a consideration of $459, payable $100 cash in advance and balance when the directory should be printed and ready for circulation. When the printing was completed, appellant, by agreement with Cloe and Peeler, sent the printed directories to the First National Bank of Bentonville for delivery to Cloe and Peeler on payment of the amount due for printing, and instructions were given to the bank to deliver the directories to those parties on payment of the price. Later verbal directions were given by appellant to the bank to deliver the directories to Cloe and Peeler on payment of the sum of $150. This was on February 12, 1919, and on that day Cloe and Peeler paid said sum to the bank for appellant and received the directories. The same day appellees Plank and Haney commenced separate actions before a justice of the peace of Benton County against T. M. Harper and O. T. Dixon as partners under the name of Harper Directory Company to recover debts alleged to be due on contract, and sued out garnishments against the bank. On February 13, 1919, appellee Trusty sued the same parties and also appellant before the same justice of the peace, to recover an alleged debt due on contract and sued out a garnishment against the bank. The funds were still in the hands of the bank at the time the writs of garnishment were served. A warning order against the defendants in each case was issued and published. On March 1, 1919, appellants filed in each of said cases an intervention plea claiming to be the owner of the funds in bank as a payment to them under its contract with

Cloe and Peeler and prayed that said fund be adjudged to be its property, and that judgment be rendered in its favor for said fund. On the return day of the writs of garnishment appellants moved the court for consolidation of the three cases, and the court granted the prayer. The order entered by the court reads as follows:

"It is therefore ordered by the court that the garnishment writ issued in each of said cases, the answer of the First National Bank of Bentonville, Ark., thereto, and the intervention of the O. T. Dixon Printing and Stationery Company, be consolidated as one proceeding under said writ of garnishment and answer thereto and intervention aforesaid, and that said writ of garnishment proceedings and answer thereto and intervention aforesaid and all issues arising under the same be set for trial on April 18, 1919."

On April 18, 1919, there was a trial before the court which resulted in a judgment dismissing the intervention of appellant, and the latter took an appeal to the circuit court and gave a supersedeas bond. A transcript of the proceedings before the justice of the peace was lodged in the circuit court, and the cause came on for trial in that court on December 19, 1919. Testimony establishing the above facts was introduced, and there was also introduced in evidence over the objection of appellant an additional record of the justice of the peace showing a judgment by default entered by said justice on November 20, 1919, as of April 18, 1919, in the case of Trusty for recovery by him against all of the defendants including appellant, of the sum sued for. The judgment recites the publication of the warning order and proof thereof and the failure of the defendants to appear after being called. In that judgment the garnishee was ordered to pay over to Trusty the amount of said funds in its hands after satisfying the claim of Plank and Haney.

The circuit court found in favor of appellees and entered judgment dismissing the intervention of appellant.

Our opinion is that the judgment of the circuit court is not supported by the evidence. The funds in controversy were paid into the bank to the credit of appellant pursuant to its contract with Cloe and Peeler and in accordance with express direction to the bank when the funds were paid over. The funds belonged to appellant, and there is no testimony in the record tending to show that appellant owed anything to either of the appellees. If appellant is liable to the Harper Directory Company in any way or in any sum on its transaction with the latter in regard to the publication of the Bentonville directory and if appellees wish to enforce that liability as creditors of the Harper Directory Company, a remedy must be sought in an appropriate action. It can not be enforced in this action.

The circuit court also erred in holding that the judgment of the justice of the peace in the Trusty case, unappealed from, is conclusive of appellant's right to recover the funds in controversy. Appellant was a defendant in that case, and was brought in by publication of a warning order, and it filed its intervention in that case as in the other cases. The intervention in that case was, however, consolidated with the other cases, and all of the cases were tried together, and appellant duly prosecuted its appeal from the adverse judgment of the justice. If the filing of the intervention constituted a general entry of appearance in the case so as to raise an issue as to appellant's liability for the debt sued for, that issue was carried into the consolidation of the cases, and the justice of the peace had no jurisdiction thereafter to render an independent judgment against appellant for recovery of the debt as long as the consolidated cases were pending.

A judgment of a justice of the peace, within its jurisdiction, is as conclusive as the judgment of a superior court; but such a judgment, unlike the judgment of a court of general or superior jurisdiction, does not import incontrovertible verity, and the want of jurisdiction over the person of the defendant may be shown col-

laterally. *Jones* v. *Terry,* 43 Ark. 230; *Townsly-Myrick Dry Goods Co.* v. *Fuller,* 58 Ark. 181; *Albie* v. *Jones,* 82 Ark. 414.

It was shown in this case by the fact that the cause had, when the judgment was rendered, been consolidated with the other cases and proceeded to trial with those cases.

Reversed and remanded for new trial.

RHYNE *v.* BELOATE.

Opinion delivered June 21, 1920.

1. PARTIES—INTERVENTION.—A stranger may not intervene in a real property action to enforce a personal claim against one of the parties to such action.
2. MECHANIC'S LIEN—PLEADING.—An intervener's petition which alleged facts sufficient to create a mechanic's lien, but which was not filed within time, *held* insufficient.
3. VENUE—TRANSITORY ACTION.—A transitory action can be brought only in the county where defendant resides or was served with process.

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

J. O. Rhyne, for appellant.

1. The court erred in quashing the summons. 143 S. W. 483; 140 Fed. 921; 29 Ohio St. 611; 30 Ark. 536; 35 *Id.* 276.

2. It was error to dismiss the intervention of the intervener. 102 Ark. 380. If the complaint failed to state a cause of action, demurrer was the proper remedy. Kirby's Digest, § 6093. If the allegations were imperfect or defective, the remedy was by motion to make more definite and certain. 133 Ark. 188. If the demurrer had been sustained, intervener had the right to amend. Kirby's Digest, § 6095; 102 Ark. 380. Intervener had a right to enforce his lien for repairs and improvements in the chancery court. 47 Wis. 581; 65 *Id.* 55; 88 Fed. 924; 86 Am. Dec. 247; 1 N. J. Eq. 10; 2 *Id.* 269. The mo-

tion to strike should have been treated as a demurrer. 102 Ark. 380.

C. T. Bloodworth and *J. E. Anderson,* for appellee.

The case in 124 Ark., *Rhyne* v. *Beloate,* ended the litigation, and neither intervener nor appellee could add to or change or take from the same. 113 Ark. 582; 106 *Id.* 582; 109 *Id.* 525. W. E. Beloate, the owner, was not a necessary party, and appellant's lien was superior to C. V. Beloate's mortgage, under § 4974, Kirby's Digest, 54 Ark. 640. The chancellor properly quashed the service and struck out the intervention.

Oliver T. Massey, of counsel for appellees.

McCULLOCH, C. J. Appellee instituted this action originally against his brother, C. V. Beloate, in the chancery court of Clay County to settle the rights of those parties with respect to a mortgage lien asserted by C. V. Beloate on the homestead of their mother, N. E. Beloate, in the town of Corning. Appellee was the owner of the property by virtue of a conveyance to him by his mother. There was a decree in the cause declaring a lien on said real estate in favor of C. V. Beloate for the amount of the mortgage debt and a sale was ordered by a commissioner, with directions to sell the property and pay off the mortgage debt to C. V. Beloate and pay the remainder to appellee. Appellant intervened in the action and filed his complaint asserting a lien on the property for costs of improvements and repairs made by him under contract with appellee. Process was issued and served on appellee in Lawrence County where he resided, and he appeared and moved to quash the service on the ground that it was a personal action for the recovery of money, and that suit could not be maintained against him by appellant, except on service in the county of his residence or wherever he could be found. The court quashed the service on appellee and dismissed appellant's complaint.

Appellant could not intervene in the action between appellee and C. V. Beloate for the purpose of asserting a personal claim and take advantage of the pendency of that suit to serve writ of process on appellee in another county where the latter resided. While appellant asserts a lien on real estate, the allegations in his complaint do not sustain the claim. It is merely alleged that in January, 1913, appellee entered into an oral agreement with appellant to pay for certain repairs and that afterward said agreement was reduced to writing, and that in said writing appellee agreed to pay the costs of said repairs at the death of his mother, N. E. Beloate. If it be conceded that these allegations were sufficient to create a statutory mechanics' lien in favor of appellant, he fails to bring himself within the terms of the statute by alleging that he complied therewith. The intervention plea was filed September 4, 1919, and the allegation is that the agreement between appellant and appellee was entered into in January, 1913. There is no allegation that the lien was ever filed in accordance with the terms of the statute. Nor is there any other allegation in the complaint setting up facts which would create a lien either legal or equitable. This being true, the action was transitory and not local, and under the statute could only be brought in the county where appellee resided or was served with process. Kirby's Digest, section 6072.

The chancellor was therefore correct in quashing the service and in striking out the intervention, and the decree is affirmed.

SUMMERS v. COLE.

Opinion delivered June 21, 1920.

1. STATUTES — CONTRADICTORY PROVISIONS.—1 Road Laws 1919, p. 374, as amended in 1920, confirming, in section 4, as just and equitable the assessments as shown by the assessment books provided for by the original act, and providing, in section 6, that such assessment books shall be the basis of apportionment of the ben-

efits, that the total benefits shall be 50 per cent. in excess of the cost of construction, and that assessments may be levied up to the amount of the cost of the improvement including necessary expenses of the district and interest on its obligations, *held* that sections 4 and 6 are not contradictory.

2. STATUTES—DUTY TO RECONCILE CONFLICT.—It is the duty of courts to reconcile apparent conflicts in a statute for the purpose of ascertaining the true legislative will, if this can be done without disregarding the plain meaning of the language used.

3. STATUTES—CONSTRUCTION AS A WHOLE.—The intention of the lawmakers is to be deduced from a view of the whole, and every part of a statute is to be taken and compared together.

4. HIGHWAYS — LEGISLATIVE ASSESSMENT.—Where the Legislature fixed the maximum road improvement assessments in a certain district at 150 per cent. of the actual cost of construction, not including overhead expense and interest on bonds, it will be presumed that the lawmakers had before them information as to the cost of construction, and found that the benefits to the land would amount to 50 per cent. in excess of such cost.

5. HIGHWAYS—ASSESSMENT OF BENEFITS—INTEREST.—While the Legislature may not authorize assessments in excess of estimated benefits, even for the purpose of paying interest on bonds, it can authorize the charge of interest on postponed assessments, and such interest is not to be treated as part of the cost of improvement, but may be imposed in addition to the assessed benefits.

Appeal from Faulkner Chancery Court; *Jordan Sellers,* Chancellor; affirmed.

George F. Hartje, for appellant.

Section 6 of act No. 82, Acts 1920, is void, as it is contradictory to the terms of section 4 of the same act, and because it provides for an arbitrary and unjust assessment on the property of appellant. 125 Ark. 422; 130 *Id.* 410. The commissioners are attempting to exceed their authority.

R. W. Robins, for appellees.

1. There is no contradiction between § 4, act 82, Acts 1920, and § 6 of said act. When read together, they provide a simple and effective scheme for paying the cost of a road the Legislature found to be necessary. 22 Ark. 369; 28 *Id.* 200; 30 *Id.* 135; 38 *Id.* 205; 89 *Id.* 378. The intention of the Legislature should be given effect.

116 *Id.* 538. Similar acts have been approved by this court. 134 Ark. 447.

2. There is no provision in the Constitution requiring the Legislature to limit the cost of an improvement district. See cases in 134 Ark. 30; 136 *Id.* 524; *Brenson* v. *Bush,* U. S. Ct. Adv. Op. No. 5, p. 131. The courts presume acts of the Legislature to be valid unless shown clearly to be unconstitutional. 12 Wheat. 213; 99 U. S. 700. All doubts are resolved in favor of the constitutionality of an act. 99 Ark. 1; 102 *Id.* 166.

3. A mere general allegation that assessments are arbitrary and excessive is not sufficient. 98 Ark. 113. But here the increase is neither arbitrary nor excessive. The cost of everything has gone up and courts take judicial knowledge of the increased cost of labor, materials, etc. 142 Ia. 658; 5 Ga. App. 402; 183 Mo. App. 608.

McCULLOCH, C. J. The General Assembly at the regular session of 1919 (Special Road Acts, vol. 1, p. 374), enacted a statute creating a road improvement district in Faulkner County, designated as the Damascus Road District of Faulkner County. The statute described the district and the road to be improved, and assessed the benefits on the land in the district by zones according to distance from the road to be constructed. The statute divided the district into zones and assessed the benefits at a percentage of the value of the land according to the assessment for State and county taxation purposes. The benefits on land in zone 1, which is nearest to the road, were assessed at 90 per centum of the value according to said assessment for State and county purposes, and the assessments in other zones were diminished according to distance from the road. It is provided in the statute that the county surveyor should prepare and file in the office of the county clerk a certificate "showing in appropriate manner the different zones of the land situated therein as above set forth and showing the government subdivisions and any recorded plats of land located outside of the city of Conway and railroad,

telegraph and telephone lines and rights-of-way," etc., and that the county clerk should within ten days after the filing of the plat by the surveyor "proceed to prepare at once in a well-bound book provided for that purpose an assessment list showing the name of the owner of each tract of land as shown by the last assessment of real estate on file in his office and the betterment accruing to each tract of land as herein ascertained and declared, and said assessment list shall be the assessment of said district, and the taxes levied as hereinbefore provided shall be computed thereon."

The General Assembly at the special session in January, 1920, enacted another statute amending the original, and the two sections which relate to the present controversy are as follows:

"Section 4. The assessment for all of the above mentioned road districts and also the assessments for Road Improvement District Number Five of Faulkner County (except assessments on which appeals have heretofore been filed in the Faulkner Chancery Court, and except the assessments mentioned in section 1 of this act), as shown by the assessment books for said districts, respectively heretofore prepared by the county clerk of Faulkner County and now on file in his office, are hereby approved and confirmed, same being found and hereby declared to be fair, just and equitable; *provided,* that the county clerk of said county may at any time correct any incomplete or incorrect description of any real estate on any of said assessment books."

"Section 6. It is hereby declared and ascertained that the lands and real property embraced in each of the above named districts, respectively, will be benefited in an amount equal to fifty per cent. in excess of the cost of the construction of the road authorized by the act creating each of said districts, respectively, along the general route of the road designated in the above mentioned acts creating said districts, respectively, and that the assessments for said districts as shown by said assessment books, respectively, provide a just and equita-

ble basis for apportioning the cost of said improvements, respectively, against the various tracts and parcels of land and real property in each of said districts, respectively. And, should assessments for any of said districts with interest thereon as herein provided for, be found to be insufficient to defray the cost of the said improvement within the district, including necessary expenses of said district and interest on all obligations of said district, the county court shall make an order levying such additional portion of or rate upon the said original assessment, to be collected in the manner provided in the act of the General Assembly creating said district for the collection of taxes for such district, as will be necessary to pay any balance of the cost of said improvement including necessary expenses of such district and interest on its obligations."

Appellant, the owner of real property in the district, instituted this action to restrain the commissioners of the district from proceeding toward the issuance of bonds and the construction of the improvement, and he alleged in his complaint that the assessment list, as prepared and filed by the county clerk in accordance with the provisions of the original statute, showed that the benefits to the lands amounted to the sum of $273,-492.93. but that the commissioners were about to issue bonds in the sum of $350,000 to construct the road, which it is alleged would cost that sum.

The contention is that section 4 of the statute as set out above, constitutes a legislative assessment by confirming the list as filed by the clerk and that the cost of construction and the amount of the bond issue can not exceed the total amount of benefits shown by that list. It is argued that the two sections set forth above are contradictory, and that unless section 4 controls as the legislative assessment of benefits the statute should be held to be void on account of the contradiction between the two sections. Our conclusion is that the contention of appellant is not correct, and that the two sections of

the statute should be considered together for the purpose of construing their effect.

The assessment list referred to in section 4 was made pursuant to the directions of the original statute, and, if nothing else should be considered but the language of section 4 as amended, it should be construed to mean merely a confirmation of the list prepared by the clerk as the proper assessment of benefits. Construing the language of the two sections literally, there is apparent conflict, but it is our duty to reconcile that conflict for the purpose of ascertaining the true legislative will, if we can do so without disregarding the plain meaning of the language used. We have often said that the intention of the lawmakers "is to be deduced from a view of the whole, and every part of a statute to be taken and compared together." *McNair* v. *Williams*, 28 Ark. 200; *Ingle* v. *Batesville Grocery Co.*, 89 Ark. 378; *West* v. *Cotton Belt Levee District No.* 1, 116 Ark. 538.

Section 4 as amended provides that the assessment lists filed by the clerk "are hereby approved and confirmed, same being found and hereby declared to be fair, just and equitable;" but section 6 provides "that the lands and real property embraced in each of the above named districts, respectively, will be benefited in an amount equal to fifty per cent. in excess of the cost of construction of the road authorized by the act, * * * and that the assessments for said district as shown by said assessment books, respectively, provide a just and equitable basis for apportioning the cost of said improvements."

Section 6 not only declares in express terms that the total benefits shall be fifty per cent. in excess of the cost of construction, and that the assessment lists filed by the clerk shall be the basis of apportionment of the benefits, but it also authorizes the levy of assessments up to the amount of the cost of the improvement "including necessary expenses of the district and interest on its obligations." It is clear from section 6 that the

Legislature meant to authorize the levy of assessments of sufficient amount to pay for the construction of the improvement and other necessary expenses and the interest on bonds, not exceeding 150 per cent. of the actual cost of construction, and that the original assessment list as certified by the clerk is the assessment fixed at the percentage declared in the original statute to be the basis of apportionment. The maximum is fixed at 150 per centum, not of the total cost, including overhead expense and interest on bonds, but the actual cost of construction of the road. The lawmakers did not intend to fix benefits at fifty per cent. in excess of the total cost including all expenses and interest, but what they meant to do was to declare the benefits to be 150 per cent. of the actual cost of construction. *Oliver* v. *Whittaker*, 122 Ark. 291.

The language of section 6 is explanatory of the language of the preceding section, and the two sections when read together can, we think, be harmonized, and it is our duty to do so. Treating section 4 as the lawmakers evidently treated it, if we give any effect at all to the language of section 6, as a declaration of a just and equitable basis for the apportionment of benefits, the conflict between the two sections disappears. The lawmakers are presumed to have had before them information as to the cost of the construction of the road according to the plans and specifications and to have found that the benefits to the land would amount to fifty per cent. in excess of the cost of construction, and they intended by this statute to authorize the levy of assessments for the purpose of paying for the cost of the improvement and the other expenses including interest on the bonds up to the maximum of benefits thus declared.

The chancellor was correct in his interpretation of the statute and the decree is therefore affirmed.

HART, J. (dissenting). It is perfectly apparent that the majority opinion has eliminated section 4 from the

act. The opinion recognizes the general rule that it is the duty of the court to give effect to every section of the act, and to harmonize them if possible. It then proceeds to harmonize them by saying that section 6 is explanatory of section 4, and that when read together they mean that the assessment of benefits, made by the Legislature when the original act was passed and extended on the assessment books pursuant to the terms of the act, is merely a just and equitable basis for apportioning the benefits. In short, it holds that the assessment of benefits originally made by the Legislature is not an assessment of benefits, but is merely a declaration of a just and equitable basis for the apportionment of benefits, and says that by this construction the conflict between the two sections vanishes. The practical effect of this construction is to give no meaning whatever to section 4. The court has no more right to eliminate section 4 than it would have to eliminate section 6 and give no meaning to it. Section 4 plainly says that the assessment books extending the assessment of benefits as made by the Legislature in the original act is approved and confirmed, the same being found and hereby declared "to be fair, just and equitable."

Section 6 does not purport to be explanatory of section 4 as declared in the majority opinion. In the first place, the language of section 4 is so plain that it speaks for itself. Moreover, section 6 deals with a different phase of the question. Section 6 does not refer to section 4, but provides for an additional assessment of benefits if necessary to defray the cost of the improvement, and declares that for this purpose the assessment books provide a just and equitable basis for apportioning the cost of the improvements against the various tracts of land in the district. This is clearly shown by the concluding part of section 6, which provides for an additional assessment to defray the cost of the improvement, including necessary expenses and interest on all obligations, should the original assessment be found insufficient to pay such costs. Section 6 is therefore in direct con-

flict with section 4, and is contradictory to it, and the conflict renders the act void. It is our duty to construe the language according to its plain meaning. We have no more right to say that the Legislature did not intend section 4 to have any meaning than we have to say that it did not intend section 6 to have the meaning which its language clearly imports. In short, section 4 in plain terms confirms the original assessment made by the Legislature, declaring it to be fair, just and equitable.

Section 6 provides that if the original assessment is insufficient to defray the cost of the improvement, including necessary expenses and interest, an additional assessment shall be made to pay such cost and expenses, and that for this purpose the original assessment shall be considered as a just and equitable basis for apportioning the cost of the improvement. If the language in section 4 is to be given its plain and ordinary meaning, section 6 is an arbitrary assessment of benefits by the Legislature; for it is evident that if the assessment made by the original act and approved by section 4 is just and equitable, no additional assessment of benefits can be made. Neither the Legislature nor any other body or tribunal can make an arbitrary assessment of benefits. *Bush* v. *Delta Road Imp. Dist.*, 141 Ark. 247.

Mr. Justice SMITH concurs in this dissent.

OPINION ON MOTION TO MODIFY.

McCULLOCH, C. J. A modification of the opinion in this case is asked for by appellee on the ground that our construction of the statute was erroneous in holding that the assessments were fixed by the Legislature at one hundred and fifty per cent. of the actual cost of construction, exclusive of interest on bonds and other expenses, and also in holding that the total levy of assessments can not exceed the maximum benefits thus determined.

Counsel for appellee bring to our attention section 5 of the statute, which reads as follows:

"Section 5. The amount of interest which will accrue on bonds issued by any of said districts shall be in-

cluded and added to the tax to be collected for such district, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of the cost of construction in determining whether or not the expense and costs of making said improvements are or are not equal to or in excess of the benefits assessed. The landowners shall have thirty days after the passage of this act in which to pay their assessment in full, but all said assessments shall be made payable in installments so that not more than twenty per cent. thereof shall be collectable in any one year against the wishes of the landowners, and in the event that any landowner avails himself of this indulgence the assessed benefits shall bear interest at the rate of six per cent. per annum and shall be payable only in installments as levied. The levy of assessments may be made by way of proportional amounts of the total assessed benefits and the interest need not be calculated until it is necessary to do so to avoid exceeding the total amount of benefits and interest, or the interest may first be collected, at the discretion of the board."

We think that this section of the statute tends to strengthen rather than to weaken our position in the former opinion in holding that the legislative determination of benefits was not based on the total cost of the project, including interest and other expenses. Section 5 draws the distinction between interest on bonds and other expenses to be incurred, and expressly declares that such interest shall be deemed to be a part of the cost of construction. This section shows that the Legislature must have used advisedly the term "costs of construction of the road" in section 6 and that the interest on bonds and other expenses were not treated as a part of the cost of construction. Section 5 goes further and declares that interest on bonds shall not be construed to be a part of the costs of construction in determining whether or not such costs shall exceed the benefits.

It is not within the power of the Legislature to authorize assessments in excess of the estimated benefits,

even for the purpose of paying interest on bonds (*Fitzgerald* v. *Walker*, 55 Ark. 148, *Oliver* v. *Whittaker*, 122 Ark. 291), but the Legislature can authorize the charge of interest on postponed assessments and such interest on assessments is not to be treated as a part of the cost of improvement, but may be imposed in addition to the assessed benefits. *Oliver* v. *Whittaker, supra; Pfeiffer* v. *Bertig*, 141 Ark. 531.

We adhere therefore to the conclusion announced in the original opinion and the motion to modify will be overruled.

ELLIS v. STATE.

Opinion delivered June 21, 1920.

1. WITNESSES—CROSS-EXAMINATION.—It was not error, in a criminal case, to permit the State, in cross-examining the accused, to ask him whether he made certain statements before the examining court; such questions not being asked to show a confession without proving that it was free and voluntary, but merely to lay foundation for impeachment.
2. CRIMINAL LAW—ADMISSIBILITY OF CONFESSIONS.—Statements of the accused in the nature of confessions of guilt, made voluntarily in open court at the examining trial, are admissible.
3. CRIMINAL LAW—SUFFICIENCY OF VERDICT.—In a prosecution for receiving stolen goods, where the court properly charged the jury as to the offense and the form of their verdict, a verdict, "We, the jury, find the defendant guilty and leave the punishment to the court," *held* not defective.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade*, Judge; affirmed.

Troy W. Lewis, for appellant.

1. The alleged confession of appellant should not have been admitted in evidence. 1 Greeleaf on Ev., §§ 219, 219a; 50 Ark. 305. Here the confession was obtained by beating and whipping in a most cruel and unmerciful manner. Improper influences used to extort a confession are presumed to continue unless shown to have been re-

moved. 18 L. R. A. (N. S.) 832; 69 Ark. 599. There is no evidence that they were removed here.

2. The burden was on the State to show that the improper influences were removed at the time of the confession. 74 Ark. 397; 109 *Id.* 932; 69 *Id.* 599.

3. The court erred in giving instruction No. 6 as to the form of the verdict. 94 Ark. 548; 104 Mo. 365-644.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. Appellant denied that he made any confession to the officers who beat him. The burden is only on the State to prove by a preponderance of the evidence that the confession was voluntary and without undue influence. 125 Ark. 263. Here the confessions were in open court, and they were not made under duress. 99 Ark. 455. And there was other evidence to support the conviction. His confession was duly corroborated. 99 Ark. 455; Kirby's Dig., § 455.

2. The verdict was in proper form. 50 Ark. 506; 94 Ark. 548. But appellant did not object to the form of the verdict and can not now complain here for the first time.

WOOD, J. Appellant was indicted under section 1830 of Kirby's Digest, for the crime of receiving stolen goods knowing them to be stolen with intent to deprive the true owner thereof. He was convicted and appeals from a judgment sentencing him to eighteen months imprisonment in the State penitentiary.

There was testimony on behalf of the State tending to prove that in January, 1920, articles of clothing were stolen from several persons in Little Rock, Pulaski County, Arkansas, of the aggregate value of more than $300. Two boys confessed to stealing the property, and they told the police officers where the articles could be found. They were under a dwelling house at 315 Gaines Street, up near the front. Appellant, after he was arrested, also told the officers where they could find the stolen goods.

On cross-examination, one of the officers was asked if he knew whether or not appellant was whipped at police headquarters. He answered that he did not know anything about it. After this the question was repeated and objected to by the State. The court, at this juncture, sustained the objection, reserving a final ruling until appellant showed that he was subjected to a whipping for the purpose of extorting statements from him.

The boys who stole the property stated that they deposited the same at Nineteenth and Commerce. One of these stated that at appellant's request witness and one Davis "went out there and got out the stuff and carried it down to the house" where appellant resided; that appellant stated he would put it where it could not be found. The witness testified that the appellant knew that the articles were stolen. Witness stated that he so informed the appellant.

The testimony of the appellant was to the effect that he did not have any conversation with the parties who stole the goods. He was informed by one Davis after the parties were arrested that the goods were taken to appellant's house. Appellant looked for the things and could not find them. The officers arrested appellant and took him to the city hall where they asked him about the suit cases containing the articles. Appellant testified that the officers beat him up so he did not know what he was talking about. They whipped him "on his naked meat," broke the skin, and brought blood from him. One of the officers put his foot on his head and was holding him down on the floor. This officer hit appellant over the head three times with a black-jack. After beating him they gave him salve for his wounds. They injured his back, and he passed blood in his urine. They tried to make him confess that he stole the two grips.

At this juncture the appellant was asked the following question:

"Q. Did you confess it?"

"A. No."

Among other instructions the court gave the following: "If you find the defendant guilty, you will say, 'We, the jury, find the defendant guilty of receiving stolen property, as charged in the indictment,' and fix his punishment at a term of years in the penitentiary not less than one or no more than five years. If you find the defendant guilty and can not agree upon the punishment you will leave that to the court and in that event the court will fix the punishment."

The appellant duly excepted to the ruling of the court in giving this instruction. The jury returned a verdict as follows:

"We the jury find the defendant guilty and leave the punishment to the court." There was no objection by the appellant at the time the verdict was rendered, to the form of the verdict.

The appellant contends that the court erred in permitting the State to introduce the confession of appellant without first proving that the confession was free and voluntary.

The record does not bear out counsel for appellant in his contention that the State, over the objection of appellant, introduced a confession by appellant in order to establish his guilt. Although appellant testified that he was severely beaten by the officers for the purpose of making him confess, nevertheless he denied that he made any confession. The proof introduced on behalf of the State did not tend to prove any confession on the part of appellant. True, the prosecuting attorney propounded certain questions in his cross-examination of appellant concerning alleged statements made by appellant when a witness on the examining trial before the municipal court. The appellant answered these questions by saying that he did not know, or by categorically denying that he made the statements attributed to him.

It is manifest that the purpose of this examination was not to introduce any alleged statement of the appellant in order to show a confession, but for the purpose

of laying the foundation for the impeachment of appellant as a witness.

The record as abstracted by appellant's counsel does not show that the court permitted any testimony in the nature of a confession to go to the jury. Moreover, if any of the statements made by appellant on the examining trial were susceptible of being construed as in the nature of confessions of guilt, such statements were made in open court, and besides were entirely voluntary. See *Iverson* v. *State,* 99 Ark. 453. It was proved that the appellant was anxious to testify before the examining court.

There was no prejudicial error in the rulings of the court in admitting or excluding testimony.

The appellant did not object to the form of the verdict at the time same was rendered. Furthermore, the verdict was not fatally defective on account of its form. The court had fully and correctly instructed the jury as to the essentials of the crime of which appellant was accused, when the verdict is taken in connection with the instructions there can be no doubt that the jury intended to find appellant guilty of receiving stolen property knowing at the time he received it that same was stolen. The court had instructed the jury that, before they could find the defendant guilty, they "must find that at the time he received it he did so receive it with the knowledge that it was stolen and that he had the intent in so receiving it to deprive the true owner of the property. There was no error in the instruction as to the form of the verdict.

The indictment charged that appellant "did unlawfully and feloniously receive and have with the felonious intent to deprive the true owners thereof, he then and there well knowing that the property had been so feloniously stolen, etc." When the jury found the appellant guilty as charged in the indictment, they necessarily found that he received the goods knowing at the time that they were stolen.

There is no error. Affirmed.

AMERICAN RAILWAY EXPRESS COMPANY v. COLLINS.

Opinion delivered June 21, 1920.

CARRIERS—TRANSPORTATION AND DELIVERY—JURY QUESTIONS.—In an action against an express company for loss of the effects of plaintiff's deceased son, alleged to have been delivered to the company by the Navy Department, an itemized list of the articles shipped by the Navy Department sent by such department to plaintiff by mail, together with a bill of lading showing that the department had delivered to the company a package to be delivered to plaintiff, was sufficient to justify a finding that the items of the list were delivered to the company for shipment, and where some of the items were missing from the package delivered to plaintiff, whether the company tendered the same package that was delivered to it *held* for the jury.

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

Davis & Bohlinger, for appellant.

The trial court should have granted appellant's motion for a directed verdict, as there was no evidence for a jury. 14 R. C. L. 747; 132 Ark. 54.

John B. Crownover, for appellee (no brief).

WOOD, J. Jerry Collins died on the U. S. Hospital Ship "Mercy." The Navy Department furnished J. K. Collins, his father, hereafter called appellee, a list of his son's personal effects. Appellee instructed the Navy Department to forward by express his son's belongings to him at Ola, Arkansas. June 15, 1919, the agent of the American Railway Express Co., hereafter called appellant, attempted to deliver to appellee a bundle of clothing which it had received from Norfolk, Va. Upon examination of the package appellee became satisfied that it did not contain the property of his son. It did not contain all the items on the list of his son's property which had been sent the appellee by the Navy Department. Some of the items were marked "R. Collins." Appellee thought the package delivered weighed more than the weight given of the package containing his son's property. The Navy Department sent to the appellee a bill

of lading November 1, 1918. He turned the bill of lading over to the telegraph operator at Ola and requested him to trace the goods, which the operator afterward told him that he could not locate. Appellee made several inquiries of appellant's agent at Ola, and upon being unable to locate the goods appellee brought this action against the appellant August 12, 1919, to recover damages for the loss of the articles which he valued at the sum of $85. The bill of lading and the list of articles furnished appellee by the Navy Department were without objection introduced in evidence. Appellee testified to the items which were included in the list sent him by the Navy Department, and which were not contained in the package tendered him by the appellant. On cross-examination, appellee stated that he could not swear that the items claimed as missing had ever been delivered to appellant and that he could not swear that the items claimed by him were the items listed under the heading of personal effects on the blank furnished by the Navy Department; but he further stated on redirect examination that the list of his son's personal effects offered in evidence had been forwarded to him by the Navy Department through the mail. He could not swear that the appellant issued the bill of lading which was sent him.

The court instructed the jury, among other things, that the burden was upon the appellee to make out his case by a preponderance of the evidence and that unless the goods of appellee's son were delivered to the appellant it would not be liable. That if appellant tendered to appellee the goods that were delivered to it by the Navy Department for shipment to appellee the appellant would not be liable.

The appellant asked the court to instruct the jury to return a verdict in its favor. The court refused to grant appellant's prayer.

The jury returned a verdict in favor of the appellee in the sum of $55. From the judgment in that sum is this appeal.

Appellant contends that there is no testimony to show that the items listed by the Navy Department, which list was sent by the Navy Department through the mail to appellee, were ever delivered to the appellant; that there is no testimony to show that the package which appellant tendered to appellee was not the identical package which it received from the Navy Department for shipment to the appellee.

This contention of appellant is untenable. Although appellee was unable to identify the articles contained on the list sent by the Navy Department as the ones delivered by the Navy Department to appellant for shipment to the appellee, and although no other witness testified that they were the same articles delivered to appellant for shipment to the appellee, yet the jury were warranted in finding that such were the facts from the list sent by the Navy Department through the mail to the appellee and the direction given by the appellee to the Navy Department to ship the articles contained on the list to him and the further fact that the Navy Department sent in its letter to appellee the bill of lading showing that the Navy Department had delivered to appellant a package to be transported to the appellee. This fact made it an issue for the jury to say whether or not the Navy Department delivered to appellant the personal effects that belonged to appellee's son and whether appellant tendered to appellee this same package.

The court did not err in submitting this issue to the jury. Appellant does not complain that the issue was submitted under erroneous instructions. Appellant only contends that there was no substantial evidence to take that issue to the jury.

We are convinced that there was such evidence. The judgment is correct and, therefore, affirmed.

SOUTHERN MUTUAL LIFE INSURANCE COMPANY *v.* PERRY.

Opinion delivered June 21, 1920.

1. INSURANCE—RIGHT TO RECOVER—BURDEN OF PROOF.—One who sues on a policy of insurance has the burden of proving the right to recover.
2. INSURANCE—INSURABLE INTEREST.—The principle upon which life insurance is based is that one who has a reasonable expectation of benefits and advantages growing out of the continuance of the life of the insured has such an interest in his life that he may insure same.
3. INSURANCE—WAGERING CONTRACT.—The issue of a policy of life insurance to one who has no insurable interest in the life of the insured, but who pays the premiums for the chance of collecting the policy, is invalid because it is a wagering contract, and against sound public policy.

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

C. P. Harnwell, for appellant.

A verdict should have been directed for appellant. The appellee has no insurable interest in the life of her cousin. She was not dependent on Sally Cox, but simply was her cousin and paid the premiums. The policy was void—nothing but a wagering contract, and against public policy. 33 L. R. A. (N. S.) 949; 98 Ark. 52; 105 *Id.* 281. The statements in the policy were warranties of their truth, and the evidence shows her statements as to her age were false, as also other material statements. 103 Ark. 202; 111 *Id.* 554. The case should be reversed and dismissed. 104 Ark. 538.

S. A. Jones and Carmichael & Brooks, for appellee.

1. The company was bound by the acts of its agent in accpeting premiums from appellee. 129 Ark. 450.

2. The evidence is ample to sustain the verdict, and it is conclusive.

Wood, J. This action was brought by the appellee against appellant on a policy of insurance issued by the

appellant to one Sally Cox. The appellee was named as beneficiary in the policy.

Appellee testified that Sally Cox carried a policy with appellant. She identified the policy and same was introduced in evidence. Appellee testified on direct examination that Sally Cox died in November, 1915; that all of the dues had been paid promptly. On cross-examination she testified that she (appellee) had receipts at the time Sally Cox died for all the premiums. Appellant would send appellee the receipts; would send her a notice a few days before the premiums were due; she (appellee) would send the money back to appellant and it would receipt her on a card. Sally Cox was her cousin.

At this juncture the witness was excused, and another witness was examined touching the proof of death, after which appellee was recalled for further direct examination. Her counsel asked, among others, the following questions:

"Q. They collected from her regularly, did they?

"A. They did collect from her regularly.

"Q. Did you know anything about the policy having been issued at the time it was issued?

"A. I knew nothing about it at the time it was issued.

"Q. You did not secure it yourself?

"A. Did not; was not present."

On further cross-examination appellee testified that one day the agent came to her house and told her that the policy was made to her, and that Sally Cox had no change, and asked witness to pay that particular premium, and witness paid it. She could not remember the date.

Further testimony was developed, but from the conclusion we have reached on the above testimony, it is unnecessary to set forth the other testimony.

Appellant prayed the court to direct the jury to return a verdict in its favor, which prayer the court refused. The trial resulted in a judgment in favor of the appellee, from which is this appeal.

The court erred in refusing appellant's prayer for a directed verdict. The undisputed testimony of the appellee shows that the appellee and Sally Cox were cousins. The burden was upon the appellee to prove that she was entitled to recover under the contract of insurance.

The only conclusion that any reasonable mind could reach from the testimony of appellee is that she paid the premiums on the policy issued by appellant to Sally Cox. If there had been no peremptory instruction, the only verdict that the jury could have returned under appellee's testimony would have been to the effect that the premiums were paid by the appellee; for that is the only possible way that the jury could have reconciled her testimony, which it would have been its duty to do.

When appellee was first examined, she swore positively that the appellant would send her the notice before the premiums were due and that she would send the money back to appellant and appellant would receipt her. The only possible way that this testimony can be reconciled with her subsequent statement that the appellant collected from Sally Cox regularly is to say that appellee furnished Sally Cox the money with which to pay the premiums. Any other view would be a stultification of the testimony of the witness and, on its face, would put same beyond the pale of competent testimony. For a party, who is also a witness, will not be allowed to declare in one breath a certain state of facts and in the next, without explanation, declare the opposite. Under such conditions the two statements would neutralize and nullify each other, and in legal effect same would be tantamount to no testimony. The positions assumed by the party would be wholly inconsistent.

We conclude, therefore, that the undisputed evidence shows that the appellee paid the premiums on the policy in controversy, and that she was the cousin of Sally Cox. There is no testimony tending to show that appellee was dependent upon Sally Cox, and no testimony to furnish

appellee reasonable grounds to expect that Sally Cox would support or aid her in any way.

In *McRae* v. *Warmack,* 98 Ark. 56, we said: "The principle upon which life insurance is based is that one who has a reasonable expectation of benefits and advantages growing out of the continuance of the life of the assured has such an interest in his life that he may insure the same. But where one is not thus interested in the life of the assured, but by insuring such life is rather interested in his early death, the contract of insurance is a mere wager, and against a sound public policy. Such contracts, it has been thought, would, if upheld, result in a mere traffic in human life, and would lend a great incentive to one thus disinterested in the life but interested in the death of the assured to shorten that life. It is, therefore, well settled that the issue of a policy to one who has no insurable interest in the life of the insured but who pays the premium for the chance of collecting the policy is invalid because it is a wagering contract and against a sound public policy."

For the error in refusing to direct a verdict in favor of the appellant the judgment is reversed and the cause is dismissed.

DICKINSON *v.* ROBERTSON.

Opinion delivered June 21, 1920.

1. CARRIERS—DISCRIMINATION IN FURNISHING CARS.—Where the evidence established that, owing to the exigencies of war, a carrier was unable during certain months to furnish the usual amount of cars to its shippers, but that it was able to fill forty to seventy-five per cent. of the orders received for cars, proof that the carrier furnished only twenty-two per cent. of the cars ordered by plaintiff during those months justified submission to the jury of the issue whether the carrier had discriminated against plaintiff.
2. CARRIERS—DISCRIMINATION IN FURNISHING CARS.—The liability of a carrier, under Kirby's Digest, § 6408, for failure to furnish cars is founded, not so much on the inadequacy of the facilities at his command to supply the demands of shippers as on his refusal or failure to make the facilities which he has available to all who are similarly situated, without discrimination or delay.

3. CARRIERS—FAILURE TO FURNISH CARS—DAMAGES.—In an action for damages for failure to furnish cars to a shipper, where the shipper, would not have been put to expense in loading cars or in transportation to destination, the measure of damages was the difference between the market value of the goods at the point of shipment and the market value at point of destination.

Appeal from Prairie Circuit Court, Southern District; *George W. Clark,* Judge; affirmed.

Thos. S. Buzbee, Geo. B. Pugh and *Chester L. Johnson,* for appellants.

1. This suit is the result of the car shortage in the fall of 1916, caused by the unprecedented movement of freight to the seaboards by reason of the war. The law is well settled in this State that carriers, while bound to provide reasonable facilities for shippers of goods, are not required to provide in advance for an unprecedented and unexpected rush of business as is shown here and will be excused for delay until the emergency can, in the regular course of business, be removed. 77 Ark. 357; 217 U. S. 136. The defendant was not liable under the evidence here. There was no discrimination. 77 Ark. 357.

2. According to the testimony plaintiff did not suffer any pecuiary loss from defendant's failure to furnish cars. The loss is purely speculative and prospective, and the court erred in its instructions as to the measure of damages.

Chas. B. Thweatt and *Emerson, Donham & Shepherd,* for appellee.

The law of this case is settled by 77 Ark. 357; 120 *Id.* 119; 105 *Id.* 415; 81 *Id.* 373; 85 *Id.* 311, and the court followed the law in its instructions. The measure of damages was correctly stated by the court in instruction No. 3. 3 Hutch. on Carriers, par. 1366; 73 Ark. 112; 74 *Id.* 358.

WOOD, J. Appellee was engaged in the business of buying and selling hay during the months of September, October, November and December, 1916. Appellee

ordered of appellant 125 cars to enable him to ship the hay from various stations on appellant's railroad. He was furnished 27 cars. The box cars, such as appellee ordered, would hold from ten to fifteen tons of hay, and if appellant had furnished the cars ordered by appellee for the shipment of the hay, he would have realized a profit at the current market price of hay during that time of from 50 cents to $1.50 per ton, which amounted in the aggregate to the sum of $1,173, all of which he lost by reason of appellant's refusal and failure to furnish the cars as ordered by the appellee.

Appellee instituted this action against the appellants, and alleged substantially the above facts in his complaint, and filed therewith as exhibit "A" an itemized statement of the number of cars ordered during the time mentioned; the number furnished; the price paid per ton when purchased and price paid for same when sold. He alleged actual damage in the above sum. Appellee also alleged that during the time mentioned the appellants were furnishing cars to others and in so doing discriminating against the appellee. On account of the alleged discrimination appellee prayed that he might have judgment for double the amount of the actual damages he had sustained.

The appellants denied the material allegations of the complaint and set up that the failure to furnish appellee all the cars alleged to have been ordered by him was caused by reason of the war activities of German submarines which resulted in a lack of sufficient facilities on the Atlantic seaboard of unloading cars promptly upon reaching the ports, which deprived the appellants of the control and use of their cars; that appellant's freight equipment was further overtaxed because of the increase of the price of cotton in 1916 and an early harvest of that crop; that appellee's business was mostly interstate and to have furnished him with all the cars ordered at the time the orders were placed would have interfered with appellant's interstate com-

merce and would have resulted in giving preference to appellee's intrastate business and thus would have discriminated against those making interstate shipments as well as against others who were making intrastate shipments, in violation of the laws of the State of Arkansas and also of the United States.

The testimony of the appellee and other witnesses introduced in his behalf tended to establish the facts as above set forth and as alleged in appellee's complaint. Appellee's testimony shows that he ordered 61 cars during the month of September and received 5 or 6. In October he ordered 27 cars and got 3; in November he ordered 25 cars and received 5 or 6; in December he ordered 21 cars and got 9. Of the 125 cars ordered he received 27 cars. Other people were getting cars for the shipment of their hay after appellee had placed his orders for the cars and at the same time cars were refused him. He took the matter up with the local agent almost daily and also with the superintendent of the car service. Appellee agreed to handle about 65 tons of hay of one Fisher, paying him the market price for same, but was compelled to cancel his contract with Fisher because appellee could not get cars to ship the same.

The testimony of witness Fisher on behalf of the appellee corroborated the testimony of the appellee as to this transaction, and his testimony further shows that, after delivering three cars of hay which he had contracted to sell to the appellee, appellee could not get any more cars, and he then sold the balance to one Sims, who got cars. The first car load was sold to Sims on the 17th of December and shipped about the 19th. The next car was sold on the 30th and shipped January 1st.

The testimony of appellants' local agent, through whom appellee ordered most of the cars, was to the effect that appellant was able to furnish 50 to 75 per cent of the cars ordered through him. The testimony of appellant's superintendent of car service was as follows: "We were able to take care of only 40 to 50 per cent. of

the requirements, due to the abnormal amount of business, influenced by war conditions in Europe, and this condition resulted in an unprecedented movement of business to the sea-board and caused the tying up of equipment of western lines at the Atlantic sea-board principally.

The verdict was in favor of the appellee in the sum of $597.37. From a judgment in that sum is this appeal.

The appellant contends that the undisputed evidence shows that there was no negligent failure to furnish cars and no unjust discrimination against appellee in favor of other shippers similarly situated in the furnishing of cars.

The undisputed evidence shows that during the four months that appellee complains of car shortage, the exigencies of war had caused the congestion of eastern ports, and that railroad lines as far west as the Missouri River were congested and held thousands of appellant's cars. In consequence thereof appellant was unable to furnish its shippers the usual amount of cars required to handle the business from its stations which otherwise it was fully equipped to do.

The testimony of appellant's station agent, at Hazen, through whom appellee ordered cars, and the testimony of its superintendent of car service, shows that during the four months involved appellant was able to fill 40 to 75 per cent. of the orders received for cars. The testimony shows that appellee during the months mentioned ordered 125 cars and received 27, or about 22 per cent., whereas, according to the above testimony he should have received from 50 to 94 cars.

It is obvious, therefore, that appellants are in no attitude to complain because the court submitted the issue to the jury as to whether appellants supplied the appellee with the number of cars to which he was entitled according to the percentage which they were able to furnish under the unexpected and extraordinary circumstances.

The evidence set forth above was legally sufficient to justify the court in submitting to the jury the issue as to whether or not appellants had unlawfully discriminated against appellee in favor of Sims, who was also engaged in the business of buying and selling hay at the town of Hazen. The jury were warranted in finding from the above testimony that appellee had contracted to purchase about 65 tons of hay from one Fisher, but which purchase he had to abandon because of appellant's failure to furnish him cars for the shipment of the same; that immediately thereafter Fisher sold the same hay to Sims, who secured cars and loaded it out. The appellee and Sims were similarly situated, as both were engaged in the same business in the town of Hazen.

The testimony shows that appellants furnished from 40 to 75 per cent. of the cars ordered. If Sims received 40 to 75 per cent. of the cars ordered by him, it certainly can not be said as a matter of law that appellee, under similar circumstances, should not have received like treatment at the hands of the appellants. We can not discover any undisputed evidence in the record furnishing a conclusive and satisfactory reason for the seeming preference in favor of Sims in the matter of furnishing him cars. The issue, therefore, as to the discrimination was one which the court properly submitted to the jury for its determination.

In *St. L. S. W. Ry. Co.* v. *Clay County Gin Co.*, 77 Ark. 360, we said: "But the liability of the carrier under the act of March 11, 1899 (Kirby's Digest, § 6804), is founded, not so much on the inadequacy of the facilities at his command to supply the demands of shippers, as on his refusal or failure to make the facilities which he has, available to all who are similarly situated, without discrimination or delay. For the act makes it the duty to furnish, without discrimination or delay. So if the carrier, by reason of some unforeseen and unusual or unprecedented condition in the traffic, is unable to furnish cars for the accommodation of all shippers, he must, in

order to escape liability under this statute, furnish such as he has to all shippers without discrimination or delay."

Appellants do not urge that there was any error in the instructions of the trial court on the issue as to whether or not appellants failed to furnish cars nor on the issue of unjust discrimination.

We find, upon examination of the instructions, that these issues were submitted under declarations of law in conformity with the doctrine announced by this court in *St. L. S. W. Ry. Co.* v. *Clay County Gin Co., supra; St. L., I. M. & S. Ry. Co.* v. *Wynne Hoop & Cooperage Co.,* 81 Ark. 373; *St. L. S. W. Ry. Co.* v. *State,* 85 Ark. 311; *Cumbie* v. *St. L., I. M. & S. Ry. Co.,* 105 Ark. 415; *St. L., I. M. & S. Ry. Co.* v. *Laser Grain Co.,* 120 Ark. 119.

The court, over the objection of appellants, instructed the jury on the measure of damages as follows: "You are instructed that if you find for the plaintiff in the first count of his complaint, his measure of damages is the difference between the market value of the hay at the point of shipment when cars should have been furnished, and at the point of destination when same should have been furnished."

There was testimony from which the jury might have found that the appellee purchased and sold the hay f. o. b. at point of shipment. In other words, the jury could have found from the testimony that the appellee was not put to any expense in the loading of cars at point of shipment nor in the transportation from that point to their destination. The instruction, therefore, announced the correct rule for measuring the damages. *St. L. S. W. Ry. Co.* v. *Leder,* 87 Ark. 298.

There is no error. Affirmed.

BEESON v. LAVASQUE.

Opinion delivered June 21, 1920.

1. LANDLORD AND TENANT—UNCERTAINTY OF TERM.—A contract for the lease of a newspaper plant during the period the lessor should be in the military service during the war with Germany or in any event for one year is not void for uncertainty, for in the course of nature the lessor's term of service would terminate.
2. GUARANTY—CONSIDERATION.—Where a guaranty was attached to a contract of lease at the time the lessor executed the lease, the guarantor was as much bound for the performance of the contract as the lessee.
3. GUARANTY—NOTICE OF ACCEPTANCE.—Where a guaranty was attached to a contract of lease and was part of it, and not a mere offer or proposal, the guarantor need not be notified of the acceptance of the lessor, who executed the instrument and delivered possession.
4. EVIDENCE—JUDICIAL NOTICE.—The courts take judicial notice of conditions existing in June, 1917, while the United States was engaged in the world war.
5. LANDLORD AND TENANT—TERM OF LEASE.—While a lease for years must be for a definite term, a contract for a lease during the period of the war with Germany is not for an indefinite period.

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

Strait & Strait, for appellants; *Compere & Compere*, of counsel.

The court erred in sustaining the demurrer. The contract was not void for uncertainty as to the period of its duration. The contract does not fall within that class of contracts which are held void for uncertainty of duration. The date of its beginning is fixed definitely and an event which must inevitably occur is specifically mentioned for its termination. 9 Cyc. 250; Coke, Litt. 45; 6 Coke 35; 21 Ill. App. 189; 6 R. C. L. 647; 78 Am. St. 914; 69 S. W. 552.

Edward Gordon, for appellees.

1. The demurrer was properly sustained, as the contract was void for uncertainty and too indefinite to be capable of enforcement. 1 Page on Contracts, § 28.

The guaranty was void for want of notice. 104 U. S. 686; 12 Peters 213, 504; 10 How. 475; 1 Story 22; 12 Peters 213; 34 Fed. 108.

2. A contract to be valid must be definite and certain as to duration and termination. 34 L. R. A. (N. S.) 1070; 135 S. W. 47; 49 N. Y. 499; 99 Mass. 229; 63 Mo. App. 648; 113 S. W. 229; 47 L. R. A. (N. S.) 949; 39 App. Cas. (D. C.) 343. The contract, as shown by these authorities, is absolutely void, because it is too indefinite and uncertain as to duration to be enforced.

G. P. George, of counsel for appellees.

HART, J. V. A. Beeson instituted this action in the circuit court against Arthur LaVasque and A. R. Bradley to recover damages for the alleged breach of a contract for the lease of a newspaper and printing establishment situated at Morrilton, Arkansas. The contract was in writing and was executed on the 30th day of June, 1917. The contract was signed by V. A. Beeson and C. L. Beeson, parties of the first part, and Arthur W. LaVasque, party of the second part. Attached to the contract and immediately following the signature of the parties was a guaranty that the party of the second part should faithfully perform the contract and discharge his obligations under it in the manner provided in the contract. This was signed by Adam R. Bradley.

According to the allegations of the complaint at the time the contract was executed V. A. Beeson was the principal owner, business manager, and editor of said plant and newspaper. At that time he had entered the military service of the United States for and during the war between the United States and Germany.

The contract further alleges that on or about July 1, 1918, the said party of the second part abandoned and closed up the newspaper plant and thereafter refused to further perform the contract on his part; that the publication and distribution of said newspaper was discontinued, and that the machinery and fixtures were al-

lowed to deteriorate greatly in value, and that the said V. A. Beeson was not discharged from the military service of the United States until the 19th day of August, 1919.

The defendants filed a demurrer to the complaint on the ground that the contract was void for uncertainty in the time of its performance, and that the contract of guaranty signed by A. R. Bradley did not recite a consideration nor state that V. A. Beeson was present when the same was executed, or had accepted the same.

The court sustained the demurrer and dismissed the complaint of the plaintiffs. The case is here on appeal.

The court below was of the opinion that the contract was void because the time of its existence is too indefinite to be capable of enforcement. The part of the contract which involves this issue is as follows:

"That the said parties of the first part, for and in consideration of the premises, stipulations, agreements and payments hereinafter set forth, hereby lease, rent and let to the said party of the second part, the said Morrilton Headlight printing plant, together with all fixtures, appurtenances and parts thereunto belonging, for the following period, towit: "Commencing from July 1, 1917, and continuing during the time, not less than one year, during which the said V. A. Beeson may be in the military service of the United States; said lease contract to terminate and end upon the discharge or release of said V. A. Beeson from said military service; said lease period, however, regardless of the date of his discharge, to continue for not less than one year from July 1, 1917."

The general rule is that if the time of performance of the contract is one which is bound to happen at some time in the future, such contract is certain, even though the time can not be fixed in advance. Page on Contracts, vol. 1, sec. 28. Hence it has been decided that a contract to marry after the death of the divorced wife of one of the parties is reasonably definite and certain with respect to the time of performance, since it is made to

depend upon an event which, in the course of nature, must inevitably occur, notwithstanding the fact that it is possible that one of the contracting parties may die before that event takes place. *Brown* v. *Odill* (Tenn.), 52 L. R. A. 660.

The contract sued on was executed on the 30th day of June, 1917, and by its terms was to continue not less than one year and during the time the said V. A. Beeson might be in the military service of the United States.

In the application of the principle above announced we do not think that it can be said that the period of time for the existence of the contract is too indefinite to be capable of enforcement. In the first place, it may be said that at the time the contract was executed Beeson was the principal owner and editor of the newspaper plant and that the reason for the execution of the lease was, that he had entered the military service of the United States for the period of time that the war with Germany should continue. Moreover, the contract in question recited that it was to continue during the time which V. A. Beeson might be in the military service of the United States. His military service was bound to terminate either by his discharge from the army or by his death. Therefore, it must in the course of nature occur, and we are of the opinion that the contract did not depend upon an indefinite event and was on that account incapable of enforcement.

Again, it is insisted that the contract can not be enforced against Bradley, because he was not notified of the acceptance of his guaranty by Beeson, and that there was no consideration for it. We can not agree with this contention. The guaranty was attached to and is a part of the original contract. According to the allegations of the complaint, Beeson turned over his newspaper plant to LaVasque in pursuance of the terms of the contract. This amounted to an acceptance of the guaranty on his part, and Bradley was as much bound for the performance of

the contract as LaVasque. They both signed it and undertook to carry out its obligations.

As above stated, the guaranty was attached to the original contract and was a part of it. Bradley was, therefore, equally bound with LaVasque to perform the obligations of the contract. In the case of *Falls City Construction Co.* v. *Boardman,* 111 Ark. 415, the court said: "Where the transaction is not merely an offer to guaranty the payment of debts and amounts to a direct promise of guaranty, all that is necessary to make the promise binding is that the promisee should act upon it; he need not notify the promisor of his acceptance."

It follows that the court erred in sustaining the demurrer to the complaint, and for that error the judgment will be reversed and the cause remanded for further proceedings according to law.

OPINION ON REHEARING.

HART, J. It is well settled that a lease for years must be for a definite term. It is earnestly insisted by counsel for the defendant that the lease in question does not come within the rule just stated; but that the duration of the term is too uncertain for the lease to be enforceable. The lease in question was executed on the 30th day of June, 1917. The court will take judicial notice of conditions as they then existed. The United States had entered the world's war, and a draft law had been enacted. V. A. Beeson had entered the military service of the United States with the intention of remaining there until the war ended. It was recognized in the lease contract that Arthur LaVasque might also be drafted in the army of the United States. The lease contained a general covenant against subletting, and also contained a special provision that if LaVasque should be drafted in the army of the United States his obligations under the lease should terminate upon his securing a suitable lessee. Thus it will be seen that the parties themselves recognized that the war would come to an end in a few years, and that it was the intention of Beeson to lease out his

newspaper plant during the period of the war. It was the intention of the parties that the lease contract should terminate when the war was ended. It is true the contract provides that the lease is to be terminated upon the discharge or release of Beeson from said military service. But, as above stated, the existing conditions are to be taken into consideration in determining the meaning of these words. From the recitals above stated, it is evident that the parties intended for the lease contract to terminate at the end of the war and not for such uncertain and indefinite period of time as Beeson might choose to remain in the army. This is shown by the fact that provision is made for releasing LaVasque in the event he should be drafted in the army. Then, too, the necessity of everyone within the draft age making provision for the continuance of his business during the period of his service in the army is apparent. The contract, when considered as a whole and when considered with reference to the unusual circumstances existing at the time of its execution, shows that the parties intended for the lease contract to continue until the war with Germany was ended. When so construed, we think that the terms of the lease was sufficiently certain and definite to prevent the lease from being declared invalid.

In *Ely* v. *Randall* (Minn.), 70 N. W. 980, the court had under consideration a lease containing a clause as follows:

"To hold for the term of five years, with the privilege of holding it longer. A consideration for holding possession of said described premises is that said lessee, A. J. Randall, does covenant to keep a postoffice and a store of merchandise; and if, at any time, the said lessee shall cease to keep a postoffice and a store, then this obligation on the part of the first party shall become null and void. As long as the said A. J. Randall shall keep his part of the contract and keep the premises in good repair, he shall enjoy peaceful possession."

It was there contended that the lease was void for uncertainty. The court held that, when both clauses were considered together, the meaning was apparent and the uncertainty ceased.

It follows that the motion for rehearing will be denied.

PEARMAN v. PEARMAN.

Opinion delivered June 21, 1920.

1. QUIETING TITLE — JURISDICTION.—The jurisdiction of equity to quiet title, independently of statute, can be invoked only by a plaintiff in possession, unless his title be merely an equitable one; the remedy at law being otherwise adequate.
2. QUIETING TITLE—TAX TITLE.—Under Kirby's Digest, § 665, providing that there shall be no confirmation of tax sales of any lands in adverse possession of another, plaintiff can not maintain a suit in equity to confirm a tax title to land held adversely by the defendant.

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

STATEMENT OF FACTS.

G. W. Pearman brought this suit in equity under that part of chapter 25 of Kirby's Digest relating to the confirmation of tax titles.

Anna Pearman was allowed to file exceptions to the petition on the ground that she resided on the property and was in actual adverse possession of it. G. W. Pearman filed a response in which he denied that Anna Pearman was in legal possession of the property, or had been for several years last past.

G. W. Pearman was a witness for himself. According to his testimony, he was the owner of three lots in the town of DeWitt, Arkansas, and had owned them since December, 1898. The lots in controversy were sold at a tax sale in 1896 for the taxes of 1895. On June 14, 1898, the clerk executed a tax deed to J. A. Gibson, the purchaser at the tax sale. On June 25, 1898, J. A. Gibson, by a quitclaim deed conveyed the lots to L. C. Smith,

and on December, 1898, L. C. Smith conveyed the lots to G. W. Pearman. G. W. Pearman has paid the taxes on the lots every year since he purchased them. He gave his son, Arthur Pearman, permission to build a house on the lots. He furnished to his son part of the lumber, and his son, who was a carpenter by trade, furnished the balance of the lumber and materials, and himself erected the house. Pearman allowed his son to live on the place rent free and intended that in case he died first that his son should have the lots as a part of his portion of the father's estate. The son became sick and went West for his health. On his return he resided with his father, but was allowed to receive the rents from the property. The son rented out the property, and his tenant was in possession of it at the time he died. A few days before the son's death, G. W. Pearman told him that he intended to deed the property to the son's infant child as soon as he could quiet the title to the property.

Anna Pearman is the widow of Arthur Pearman, who was the son of G. W. Pearman. She and Arthur Pearman were married on the second day of October, 1915, and lived together as husband and wife until the husband died. A child was born unto them on November 4, 1916, and it died just three months after the death of its father. Arthur Pearman and Anna Pearman, his wife, moved into the house, which had been built by him on the lots in controversy, as soon as they were married and lived there until Arthur Pearman went West for his health. They then rented the property and Arthur Pearman collected the rents as long as he lived. After Arthur Pearman died, Anna Pearman did not collect the rents for two months; but after their baby died she again began collecting the rents. Subsequently she moved into the house and requested G. W. Pearman to make her a deed to the property, claiming that he had given the lots to his son before the latter erected the dwelling house on them. G. W. Pearman refused to make her a deed, and she continued to reside on the lots, claiming title to them and claiming to hold them adversely to

G. W. Pearman. This all occurred before G. W. Pearman brought suit under the statute to confirm his title in the lots. During the pendency of the proceedings, G. W. Pearman died, and the proceedings were revived in the name of his two sons, who were his sole heirs at law.

The chancellor found the issues in their favor and the title to the lots was quieted in them against the claims of all persons whomsoever. Anna Pearman has appealed.

R. D. Rasco, for appellant.

Appellant was the owner and in possession of the lots. The petitioner gave these lots to her late husband, who was the son of petitioner, and on the faith of the gift her husband built a residence on them, worth $1,250. After the death of the donee, petitioner denied the gift, and institutes this proceeding to confirm title in himself. The question is, was there a gift? The law is settled. 12 R. C. L., § 16; 5 L. R. A. 323. Possession and expenditures for improvements constitute part performance sufficient to take the case out of the statute of frauds and to authorize specific performance. 129 U. S. 305; 118 Ill. 73; 113 Ind. 256; 9 Wall. 1; 114 Ill. 302; 5 Mont. 26; 62 Mich. 15; 32 Ark. 97. The proof here was clear and convincing. 44 N. W. 721; 133 Ia. 351; 110 N. W. 840. Such a promise stands on the same footing with a promise to sell. 143 N. Y. 34; 3 Am. Rep. 657. This is not a suit for specific performance; the land really belongs to appellant, and appellees are not entitled to a confirmation of title. The chancellor erred in its findings that there was no testimony to show an agreement to convey these lots to Arthur Pearman. The testimony of G. W. and C. B. Pearman shows there was such an agreement. Thornton on Gifts, §§ 256, 401. Our statute provides there shall be no confirmation of title to lands in the actual possession of one claiming adverse title to the petitioner. 1 Ark. 472. When appellant objected to confirmation on account of being the owner and in actual

possession of the land, no decree should have been entered under our statutes. The remedy was in ejectment. 51 Ark. 259; 27 *Id.* 233, 414; 29 *Id.* 612; 30 *Id.* 579; 37 *Id.* 643; 43 *Id.* 32; 44 *Id.* 436; 17 A. & Eng. Enc. Pl. & Pr. 307; 27 Pac. 427; 87 Pac. 427; 21 Standard Enc. of Prac., p. 1015.

This court will sift the evidence and determine what the chancellor's finding should have been, 43 Ark. 307, and where erroneous will reverse. 31 Ark. 85; 98 *Id.* 459. Appellant is certainly entitled to pay for the improvements, and petitioner stated he was willing to pay. The chancellor erred in ignoring this offer, and gave appellant nothing.

Lee & Moore, for appellees.

The parol gift being asserted by appellant, the burden was upon her to establish same; the evidence shows that she has not met the issue by a preponderance of the evidence. To constitute a gift, it must clearly appear that the intention was to transfer the present title. 12 R. C. L., p. 940, par. 7. The mere fact that a child is in possession, and has made improvements on the promise that the land will be given to the child at the father's death, will not take the case out of the statute of frauds. 12 R. C. L., p. 940, par. 17; 63 Ark. 107; 82 *Id.* 43; 134 *Id.* 605. The decree is right and should be affirmed.

HART, J. (after stating the facts). The equity jurisdiction to quiet title, independent of statute, can only be invoked by a plaintiff in possession, unless his title be merely an equitable one. The reason is that where the title is a purely legal one and some one else is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment can not be maintained under the guise of a bill in chancery. In such case the adverse party has a constitutional right to a trial by a jury. *Mathews* v. *Marks,* 44 Ark. 436; *Ashley* v. *Little Rock,* 56 Ark. 391; *Burke* v. *St. Louis,*

I. M. & S. Ry. Co., 72 Ark. 256, and *St. Louis Refrigerator & Wooden Gutter Co.* v. *Thornton*, 74 Ark. 383.

The action has been greatly extended by statute and in many States is the ordinary mode of trying disputed titles. Pomeroy's Equity Jurisprudence (3 ed.), vol. 4, section 1396. Such is not the case in this State, however.

Section 665 of Kirby's Digest, which is a part of the chapter relating to the method of procedure in confirming tax titles, provides that there shall be no confirmation of the sale of any lands that are in actual possession of any person claiming title adverse to the petitioner. At the time the proceedings in the case at bar were brought by G. W. Pearman, Anna Pearman was in the actual possession of the lots in controversy, claiming title thereto adverse to the petitioner. She claimed that G. W. Pearman had given the lots to his son who was her husband, and that she and her husband had resided on the lots until they went West and afterward collected the rents on the same until his death. He left surviving him his widow and an infant child. The child died in about three months after the father, and the widow went into possession of the lots after her child's death, and she claimed to hold adversely to G. W. Pearman at the time he brought the proceedings to confirm his tax title in the lots.

Anna Pearman did not seek to quiet her own title to the lots, and thereby give the court jurisdiction of the entire controversy as was the case in *Goodrum* v. *Ayers*, 56 Ark. 93. She was content to file exceptions to the right of G. W. Pearman to have his tax title confirmed and did not seek affirmative relief on her own account. She was in adverse possession of the lots at the time G. W. Pearman filed his petition to confirm his tax title, and the court erred in granting the relief prayed for.

It follows that the decree must be reversed and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

COLE v. STATE.

Opinion delivered June 21, 1920.

1. INTOXICATING LIQUORS—SUMMARY SEIZURE AND DESTRUCTION.—The statute providing for the summary seizure and destruction of intoxicating liquors kept in a prohibited district to be sold contrary to law is valid and does not contemplate a jury trial in a proceeding to condemn and destroy such liquors.
2. TRIAL—DUTY OF LITIGANT TO ATTEND HEARING.—It is the duty of a litigant to keep himself informed of the progress of his case, and a party seeking relief against a judgment upon a ground of unavoidable casualty in not attending the hearing must show that he himself was not negligent; and where a case was regularly set for trial at 8:30 a. m. it is not sufficient to show that appellant and his attorney understood that the case was set for a later hour.

Appeal from Sebastian Circuit Court, Fort Smith District; *John Brizzolara,* Judge; affirmed.

STATEMENT OF FACTS.

This appeal involves the validity of a judgment of the circuit court adjudging that ten gallons of alcohol in the possession of the sheriff of Sebastian County, Arkansas, and claimed by W. H. Cole, be publicly destroyed by the sheriff.

It appears from the transcript that the cause was specially set for hearing in the circuit court at 8:30 a. m. on November 17, 1919, and that the defendant was notified of the setting of the case for that time. When the case came on to be heard, the defendant and his counsel were separately called, but neither made any appearance in the proceeding. The prosecuting attorney on behalf of the State introduced evidence tending to show that the ten gallons of alcohol had been taken by the sheriff from the possession of W. H. Cole, and that said Cole kept alcohol to be sold contrary to law. The alcohol was destroyed by the sheriff in compliance with the order of the circuit court.

Subsequently, at the same term of the court, the defendant filed a motion for a new trial, in which he set up that he had been charged with the illegal sale of in-

toxicating liquors and had been acquitted of the charge; that the alcohol had been seized by the sheriff and that the case, in so far as the seizure of the alcohol was concerned, had been continued several times at the instance of the prosecuting attorney, and at each time the case had been set for 1 o'clock p. m.; that the case had been finally set for November 17, 1919, and that both Cole and his attorney understood that it was set for 9 o'clock a. m.; that the attorney of Cole resided near the courthouse and came there at 8:40 o'clock a. m. on the morning in question for the purpose of appearing for Cole in the case; that when he arrived the case had been disposed of and the alcohol ordered destroyed; that the sheriff complied with the order of the circuit court as soon as it was made, and immediately publicly destroyed the alcohol; that both Cole and his attorney understood the proceeding to be set for trial in the circuit court at 9 o'clock a. m. on the day of November 17, 1919. The case is here on appeal.

J. E. London, for appellant; *T. S. Osborne,* of counsel.

After continuing the case three times, court convenes at 8 a. m. and calls the case one hour in advance of the regular time for calling cases for trial and in the absence of defendant and counsel. This practice of railroading a case through court shocks one's sense of justice and right. The court arrogated to itself the right to hear the case without a jury and without the consent of the parties, and clearly violated Kirby's Digest, § 7609. The court tried the case *de novo* upon purely hearsay testimony. Not one word of competent evidence was heard, yet the alcohol was destroyed, when all the court had to do was to give appellant the right to be heard, and appellant would have proved that he was a druggist and doing a legitimate business. The judgment should be reversed, as the court's action was a violation of appellant's rights and contrary to law and the evidence, and shocks one's sense of justice.

John D. Arbuckle, Attorney General, and *Silas W. Rogers*, Assistant, for appellee.

1. Appellant had "his day in court," as the record conclusively shows, and the alcohol was properly ordered destroyed. A verdict of guilty for selling liquor contrary to law is not a condition precedent to the order to destroy the liquor. Under the statute no trial by jury is necessary, but appellant can not be heard to complain, as he did not appear for trial at the time set for hearing and demand a jury. The court granted the order of destruction after hearing the statements of the prosecuting attorney, sheriff and witnesses under oath, and the law authorizing the destruction was fully complied with.

2. But for argument, granting that the trial judge did overstep his authority in ordering the destruction of the alcohol, where is the remedy? The alcohol can not be restored, and this court can not enter judgment against anyone for the loss. Neither the judge, sheriff, or prosecuting attorney, are liable for reimbursement for the loss. No inalienable rights of appellant have been violated, but if injustice was done under this appeal this court is powerless to enforce any remedy.

HART, J. (after stating the facts. It may be stated at the outset that the court has held valid our statute providing for the summary seizure and destruction of intoxicating liquors kept in a prohibited district to be sold contrary to law, and that the act does not contemplate a trial by jury in a proceeding to condemn and destroy such liquors. *Kirkland* v. *State,* 72 Ark. 171.

It appears from the bill of exceptions that the case was specially set for 8:30 a. m. on November 17, 1919, and that it was heard and determined at that time. It is true that, according to the affidavits of Cole and his attorney, they understood that the case was set at a different hour on that day, but these affidavits were not sufficient to conclusively overcome the recital in the bill of exceptions that the case had been specially set for 8:30 a. m.

The court overruled Cole's motion for a new trial because it did not state the facts, and it can not be said that the finding of the court in this respect is without evidence to support it. The case was brought regularly on for trial and was regularly submitted for decision. It is the duty of a litigant to keep himself informed of the progress of his case, and the party seeking relief against a judgment on the ground of unavoidable casualty must show that he himself is not guilty of negligence. *Trumbull* v. *Harris,* 114 Ark. 493.

As above stated, the testimony of Cole and his attorney to the effect merely that they understood the case was set for a later hour does not conclusively overcome the recital in the bill of exceptions that the case was specially set for trial at 8:30 a. m.; and it can not be said, therefore, that the judgment of the court in overruling Cole's motion for a new trial is not without evidence to support it.

Therefore, the judgment will be affirmed.

HUMPHREYS, J., not participating.

KECK v. NORTHCUTT.

Opinion delivered June 21, 1920.

HIGHWAYS—ROAD DISTRICT—FILING ASSESSMENT OF BENEFITS.—Acts of special session of 1920, No. 266, creating Fulton and Izard Improvement District No. 4, to build and maintain a highway in Fulton and Izard counties, is not void for ambiguity in providing, in section 8, that the assessment of benefits of said district shall be filed with the county clerks of said counties; the intention being that the assessment of benefits on lands in each county shall be filed with the clerk of such county.

Appeal from Fulton Chancery Court; *Lyman F. Reeder,* Chancellor; affirmed.

Oscar E. Ellis, for appellant.

Act 266, Acts 1919, special session, is void and unenforceable because the county court intended by it to

make the order creating the road district and the court was without jurisdiction to make the order, for no county court can make an order having any effect upon lands within the territory of another county court. The act is void for ambiguity of sections 8 and 10 also.

Geo. T. Humphries, Perry C. Godwin and *E. E. Godwin,* for appellees.

The whole act should be construed together, and, so doing, it is thoroughly enforceable, and there is no ambiguity in §§ 8 and 10 of said act, and the demurrer was properly sustained.

SMITH, J. This suit questions the validity of act No. 266 of the special session of the General Assembly of 1920. It is said that the act is void because of the ambiguity of sections 8 and 10 thereof.

By section 1 of the act it is provided that the persons made defendant herein shall be commissioners of the Fulton and Izard Improvement District No. 4, and creates said improvement district for the purpose of building and maintaining a highway in Fulton and Izard counties. It also provides that two of the three commissioners shall be residents of Fulton County and own property within the district, and that the other commissioner shall be a resident of Izard County, and shall own property within the district. Section 2 of the act provides that the road to be constructed and repaired shall begin at Calico Rock in Izard County and shall run in a certain direction to certain other towns and on to the town of Salem in Fulton County. Section 3 provides which lands are within the district; and section 8 provides that the commissioners shall assess the lands within the district, and shall inscribe same within a book and assess the value of the benefit to each tract and enter the same opposite the description, and shall also enter therein the names of the supposed owners.

Section 8 reads as follows: "Section 8. The assessment of benefits of said district shall be filed with the county clerks of said counties, and the secretary of

the board shall thereupon give notice of its filing by publication for two weeks in a newspaper published and having a *bona fide* circulation in that county. This notice may be in the following form:

"ROAD IMPROVEMENT DISTRICT No.

"Notice is hereby given that the assessment of benefits and damages of the above district has been filed in this office of the county clerk of.....county, where it is open to inspection.

"The following lands not embraced in the district, as originally laid out, have been assessed for the improvement:

"(Here will follow a description of the lands beyond the borders of the district which have been assessed.)

"All persons wishing to be heard on said assessment will be heard by the commissioners of said district at the county court room at.....on the .....day of.....19.....

".....

"Secretary.

"On the day named in said notice, it shall be the duty of the commissioners to meet at the place named, and to hear all complaints against said assessments, and to equalize and adjust the same, and their determination shall be final, unless suit is brought in the chancery court of the county where the lands lie within thirty days thereafter to set aside their finding."

Section 10 reads as follows: "Section 10. The county court shall, at the time that the assessment of benefits is filed, or at any time subsequent, 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, with ten per cent. added for unforeseen contingencies, which tax is to be paid by the real property in the district in proportion to the amount of the assessment of benefits

thereon, and which is to be paid in annual installments, payable not to exceed ten per cent. for any one year, as provided in such order. The tax so levied shall be a lien upon all the real property in the district from the time that the same is levied, and shall be entitled to preference over all demands, executions, incumbrances or liens whensoever created, and shall continue until such assessment, with any penalty and cost that may accrue thereon, shall have been paid. The remedy against such levy of taxes shall be by appeal, and such appeal must be taken and perfected within twenty days from the time that said levy has been made, and on such appeal, the presumption shall be in favor of the legality of the tax."

It is insisted that section 8 is so ambiguous as to render the act void, and that the act must fall with that section. It is objected that section 8 does not specify where the assessments shall be filed, nor in what county notice thereof shall be given, and that it can not be ascertained in which county the hearing provided for on the assessments will be had.

There are parts of two counties in the improvement district, and section 8 provides that "The assessment of benefits of said district shall be filed with the county clerks of said counties." The ordinary, and, we think, fair, interpretation of this language is that there shall be an assessment of the lands of each county, and that each of these assessments shall be filed with the county clerks of the respective counties, the assessment for Fulton County with the county clerk of that county, and the assessment for Izard County with the county clerk of that county.

After the assessments have been made and filed, the act provides that "the secretary of the board shall thereupon give notice of its filing by publication in a newspaper published in that county," that is, that notice shall be given in Fulton County of the assessment in that county, and notice shall be given in Izard County of the assessment in that county.

This construction of the act is reinforced by the form of the notice provided for by section 8. This notice was, of course, intended to be given in both counties, and in the form prescribed in the act a blank space appears in which the names of the respective counties could be inserted, and another blank space was left for the insertion of the names of the respective county seats, the hearing in each case to be in the county court room of the respective counties. *Wood* v. *Willey,* 139 Ark. 586.

The objection to section 10 is that it provides that "the county court shall make an order, having the force and effect 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," etc., without specifying which court shall perform that function. If we have correctly construed section 8, the objection to section 10 vanishes, for the county court of each county will extend the assessments against the lands of that county unless, as provided by section 8, the chancery court shall, within thirty days after the commissioners have given the property owners the hearing there provided for, set aside the finding of the commissioners on the assessments.

The court below, therefore, properly sustained the demurrer to the complaint attacking the district upon the grounds stated above, and the decree so ordering is affirmed.

JONES v. STANDARD OIL COMPANY OF LOUISIANA.

Opinion delivered June 21, 1920.

1. MASTER AND SERVANT—USE OF DEFECTIVE OIL TANK CAR.—A master is not liable to a servant for the defective condition of an oil tank car where the master made no use of the car except to unload it when received upon a siding, especially where the injured servant was the only representative of the master at the place of unloading.
2. MASTER AND SERVANT—INSPECTION OF OIL TANK CAR.—An oil company did not owe to its servant the duty to inspect a tank car re-

ceived upon a siding to be unloaded, as it is not ordinarily possible for the consignee of commodities shipped in such cars to make any inspection of them.

Appeal from White Circuit Court; *J. M. Johnson*, Judge; affirmed.

John E. Miller and *C. E. Yingling*, for appellant.

1. The court erred in peremptorily instructing a verdict for defendant, as a case for a jury was made by the evidence of negligence of defendant company, its servants, agents and employees, for which appellee company was liable.

2. The relation of master and servant was shown to exist between plaintiff and defendant, and the injury was caused by defective spring on the valve rod, and that this defect and others could have been discovered by an inspection of the car at the time, or prior to the time, the car was filled with gasoline. The evidence shows that defendant did not discharge its duty toward plaintiff, and that he was injured by reason of its failure to discharge its duty in using ordinary care to furnish him a safe place in which to work and to make reasonable inspection of the appliances and instrumentalities furnished with which he was required to work. 117 Ark. 204; 123 *Id.* 119; 116 *Id.* 277; 133 *Id.* 340. Plaintiff made such inspection of the car as he was by law required to make on its arrival at Searcy, as the evidence shows. 99 Ark. 265. The defect was hidden, and the testimony shows that plaintiff did all required of him under the circumstances of his employment. He was not an inspector of cars before they were loaded with gasoline. 93 Ark. 564-9; 121 *Id.* 507-12

3. The ordinary rules of master and servant applied here, and defendant was under obligation to inspect this car for defects, even if it was owned by a company in Oklahoma. 53 Ark. 347; 70 *Id.* 299; 78 *Id.* 510; 18 R. C. L., § 93, p. 590; 99 Ark. 277; 72 N. E. 331; 89 Am. St. Rep. 456; 3 Labatt on M. & S. (2 ed.), § 2893, p. 2893. The company owed the plaintiff the duty to in-

spect the car and see that it was in good repair and that no defect existed that could have been discovered by a careful inspection at the time the gasoline was loaded in the car. The servants of the Midland Petroleum Company, if they in fact loaded the car, were the agents of defendant for the inspection of the car. The defendant owed the plaintiff the duty to inspect, and it was a non-delegable duty, and under our law defendant can not be shielded from liability. 87 Ark. 321; 98 *Id.* 34; 111 *Id.* 5.

Reid, Burrow & McDonnell, for appellee.

1. Consignees were not liable to servants for injuries received due to defects in car. There was no negligence in defendant in not inspecting the car at the time it was loaded. Defendant was not the owner of the car, nor did it load it. The car was neither a tool, appliance or instrumentality furnished by the master, and there was no liability, and a directed verdict was proper. 74 N. E. 337; 75 *Id.* 75; 23 L. R. A. 448; 20 Atl. 981; 25 *Id.* 587. Defendant did not own the car; it belonged to the railroad company. 25 Atl. 587. See, also, 38 N. E. 324; 39 *Id.* 147; 14 L. R. A. (N. S.) 972; 83 N. E. 626; 27 Atl. 1043; 45 N. E. 1084; 30 Atl. 356; 3 Labatt, M. & S., p. 2831, note 6. A master is not liable for defects in appliances furnished by or under the control of third parties. 26 Cyc. 1109; 47 N. E. 425.

2. The scope of ways, work and machinery is restricted to things over which the master has control or right to select. 35 N. E. 547; 60 *Id.* 484.

3. Master must be charged with sufficient notice and opportunity to repair defects which are not shown to be structural defects. 46 Ark. 565; 96 S. W. 183; 78 *Id.* 220; 175 *Id.* 1177; 48 Pac. 12, 963; 57 *Id.* 973; 68 *Id.* 609; 86 Ill. App. 454; 31 S. W. 347; 79 *Id.* 973; 51 L. R. A. 881. The burden is on the servant to establish the requisite knowledge for the reason that it is one of the essential elements of negligence. Labatt on M. & S., p. 2724.

4. No negligence imputable where a defect is not discoverable by a reasonable, careful inspection. Labatt on M. & S. 2724-5. Master not liable for hidden defects which could not have been discovered by careful inspection. 20 Am. Rep. 331; 68 Ill. 561; 102 C. C. A. 579; 179 Fed. 433; 70 S. E. 742; 132 Fed. 801; 152 *Id.* 417; 89 S. W. 502; Labatt on M. & S., p. 2710; 17 N. W. 151; 40 N. E. 818.

5. A master is not required to exhaustive care in the examination of machinery which is incompatible with the proper furtherance of business. Labatt on M. &. S., p. 2818.

6. Common usage is the test of adequacy of inspection. Labatt on M. & S., p. 2821; 166 U. S. 617; 58 Ark. 125.

7. In no view of the proof could a recovery be had here, and a verdict was properly directed.

SMITH, J. This is a suit by appellant, who was plaintiff below and who will hereinafter be referred to as plaintiff, to recover damages alleged to have been sustained on account of the negligence of appellee, the Standard Oil Co. of Louisiana, which will hereinafter be referred to as the company. The case was tried before a jury, and at the conclusion of the testimony offered on plaintiff's behalf the jury, under the direction of the court, returned a verdict for the company, and this appeal is from the judgment pronounced on that verdict.

The testimony was substantially as follows: On December 30, 1918, the date of the injury, plaintiff was the agent of the company at Searcy, Arkansas, and it was a part of his duty as such to receive and unload tanks of gasoline consigned to the company, and on the date aforesaid there was delivered to him for the company tank car CRBX No. 835, from the Midland Petroleum Company, of Tulsa, Oklahoma, on the railroad tracks for the purpose of having same unloaded and the gasoline therein stored in the company's storage tanks.

Plaintiff, in the course of his employment, proceeded to remove the gasoline from the tank car, and, while in the exercise of due care, and while following the instructions which had previously been given him by the company, he unscrewed the cap at the bottom of the tank car for the purpose of connecting the pipe or hose to convey the gasoline from the tank car to the storage tanks, but when the cap was loosened the gasoline began to escape with such force as to knock plaintiff down, saturating his clothes and person and strangling him to such an extent that he was unable to escape from beneath the car for a period of several minutes, and was thereby so severely burned, that he required the care of a physician for several days, and suffered great pain and agony.

The negligence alleged was that the lower valve in the tank car was not properly set so as to prevent the flow of the gasoline when the cap was removed for the purpose of attaching the hose, and that the valve spring, which forces the valve down into the valve-seat, was worn and not strong enough to properly cause the said valve to seat and thus hold the gasoline in the car and prevent it from pouring out when the cap was taken off, as provided in the rules furnished plaintiff by the company It was the custom, when a car was placed by the carrier for unloading, to open the car by removing the cap from the dome and in this way ascertain if the lever controlling the valve was properly set, and plaintiff did that in the instant case. A rod extended through the car from the bottom to the top, and on the top end of the rod a lever was fastened which worked backward and forward and caused the valve to seat itself in the opening at the bottom of the car. When plaintiff opened the dome of the car in question, he saw that the lever on the rod indicated that the valve on the lower side was properly set. The valve in this car at the bottom did not seat, but the lever at the top in the dome indicated that the valve was properly seated.

The shipment of this car originated at Bristow, Oklahoma, the consignee being the Midland Petroleum Company, of Tulsa, Oklahoma, by which company it was owned and consigned to appellee company. It does not appear from any testimony that appellee company had any knowledge of the condition of the car or any control of its selection, nor was there any testimony that any relation existed between the two companies except that of consignor and consignee.

Appellee company had no agent at Searcy except plaintiff, and he was, therefore, not only the company's representative highest in authority at the time and place of the injury, but he was its sole representative. So that, if any duty devolved upon the company to be performed at Searcy, plaintiff alone could discharge it.

But the negligence complained of did not occur at Searcy. The trouble was caused by filling the car before the valve was properly seated, and that negligent act was committed by the consignor at the point of origin of the shipment.

Plaintiff invokes the doctrine of cases holding the master liable for the defective condition of the tools and appliances which he furnishes for the servant's use, whether these tools belonged to the master or not. But we think that doctrine is not applicable here, as the company made no use of the car except to unload it.

We think there can be no difference in principle between the duty to inspect a tank car and any of the other ordinary cars used in the transportation of the various articles of commerce, such as coal cars, box cars, cattle cars, etc., and it is not ordinarily possible for the consignees of commodities shipped in such cars to make any inspection of them.

In the case of *Dunn* v. *Boston & N. St. Ry.*, 75 N. E. 75, the employee was injured while unloading a defective car, the injury being occasioned by a defect in the car. The car was being unloaded as other cars had previously been unloaded, but the master had no custom to inspect

the cars before unloading them. In holding there was no liability on the part of the master, the Supreme Judicial Court of Massachusetts said: "To sustain the counts at common law, the plaintiff relies upon the case of *Spaulding* v. *Flynt Granite Co.,* 159 Mass. 587, 34 N. E. 1134. But that case differs widely from the one before us. There a granite company was using a car to carry its granite from its premises to the place of destination. Here the defendant was merely a consignee of coal delivered on its premises by a car of a railroad company. We are not aware of any case where under such circumstances the consignee has been held liable to its servants for a defect in the car; nor are we aware of any case which imposed upon the consignee the duty of inspecting the car."

In the case of *Anderson* v. *Oliver,* 20 Atl. 981, a verdict was directed against an employee who was injured while unloading a car of coal at his employer's furnace, and in affirming that judgment the Supreme Court of Pennsylvania said: "If it was owing to a defective brake, the defendants are not responsible, because they did not own the cars and had no control over them further than to unload them. They belonged to the railroad companies."

An annotated case on the subject is that of *Haskell & Barker Car Co.* v. *Przezdziankowski,* 14 L. R. A. (N. S.) 972. A head note in that case is as follows:

"1. The duty of inspection, owed by a transportation company to its employees, does not apply to a manufacturing company, operating a railroad for transporting materials about its establishment, in a case where one of its employees is hurt by a car owned by another company, and received upon a siding merely to be unloaded."

See, also, *McCullins* v. *Carnegie Co., Ltd.,* 158 Pa. 518, 23 L. R. A. 448; *Rehm* v. *Pa. Ry.,* 30 Atl. 356 (Pa.); 26 Cyc. 1109; *Moynihan* v. *Kings Co.,* 47 N. E. 425.

We conclude, therefore, that no breach of duty on the part of the company was shown, and a verdict in its favor was, therefore, properly directed.

Judgment affirmed.

HUMPHREYS, J., dissents.

NEAL v. COLE.

Opinion delivered June 21, 1920.

1. MORTGAGE—DEPRECIATION OF SECURITY—INSTRUCTION.—Where a mortgagee before maturity of the debt brought replevin for the property, alleging waste and depreciation of the property by the mortgagor, and the mortgagor denied waste and depreciation and demanded judgment for value of the property which had been taken by the mortgagee and sold under a power of sale in the mortgage, an instruction entitling the mortgagee to recover if the mortgagor was permitting the property "to depreciate to that extent that it diminished the security for the debt and in any way endangered the collection of the debt," *held* to properly submit the issue in the case.
2. REPLEVIN—VERDICT—SEPARATE VALUATION OF ARTICLES.—While the proper practice in replevin is for the verdict to value separately each article, the right to possession of which is determined by the judgment, so that the judgment may be satisfied by the return of such property, objection to a verdict which does not thus value the property may be waived, and is waived unless objected to before the discharge of the jury.
3. MORTGAGES — DAMAGES FOR WRONGFUL FORECLOSURE. — Where a mortgagee wrongfully brought replevin for mortgaged chattels prior to maturity of the debt on the alleged ground of depreciation of security, and foreclosed under power of sale in the mortgage, the measure of the mortgagor's damages is the value of the property at the time of the service of the order of delivery with 6 per cent. interest from that date.

Appeal from Polk Circuit Court; *George R. Haynie,* Judge on exchange; modified and affirmed.

McPhetridge & Martin and *Prickett, Pipkin & Mills,* for appellant.

1. The verdict is contrary to the evidence. The value of the property taken was placed at $483. This

value is not sustained by the evidence. The verdict is excessive.

2. The court erred in refusing the instructions asked by appellant. They were proper under the facts of this case. Kirby's Dig., § 6196; 34 Ark. 257.

Norwood & Alley, for appellee.

1. The motion for a new trial does not assign that the verdict was excessive, and hence we do not discuss the value of the property. A new trial was not asked on the ground that the verdict was excessive. 75 Ark. 345.

2. There is no error in refusing the instructions asked as they were fully covered by others given by the court. 86 Ark. 600; 105 *Id.* 355-467; 93 *Id.* 548. There were no objections made nor exceptions saved. *Ib.* There was no request to reduce the instructions to writing.

SMITH, J. Appellant sold appellee a wagon and team and harness for $367.50, and in payment therefor took his note due and payable November 15, 1919, and to secure the payment of this note, with the interest thereon, took a chattel mortgage on the property sold and four head of cattle which appellee already owned. On July 19, 1919, appellant brought replevin for this property, alleging waste upon the part of appellee and depreciation of the security. The property was taken under the order of delivery and sold by appellant under the power contained in the mortgage to several different purchasers. Thereafter, at the October, 1919, term of the circuit court appellee answered, denying waste or depreciation of the property, and prayed judgment for its value and damages for its detention. The jury fixed the value of the property *in solido* at $483 and assessed the damages at $163.33, and from the judgment pronounced thereon is this appeal.

It is first insisted that error was committed in refusing to give instructions requested by appellant. But it appears that the instructions given by the court fully and fairly submitted the case to the jury. The jury was

told to find for appellant if they found the fact to be that appellee was permitting the stock upon which appellant had the mortgage "to depreciate to that extent that it diminished the security for the debt and in that way endangered the collection of the debt." This was the issue in the case, and no error was committed in the refusing other instructions which could not properly have been more favorable to appellant.

It is chiefly insisted that the verdict is excessive. The four head of cattle were sold separately for the total sum of $130.50, and it is urged that no competent testimony placed the other property at a higher figure than $300, and it is, therefore, said that the verdict should not be permitted to stand for a larger sum than $430.50. Appellee testified that the wagon and team and harness, in his opinion, were worth what he had agreed to pay, which was $367, and the sales prices of the cattle at the foreclosure sale were not necessarily conclusive of their value. *Harrison* v. *Fulk,* 128 Ark. 232.

There is an assignment of error, however, in the motion for a new trial which appears to be well taken, and that is that the verdict and judgment are contrary to the law and the evidence.

By statute it is provided that "In actions for recovery of specific personal property, the jury must assess the value of the property, as also the damages for the taking or detention, whenever, by their verdict, there will be a judgment for the recovery or return of the property." Section 6867, Kirby's Digest. It affirmatively appears that there can be no recovery or return of the property in this case, as its conversion became complete with the foreclosure sale, the property passing into the hands of different persons who are not parties to this litigation. The verdict here was *in solido.* The proper practice is to value separately each article the right to the possession of which is determined by the judgment in the case, so that the judgment may be satisfied *pro tanto* by the return of such property; but objec-

tion to a verdict which does not thus value the property may be waived and is waived unless objected to before the discharge of the jury. *Hobbs* v. *Clark,* 53 Ark. 411. It would have been useless in this case to have had a finding of the value of each article separately, because the judgment could not be satisfied in whole or in part by the return of the property thus valued.

The measure of the damages is, therefore, the value of the property at the time of the service of the order of delivery, with interest at 6 per cent. from that date. 23 R. C. L., section 77 of the chapter on Replevin. The judgment for the $483, the value of the property, will, therefore, be affirmed; but the judgment for the $163.33 will be set aside and, in lieu thereof, appellee will have judgment for the interest on $483 at 6 per cent. from July 19, 1919, to this date, together with all costs, except the costs of this appeal, which will be assessed against appellee, and, as thus modified, the judgment will be affirmed.

PAVING DISTRICT NO. 5, CITY OF FORT SMITH *v.* FERNANDEZ.

Opinion delivered June 21, 1920.

1. COSTS—WHEN CHARGED AGAINST FUND.—In a suit against a paving district for benefit of plaintiffs and other taxpayers in the district, to wind up its affairs and distribute a surplus, it was proper for the court to charge the costs of the litigation against the fund, except in so far as the court had decreed otherwise on a former appeal.
2. COSTS—APPORTIONMENT IN EQUITY.—Costs in equity are apportioned according to what the court regards as the applicable equitable principle.
3. MUNICIPAL CORPORATIONS — PAVING DISTRICT — DISTRIBUTION OF FUNDS.—The court, trying a suit of a property owner in a paving district on behalf of himself and other taxpayers to wind up its affairs and distribute a surplus, did not abuse its discretion in ordering a distribution, though a few assessments remained uncollected, where the cost of collection would practically equal the

sum to be collected, and where the court retained control until all equities should be adjusted.

4. MUNICIPAL CORPORATIONS—PAVING DISTRICT—DISTRIBUTION OF SURPLUS.—Since the trial court had authority to compel the commissioners of a paving district to distribute a surplus, it was unnecessary to appoint a receiver for that purpose.

5. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—DISTRIBUTION OF SURPLUS.—Where a surplus remains in the hands of the commissioners of an improvement district after completing the improvement, such surplus should be distributed among those property owners who paid the last assessment.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; modified and affirmed.

A. A. McDonald, for appellants.

1. This is the second appeal in this case. See 142 Ark. 21. The opinion in that case is the law of this, and it was error to charge all the costs of the litigation against the fund to be distributed.

2. The court's order of distribution was prematurely made, as certain delinquent assessments remain uncollected. The chancery court had jurisdiction over the commissioners and the funds in question, and the commissioners have authority to collect delinquent assessments, and the order of distribution was premature.

Covington & Grant, for appellee.

1. The law of this case is settled by the first appeal. 142 Ark. 21.

2. The costs in chancery cases do not follow the decree as at law, are not adjudged against the losing party, but are in the discretion of the chancellor. 66 Ark. 7; 125 *Id.* 337; 65 *Id.* 543. The judgment of this court on the former appeal does not hold appellee liable individually for the costs, nor does it hold that they should be paid out of the funds, and this court has not settled the question of costs, and the chancellor was not precluded from taxing the costs against the funds of the district. 106 Ark. 295. The former decision of this court is the

law of this case. 124 Ark. 458. There was no error as to costs; they were properly decreed to be paid out of the funds of the district. All other questions raised by appellants are settled by this court on the former appeal, and by the court below on filing the mandate and in accordance with the decision of this court. When equity assumes jurisdiction for one purpose, it will retain it until it has completely adjudicated all the rights of the parties before it. 92 Ark. 15. The questions raised by appellants are abstract, and this court should not answer them now. 69 Ark. 245. There are no errors in the decree.

SMITH, J. This appeal is a continuation of a controversy between appellee Fernandez, a citizen and taxpayer of Paving District No. 5 of Fort Smith, and that district, reported in 142 Ark. 21.

As appears from the statement of facts in that case, Fernandez brought suit to compel the commissioners of the district to account for and to distribute among the property owners of the district a surplus remaining in the hands of the commissioners after completing the improvement and discharging the indebtedness of the district. Upon motion of Fernandez the court appointed a receiver to wind up the affairs of the district and to execute the orders of the court in that behalf. We held there that there was neither necessity nor authority for that action and reversed the decree on that account, as, in our opinion, the commissioners, as such, were amenable to the orders of the court.

Upon the remand of the cause the court below entered an elaborate decree winding up the affairs of the district. Among other things it was there required that the commissioners should file a final report showing in detail the condition of the district's finances. The decree provided for notice to be given to the property owners that the fund was about to be disbursed, to the end that any property owner who so desired might be specially heard. The decree provided that all the costs in the case should be paid out of the fund, and that the net

balance should be distributed among the persons who had paid the last assessment, the direction in that respect being that the commissioners "will fix it at such sum whose ratio to the original sum paid in by him shall be in the exact ratio of said last named sum to the whole net surplus to be distributed."

This net surplus to be distributed will probably exceed $20,000 after all costs have been paid, and while it grew out of the last assessment paid by the property owners the excess exists because of a reduction in the interest on the bonded indebtedness accomplished by the commissioners.

The first objection made to the decree is that the court charges all the costs of the litigation against the fund to be distributed. The opinion and decree on the former appeal is the law of the case, and in the mandate which went down to the court below it was "ordered and decreed that said appellants (the paving district) recover of appellee all their costs in this court expended, and have execution therefor." In the decree of the court below pronounced upon this mandate it was "ordered that all costs incurred by the plaintiff (Fernandez) in this court, and in the Supreme Court, including the costs by the Supreme Court adjudged against him in favor of defendants on appeal, be taxed against the said fund, and it is ordered that the same be by the commissioners paid therefrom."

This suit was brought by Fernandez for the benefit of himself and of all other property owners in the district, and it was, therefore, proper for the court to charge the costs of the litigation against the fund recovered except insofar as the court had decreed otherwise on the former appeal, and as appears from the mandate quoted from the above costs of the appeal were adjudged against Fernandez. To enforce that portion of the mandate the present appeal has been necessary, and the costs of this appeal will, therefore, be also assessed against Fernandez.

We permit the costs of the litigation, except that of the appeals to this court, to be recovered, because this was a proper suit to be brought by a taxpayer, but, inasmuch as the first appeal was necessary to displace the receiver who had been erroneously appointed on motion of Fernandez, we assessed the costs of that appeal against him. Costs in equity are apportioned according to what the court regards as the applicable equitable principle. *Penix* v. *Pumphrey,* 125 Ark. 337.

It is next insisted that the court's order of distribution was prematurely made, for the reason that certain delinquent assessments remain uncollected, and it is urged that a final adjustment of all the equities of the case can not be made until these delinquent assessments have been collected. As appears from the former opinion, an audit of the affairs of the district was made and the report of the auditor was filed April 9, 1917. At that time the taxes on a large number of lots were delinquent, and the delinquency extended over the last five annual assessments. It affirmatively appears that the major portion of these taxes have since been collected by foreclosure proceedings. The court considered the advisability of postponing the distribution of the fund until all the delinquent taxes had been collected, but in the decree rendered the court found the fact to be that the cost of collecting such assessments as remained unpaid would practically equal the sum collected and would add so small a sum to the amount to be distributed that further delay was not advisable. In view of the fact that more than three years have elapsed since the filing of this audit showing the delinquent assessments, we can not say that the court abused its discretion in ordering the distribution at this time. Moreover, the decree reflects the purpose of the court to retain control of the case until all equities have been adjusted.

The commissioners of the appellant district do not question the correctness of the decree in ordering the surplus paid over to the property owners who paid the

last assessment; and we agree that this was the proper order to have made; but the commissioners do question the jurisdiction of the court over them to make that order. This question was disposed of on the former appeal, as we there said it was unnecessary for the court to appoint a receiver to distribute this surplus, as the court had the right to direct the commissioners, as such, to take that action.

These commissioners also say that the court below has by its decree deprived them of the authority to collect delinquent assessments and to otherwise manage the affairs of the district as they would in duty be bound to do but for the pendency of this suit, and that the decree is circumscribing their power and authority. We find nothing in the decree which supports this contention.

The decree specifically directed the commissioners to proceed with the collection of the delinquent assessments; but such direction was unnecessary. The opinion and decree of this court on the former appeal discharged the receivership and restored the management of the affairs of the district to the commissioners, and the decree of the court below on this appeal does not undertake to interfere with the control of the commissioners except insofar as it is necessary to direct the distribution of this surplus, and this the court has the right to do as we held on the former appeal.

The brief filed on behalf of the commissioners concludes with the question, "To whom shall this money be refunded?" In a general way the decree appealed from answers that question by directing the refund to be made to the persons who paid the last assessment, as there was no surplus until the collection of that assessment was made. It is probable that some property owners have paid their delinquent assessments since the rendition of the decree here appealed from; but the decree requires the commissioners to submit a full and final report, thereby manifesting a purpose to take care of such equities as may arise up to the time of the actual distribu-

tion of the fund, and if some case presenting special equities should arise we must presume that proper orders will be made in regard thereto.

The decree of the court is therefore affirmed, as modified.

Mr. Justice HUMPHREYS not participating.

ROBERTSON v. ROBERTSON.

Opinion delivered June 21, 1920.

1. WILLS—RIGHT OF WIDOW TO CONTEST AFTER RENUNCIATION.—Under Kirby's Dig., § 2712, giving a widow a right to elect between the will and her right of dower in her husband's lands and personalty, a resident widow who has renounced the will can not contest it, since the widow, by renunciation of the will, would reap the same benefits as to real estate located in this State and personal property wherever situate.
2. WILLS—RIGHT TO CONTEST.—The right to contest a will is not an inherent or constitutional one, and does not exist independently of statute, and no such authority is given the widow of a deceased testator in this State, though the will devised property situated in another State.
3. WILLS—LAWS OF EACH STATE GOVERN WHEN.—The laws of each State govern with reference to the validity of wills of real estate situated therein.

Appeal from Benton Circuit Court; *W. A. Dickson*, Judge; affirmed.

C. A. Fuller, for appellant.

1. A widow can contest the validity of the will of her deceased husband and may appeal from the allowance of said will. 148 Mass. 421; 170 Mass. 93; 29 Pa. St. 498; 11 Am. & Eng. Ann. Cases 1013; Page on Wills, § 325; Kirby's Digest, § 2712.

2. The greater part of the estate of the husband is in North Dakota, and the election of appellant to take her rights under the laws of Arkansas not under the will can not give her any rights in the property in North Dakota. 29 Ark. 418. The election of appellant to take

under the laws of Arkansas rather than under the will is ineffective as to the property in North Dakota, as the laws of that State do not give the widow any right of election, and her only remedy is to contest the validity of the will. Laws of North Dakota 1915, p. 370, chap. 249. Dower is abolished in North Dakota. Revised Code N. Dakota, 1905, § 5188. No right of election is given the widow by the statutes of that State. Rev. Code, 1905, North Dakota, § 5087. The alienation and descent of real estate is governed by the *lex loci rei sitae.* 29 Ark. 418. But under the laws of Arkansas the widow has the right to contest the will in this State. A will executed by a resident of another State may be probated and contested in the State of the domicile of the testator and is conclusive when so probated upon all parties in North Dakota, and when the courts of Arkansas determine the validity of the will of a resident of this State disposing of lands in North Dakota the descent of those lands is governed by the laws of North Dakota. Rev. Code. of N. Dak. 1905, §§ 5097-8, 8037, 5097. 34 Mont. 96; 9 A. & E. Ann. Cas. 414; 23 A. & E. Enc. Law (2 ed.), 143; 56 Vt. 565; 79 Mass. 330; 115 Am. St. 510-18-22; 51 Am. St. 503; Kirby's Dig., § 8051; Acts 1909, 956; 64 Ark. 349. The probate of the will in this State will be conclusive on all parties in North Dakota, and if appellant is denied the right to contest the will in Arkansas all her rights in the North Dakota property will be swept away and she is without any remedy. The court erred in holding that appellant was not entitled to contest the will.

McGill & McGill and *Fowler & Green,* for appellees.

1. Appellant did not have the right to take and prosecute, nor the court jurisdiction to hear and determine, the appeal from the probate court, so far as it affects the property in North Dakota. 117 Ark. 142; 77 N. W. 575; 146 N. W. 336; 29 Pac. 298; 17 W. Va. 683; 121 S. W. 641; 89 N. E. 314; 15 Atl. 218. See also 31 Pac. 976; 87 Ark. 206; 75 N. E. 530; 22 *Id.* 599; 32 Atl. 1040; 152 S. W. 340.

So far as the Arkansas real estate and personal property is concerned, appellant had no right to appeal.

2. As to the North Dakota real estate, there was no error when the court held that it had no jurisdiction to adjudge the validity of the will as to such lands. Ann. Cas. 1918 A, p. 933, and note, p. 939; 12 C. J. 963; 38 Ark. 487; 72 N. E. 1058; 87 *Id.* 860; 193 S. W. 283; 93 *Id.* 145; 22 Am. Dec. 41. The lower court had no jurisdiction of the subject-matter. 29 Ark. 418; 47 *Id.* 254; 47 Ark. 254; 1 S. W. 243, is directly in point. See, also, 17 N. W. 289; 17 Ala. 286; 10 Wheat 192; 109 U. S. 608; 1 L. R. A. (N. S.), 996; 34 S. W. 209; 165 U. S. 566; 178 *Id.* 186; 72 Atl. 290; 14 Cyc. 21. The *lex loci rei sitæ* governs. 14 Cyc. 21; 147 S. W. 774; 48 Tex. 147; 122 N. W. 843; 100 Pac. 198; 121 S. W. 641; 247 Ill. 243; 93 N. E. 145; 215 U. S. 1. The courts of one State have no jurisdiction to adjudge the validity of a deed or will of lands in another State. 141 U. S. 87; 39 So. 351; 148 S. W. 868; 44 *Id.* 682. Appellant was not entitled to maintain her appeal, and the court did not err in dismissing it.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Benton County dismissing appellant's appeal to that court from a judgment of the Benton County Probate Court admitting the last will and testament of Thomas Robertson, deceased, to probate in common form.

In December, 1916, deceased became a resident and citizen of Sulphur Springs, Arkansas. For more than 25 years prior to that time, he had resided in Griggs County, North Dakota. In December, 1917, he married appellant at Sulphur Springs. He owned an estate of the approximate value of $50,000, about one-half of which was situated in this State and the other half in the State of North Dakota. The estate consisted of both real and personal property. While temporarily at Mound Valley, Kansas, taking medical treatment for cancer, he executed a will in which he bequeathed a small portion of

the property in Arkansas to his wife, appellant herein, and the residue of his estate to appellees, William Robertson, a brother, and Ruby Tower and Mary Cohun, nieces. He died on June 27, 1919, leaving him surviving appellant, who is his widow, and appellees, his collateral heirs. He left no children, father or mother, surviving him. On the 28th day of July, 1919, appellees presented the last will and testament of deceased to the probate court without citation to appellant, which will was admitted to probate in common form. On October 4, 1919, appellant filed her renunciation of the will and her election to take under the law. On the same day, she made herself a party to the probate proceedings and took an appeal to the circuit court, from the judgment admitting the will to probate by filing an affidavit for appeal, in which she set up that the will was induced through undue influence by appellees, and, at the time of the execution thereof, the testator was mentally incapacitated to execute a will. In the circuit court appellees filed a demurrer to appellant's affidavit for appeal and a motion to dismiss the appeal upon the ground that appellant, the widow of the deceased, had no right to contest the will in this State. The circuit court sustained the demurrer and granted the motion to dismiss, and the judgment of dismissal is challenged by this appeal. The question of whether a widow can contest the last will and testament of her deceased husband in this State is settled in the negative by statute. Section 2712 of Kirby's Digest is as follows: "In cases of provision made by will for widows, in lieu of dower, such widow shall have her election to accept the same or be endowed of the lands and personal property of which her husband died seized." Under this section, the widow, by renunciation of the will, would reap the same benefit as to real estate located in this State and personal property wherever situate, as if she successfully contested the will. *Jameson* v. *Jameson,* 117 Ark. 142. Having renounced under the will, she is no longer an interested or

aggrieved party with reference to real estate situated in this State and personal property wherever situate. The construction placed upon this statute is supported by the following authorities: *In re Fallon* (Ia.), 77 N. W. 575; *In re Smith* (Ia.), 146 N. W. 836; *McMasters* v. *Blair,* 29 Pa. St. 298; *McMechen* v. *McMechen,* 17 W. Va. 683; *Thompson* v. *Thompson* (Ky.), 121 S. W. 641.

It is insisted, because lands situated in North Dakota are devised to collateral kindred, which, but for the will, appellant would inherit, that she is an interested or aggrieved party and has a right to contest the will in the State of Arkansas. The right to contest a will is not an inherent or constitutional right. Such a right is purely statutory, and does not exist independently of statutory authority. No such authority is given the widow of a deceased testator in this State. In the statute cited above, no exception was made permitting a widow to contest the will in case it devised property situated in another State. The laws of each State govern with reference to descent, tenure and transfer of real estate situated therein. In reference to real estate, a local statute has no extra-territorial force. It was said in the case of *DeVaughan* v. *Hutchinson,* 165 U. S. 566, that "It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer and for the effect and construction of wills and other conveyances." In support of the doctrine thus announced, see *Apperson* v. *Bolton,* 29 Ark. 418; *Williams* v. *Nichols,* 47 Ark. 254; *Varner* v. *Bevil,* 17 Ala. 286; *Van Steenwyck* v. *Washburn* (Wis.), 17 N. W. 289; *Carpenter* v. *Bell* (Tenn.), 34 S. W. 209; *Clarke* v. *Clarke,* 178 U. S. 186; 14 Cyc. 21; *Hines* v. *Hines* (Mo.), 147 S. W. 774. The question therefore of the validity or the invalidity of the will in question, as it affects the North Dakota land, must be governed by the North Dakota law. It is an open question in North Dakota as to whether a foreign will may be contested when presented

for probate in that State. The only remedy, if any available to appellant in relation to real estate situated in North Dakota and devised by the will, must be found in the laws of that State.

No error appearing, the decree is affirmed.

HOME LIFE & ACCIDENT COMPANY v. COMPTON.

Opinion delivered June 21, 1920.

INSURANCE—DELIVERY OF POLICY.—Under a clause in a policy of life insurance providing that the policy should not take effect until the policy should have been actually delivered to the insured, a delivery to insured's wife according to his directions was a delivery to him; the test of delivery being whether it passed intentionally out of the control or dominion of the insurer or its agents into the control or dominion of the insured.

Appeal from Independence Circuit Court; *Dene H. Coleman,* Judge; affirmed.

T. D. Wynne, for appellant.

The policy was never delivered to the insured while he was living, and the court erred in refusing to direct a verdict.

S. M. Bone, for appellee.

The delivery of the policy by Carter to the wife of the insured was a delivery of the policy, and the judgment is right. 52 S. W. 959; 85 Ark. 169. The manual possession of a policy of life insurance by the insured or some one for him makes a *prima facie* case. 66 Ark. 612; 87 *Id.* 70. The cases cited by appellant are not in point. The policy was delivered to insured's wife as he was directed to do. The insured was in good health when the policy was so delivered. Every condition has been met so as to establish liability on the contract of insurance.

HUMPHREYS, J. Appellee instituted suit against appellant in the Independence Circuit Court to recover $2,000, as beneficiary of a policy of life insurance issued

by appellant on the life of her husband, Thos. S. Compton, Jr.

Appellee filed answer, pleading nonliability on the alleged ground that the policy was not delivered to the insured during his lifetime and while in good health, and, for that reason, under the terms of the policy, was an incomplete contract.

The cause was heard upon the pleadings and evidence, at the conclusion of which each party requested a peremptory instruction in his favor. The court refused the request of appellant and granted the request of appellee. In response to the peremptory instruction in favor of appellee, the jury returned a verdict against appellant in the sum of $2,000. The court thereupon assessed a penalty of twelve per cent. on the face of the judgment, $250 attorney's fee, and rendered judgment against appellant for $2,490, from which judgment, an appeal has been duly prosecuted to this court.

The facts necessary to a determination of the only question presented by this appeal are as follows: In the month of August, 1918, Thos. S. Compton, Jr., the then husband of appellee, applied for two life insurance policies of $2,500 each, in appellant's life insurance company. On account of having entered the military service during the war between the United States and Germany, appellant company issued a policy for only $2,000 and mailed same, on the 4th day of October, 1918, to its agent, R. M. Carter, at Batesville, Arkansas, for delivery and collection of the first premium. The policy contained the following clause: "This policy shall not take effect until the first premium shall have been actually paid and the policy actually delivered to the insured during his lifetime and good health of the insured." In the interim between the application and the issuance of the policy the insured, Thos. S. Compton, Jr., directed the agent to deliver the policy, when it came, to his wife, the beneficiary therein, for him. When the policy arrived, the insured was at Camp Mayberry, Austin, Texas. The

policy was received by the agent on the 5th day of October, 1918, and, on the same day, delivered by him to Susie Compton, wife of the said Thos. S. Compton, Jr. At the time the agent delivered the policy, he collected the first year's premium and accounted to appellant company for the amount due it. The insured, Thos. S. Compton, Jr., was in good health at the time the policy was delivered, but on the 13th of the month, died of influenza at said camp. His body was shipped back to Batesville and interred. Proof of his death was made to appellant company in accordance with the requirement of the policy and payment was refused on the ground that the policy was not delivered in person to the insured in his lifetime.

Appellant contends that the contract was incomplete and not binding on it, because the policy was not actually delivered to the insured. In other words, the contention is made that the delivery of the policy to the wife of Thos. S. Compton, Jr., in keeping with his instruction so to do, was not a delivery to him within the meaning of the delivery clause in the policy. The test of an actual delivery of an insurance policy by the insurer, or its agent, to the insured is not whether it was deposited with the insured, but whether it passed intentionally out of the control or dominion of the insurer, or its agents, into the control or dominion of the insured. It is not an essential to actual delivery that there be a manual delivery to the insured. A delivery to a third person, designated by the insured, is, to all intents and purposes, a delivery to the insured. 14 R. C. L. 898; *National Life Assn.* v. *Spear,* 111 Ark. 173; *Mo. State Life Ins. Co.* v. *Burton,* 129 Ark. 137. In the two Arkansas cases, *supra,* the court held, under the facts of each, there had been no delivery of the policies. In those cases, the companies and their agents had not parted with the control or dominion over the policies; but the doctrine was clearly announced in the case of *National Life Assn.* v. *Spear,* and clearly inferable in *Mo. State Life Ins. Co.* v.

Burton, that if an insurance company had intentionally parted with the control of and dominion over the policies, such act would amount to a delivery of the policies within the meaning of clauses similar to the delivery clause in the policy involved in the instant case.

No error appearing, the judgment is affirmed.

HETTLE v. STATE.

Opinion delivered June 21, 1920.

1. INDICTMENT AND INFORMATION—SECOND OFFENSE.—Since under Kirby's Dig., § 1810, the offense of illegal cohabitation is a graded crime, and the fact whether it is a first, second or third offense is an element in the punishment thereof, an indictment which fails to charge a prior conviction will not sustain a conviction as for a second offense.
2. INDICTMENT AND INFORMATION—PERSONS NAMED.—An indictment for illegal cohabitation which properly named the two accused persons in the caption of the indictment, and in the charging part referred to their names as set out in the caption, and in the latter part of the indictment referred to them by name as the persons indicted, *held* sufficient.
3. CRIMINAL LAW—EVIDENCE—FORMER CONVICTION.—In a prosecution for illegal cohabitation, where defendants had been previously convicted for the same offense, the admission of evidence of illegal cohabitation prior to such conviction was erroneous and prejudicial where it was undisputed that since the prior conviction defendants had never slept in the same house.
4. CRIMINAL LAW—EVIDENCE OF LIKE OFFENSES BEFORE FORMER CONVICTION.—In a prosecution for illegal cohabitation where evidence tended to show that defendants committed such offense after their former conviction therefor, evidence of like offenses committed by them before their former conviction was admissible in corroboration, but for such purpose only.

Appeal from Clay Circuit Court; *R. E. L. Johnson,* Judge; reversed.

J. M. Burrow, for appellants.

1. The court erred in overruling the demurrer to the indictment because it failed to charge a second offense. Kirby's Digest, § 1810.

2. The court erred in refusing instructions 1 and 2, asked by defendants; also in refusing 3 and 4. Defendants had also once been convicted of the same offense, and his plea of former conviction should have been sustained.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. The demurrer was properly overruled. It is not necessary to the validity of an indictment for illegal cohabitation that it should specify whether the prosecution was the first or second offense. 22 Ark. 323.

2. The indictment is good when in the caption the name is correct, but incorrect in the formal commencement of the indictment. 35 Ark. 384.

3. There is no bill of exceptions as it was not filed in time. 80 Ark. 410.

HUMPHREYS, J. Appellants were indicted in the Clay County Circuit Court, Western District, for the crime of illegal cohabitation, in the following form.

"State of Arkansas
v. No. 1223
Alford Hettle and Alphia Hall.
Western District of Clay County, June term, 1919.

"The grand jury in and for the district, county and State aforesaid, in the name and by the authority of the State of Arkansas, accuse the persons named in the caption hereof as defendants of the crime of illegal cohabitation, committed as follows, towit:

"On the first day of May, 1919, in the district, county and State aforesaid, the persons named in the caption hereof did unlawfully, knowingly and wilfully live and cohabit together as husband and wife, without being married to each other, he the said Alf Hettle, being a male person, and she, said Alphia Hall, being a female person over the age of sixteen years, against the peace and dignity of the State of Arkansas.

"T. W. Davis, Prosecuting Attorney for the Second Judicial District.

"Indictment No. 8."

The sufficiency of the indictment was attacked by demurrer upon the following grounds:

1. That the said indictment does not state facts sufficient to constitute an offense.

2. That said indictment does not charge any one in the body of the indictment of having committed an offense.

Over the objection and exception of appellants, the demurrer was overruled, and the cause was submitted to a jury upon the instructions of the court and evidence adduced. The jury returned the following verdicts:

"We, the jury, find the defendant Alphia Hall guilty of first offense and fix her punishment at a fine of $20.

"We, the jury, find the defendant Alford Hettle guilty of second offense and fix his punishment at a fine of $100 and at imprisonment in the county jail for a period of six months."

Judgments were rendered in accordance with the verdicts, from which judgments, an appeal has been duly prosecuted to this court under proper proceedings.

It is insisted that the court erred in overruling the demurrer to the indictment, because it failed to charge a second offense. Under section 1810 of Kirby's Digest, the punishment for illegal cohabitation is graded, according to first, second and third offenses. For the first offense, offenders may be fined in a sum not less than $20 nor more than $100; for a second offense, not less than $100 and imprisonment in the county jail not exceeding twelve months; and for a third offense, or any subsequent offense, by imprisonment in the penitentiary for any time for not less than one nor more than three years. Appellants were tried for a second offense under the indictment, which did not specifically charge a second offense. The contention is made by the State's attorney that the essential elements of each offense are the same and that, therefore, the allegations could be no different from a first, second or third offense. We think the

learned attorney in error in this contention. Under section 1810 of Kirby's Digest, the offense of illegal cohabitation is a graded crime, and the fact of whether it was a first, second or third offense is an element in the punishment thereof. This court said in the case of *Kightlinger* v. *State,* 105 Ark. 172, that "every indictment, for whatever offense, must set out all the facts which in law may influence the punishment for the commission thereof." In support of that rule, citation was made to Wharton, Crim. Law, § 1003; Bishop on Stat. Crimes, § 427; 2 Bishop's New Criminal Procedure, § 48, which last citation is as follows: "If the punishment to be inflicted is greater or less, according to the value of the property, the value must be stated in the indictment, because every indictment, for whatever offense, must set out every fact which the law makes an element in the punishment thereof." The rule is also supported by the following authorities: *Neece* v. *State,* 62 Tex. Crim. 496; *State* v. *Paisley,* 36 Mont. 237; *Shifleet* v. *Com.,* 114 Va. 880. The indictment, under the rules stated, was insufficient to sustain a conviction for a second offense.

The contention is also made by appellants that the indictment is fatally defective because no one was charged in the body of the indictment with having committed the offense. Appellants are properly named in the caption of the indictment and are charged in the indictment with having committed the offense, by reference to their names set out in the caption, and, in the latter part of the indictment, are specifically named as the parties against whom the indictment is preferred. We think appellants are properly and sufficiently charged in the indictment with having committed a first offense.

Appellants were convicted in a magistrate's court, on the 28th day of April, 1919, of the crime of illegal cohabitation. The indictment in the instant case was returned on June 12, following, charging them with having committed the same offense on May 1, 1919. Upon the trial, under the indictment, evidence was admitted.

over the objection and exception of appellants, to the effect that they dwelt together in like manner as husband and wife prior and up to April 28, 1919. The evidence tended to show that, after the former conviction, appellant, Alford Hettle, engaged and occupied a room at nights in a neighbor's home, a mile or more from his dwelling, and came back each day to work on his farm. In fact, the undisputed evidence showed that, after the former conviction, they never slept in the same house. Over the objection and exception of appellants, the court instructed the jury as follows: "Therefore, if you find from the evidence in this case, beyond a reasonable doubt, that the defendants, Alf Hettle and Alphia Hall, he being a male person and she being a female person over the age of sixteen years, did on the first day of May, 1919, or at any time within twelve months next before the 12th day of June, 1919, unlawfully and wilfully live and cohabit as husband and wife, without being married to each other and in the Western District of Clay County, Arkansas, then it will be your duty to convict them."

This was prejudicial error, so confessed by the Attorney General, for, under it, the jury was authorized to convict appellants for the crime of illegal cohabitation committed prior to their former conviction. Had the evidence tended to show that appellants committed the offense of illegal cohabitation after their former conviction, it would have been proper to admit evidence of like offenses occurring before their former conviction in corroboration, but for such purpose only. *Adams* v. *State,* 78 Ark. 16.

For the error in giving the aforesaid instruction and in refusing to give the converse thereof, requested by appellants, the judgment is reversed and the cause remanded for a new trial.

SMITH v. J. M. TAYLOR & COMPANY.

Opinion delivered June 21, 1920.

1. PAYMENT—BURDEN OF PROOF.—A defendant who asserts that he paid a duebill to plaintiff has the burden of proving such payment.
2. APPEAL AND ERROR—MATTERS NOT BROUGHT INTO RECORD—PRESUMPTION.—In a suit for an accounting, where the decree recited that, upon presentation of defendant's books in open court, it was adjudged that a certain sum was due, and the books were not brought into the record by bill of exceptions or otherwise, it will be presumed on appeal that they sustained the decree.
3. FRAUDS, STATUTE OF—ORIGINAL OBLIGATION.—An undertaking by mortgagee to become liable for all supplies furnished to the mortgagor or his hands is an original obligation and not within the statute of frauds.

Appeal from Cross Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

A. R. Bond, for appellant; *Killough, Lines & Killough,* of counsel.

The relation between appellee and appellant was one of trust, and appellee should be held to strict accountabiltiy. There is much lacking in the testimony of appellee, and his statements are not corroborated by the record evidence. Each allegation and contention of appellant is corroborated by facts and circumstances, and the finding of the chancellor is against the preponderance of the evidence. In stating the account the court erred in disallowing him (appellant) $400 "and interest on alleged loan in allowing appellee a large sum in excess of $127 for merchandise in 1917 and in allowing appellee $317.90 and interest for merchandise furnished R. H. Murray and $51.95 and interest for merchandise furnished A. C. Chapman. Judgment should be entered here for $335 and costs.

J. C. Brookfield, for appellee.

None of the contentions of appellant are sustained by the evidence. The accounts of the tenants charged to appellants are not within the statute of frauds. The debts of the tenants were original allegations and

charged properly to appellant and not within the statute of frauds. 20 Cyc. 160. Appellee paid the rent decree as the receipt shows. The evidence shows, as do the books in open court, that the decree is correct.

HUMPHREYS, J. Appellant, a negro farmer, instituted suit against appellee, a supply merchant, for an accounting growing out of transactions between them for the years 1916, 1917 and 1918, and for judgment in the sum of $1,400.

Appellee filed answer, denying any indebtedness on account of transactions between them, and, by way of cross-complaint, alleging that appellant was indebted to his supply store in the sum of $590.60, with interest thereon from October 25, 1918, after giving appellant credit for all amounts paid in cash or cotton; that, to secure advances made to appellant and his hands in 1917 and 1918, appellant executed two notes, secured by mortgages upon certain chattels and crops being raised by appellant, the first note and mortgage being executed on June 30, 1917, and due November 15, 1917, and the second note and mortgage upon May 25, 1918, due and payable in six months thereafter, both notes bearing interest at the rate of 10 per cent. per annum from their respective dates. The cross-bill contained a prayer for foreclosure in the total sum of $590.60, the alleged balance due on open account for advances made by appellee to appellant and his hands.

Appellant pleaded the statute of frauds as a defense to appellee's claim for merchandise furnished his hands.

The cause was submitted upon the pleadings, evidence and exhibits thereto, from which the court found that appellant was indebted to appellee in the sum of $590.60, and upon which finding a judgment and decree of foreclosure against the property were rendered. From the judgment and decree an appeal has been duly prosecuted to this court.

Appellant contends that in stating the account the trial court erred, first, in disallowing him $400 and in-

terest, an alleged loan; second, in allowing appellee a large sum in excess of $127 for merchandise in 1917; third, in allowing appellee $317.90 and interest on account of merchandise furnished R. H. Murray, and $51.95 and interest for merchandise furnished A. C. Chapman.

(1) Appellant testified that he loaned appellee $400 on December 19, 1916, for a short time and took the following duebill as evidence of the indebtedness:

"Parkin, Ark.

"In account with J. M. Taylor Co.

"I have borrowed $400 from Walter Smith for two weeks.

J. M. Taylor. 12/19. 16;"

that he gave appellee a check on the Parkin Home Bank for the amount; that he deposited the duebill with the bank in order for appellee to pay it if he desired to do so, as well as for safe-keeping, where it remained, without being presented for payment, until February or March, 1919, at which time it was returned to him on request; that appellee never repaid, and still owes, the amount to him. On the 20th day of December, 1916, appellant's account with the bank was charged with $400.

Appellee testified that he bought some cotton from appellant and owed him $400; that, on account of the bank being closed, appellant did not want a check and asked for a duebill, which he gave him; that he paid the duebill and took a receipt, as appellant did not have it with him at the time he paid it; that he wrote the receipt and appellant signed it. The receipt is as follows:

"Received of J. M. Taylor for duebill dated 12/19/16 paid in full. 12/28/16. Walter Smith."

Appellant testified that he signed the receipt when he signed the first note and mortgage, without knowing its contents or that he was signing a receipt.

The point of difference as to whether the duebill evidenced money loaned or cotton sold is really immaterial further than to show who had the better memory. Both testified that it represented a *bona fide* indebtedness. The all-important question is whether it was paid.

The burden, of course, was upon appellee to establish the payment. The receipt strongly corroborates the testimony of appellee on this point, unless obtained through deceit or fraud. There is nothing in the evidence to indicate fraud or deceit. Appellant could read and was negligent unless he did so. The other papers signed by him did not bear the same date of the receipt. Neither he nor the bank, with whom the duebill was left, ever presented it for payment. We think appellee met the burden. The testimony preponderates in favor of payment.

(2) Appellant testified positively that he only purchased merchandise to the amount of $127 from appellee in 1917; that the items in excess of that amount were items purchased in 1916, for which he had settled.

Appellee testified to the correctness of the items from a statement made up from the books, and agreed to produce the books in open court for the inspection of the court and parties, including the book in which the running account for 1916 was entered, so that it might appear whether the items charged in 1916 and paid for were carried into the 1917 account. Appellee admitted that appellant had paid the running account of 1916 in full.

The contention of appellant on this point is that, had the book of 1916 been produced, it would have disclosed that items purchased in 1916, and paid for, had been carried forward and entered as purchases in 1917. This contention is met and fully answered by the recital in the decree that "upon presentation of defendant's books in open court, it is found and adjudged that the amount due, secured by said mortgages and notes, is the sum of $590.60." The books not having been brought into the record by bill of exceptions or otherwise, and this evidence not being before us, we must presume that it sustained the finding and decree of the court.

(3) The evidence disclosed that R. H. Murray and A. C. Chapman were appellant's hands; that, during the

year 1917, R. H. Murray obtained merchandise of the value of $317.90, and A. C. Chapman of the value of $51.95, from appellee, which accounts were carried on the books as accounts against R. H. Murray and A. C. Chapman; that the mortgages, which were given to secure advancements, contained the stipulation that appellee was to furnish supplies to appellant and his hands. These clauses in the mortgages constituted the undertakings original obligations, and therefore not within the statute of frauds.

No error appearing, the decree is affirmed.

GILLIAM v. PEEBLES.

Opinion delivered June 28, 1920.

1. APPEAL AND ERROR—CHANCELLOR'S FINDING.—A chancellor's finding of facts will be accepted as correct where there was a sharp conflict in the testimony, and the only testimony bearing on this issue was that of the two parties themselves.
2. USURY—INTENT TO PAY EXCESSIVE INTEREST.—If an amount was added to a note by mistake, without any intention on the part of either of the parties to charge or pay usury, it would not constitute usury.
3. MORTGAGES—FORM OF INSTRUMENT.—Where the evidence clearly shows that an instrument was intended to secure a debt, it will be held to be a mortgage, regardless of its particular form.

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

Avery M. Blount, for appellant.

The contract was usurious. The deed was an equitable mortgage but tainted and void for usury. 47 Ark. 287; 36 *Id.* 252; 51 S. W. 460; 32 Ark. 346; 41 *Id.* 331.

John D. DeBois, for appellee.

The court properly held that there was no usury as the evidence shows there was none. The burden was on him who pleads usury to prove it. The excess of $100 in

the note was $50 to cover taxes and improvement assessments and the other $50 was added by mistake of the attorney who prepared the deed. Under the circumstances and proof there was no usury. 91 Ark. 461; 83 *Id.* 31; 54 *Id.* 566; 86 *Id.* 25; 87 *Id.* 526. Usury is never inferred; it must be proved. 107 Ark. 10. The burden was on him who pleads usury to prove it. 105 Ark. 653; 74 *Id.* 241; 91 *Id.* 458.

Where there is no option given to purchase land within a fixed time, time to close under said option is material. 82 Ark. 573. Where the option is limited to a specific and definite time, it is necessary that the option be exercised before the option expires or it is lost. 82 Ark. 582. The time specified for the performance is of the essence of the contract, and the party holding the option must show performance. 103 Ark. 575, 580-1; 82 *Id.* 582-3.

The findings of the chancellor that the deed was an equitable mortgage and that there was no usury are sustained by the evidence.

McCULLOCH, C. J. Appellant owned a certain lot or tract of real estate in Searcy, White County, Arkansas, and on September 8, 1917, she mortgaged it to appellee to secure a note in the sum of $485, bearing interest at the rate of ten per cent. per annum from date until paid, executed in evidence of a debt to appellee for borrowed money. The debt was not paid, and on January 10, 1919, there was an unpaid balance of $449.25 on the debt. Appellant applied to appellee for an additional loan of $400, which appellee agreed to make to her, and did make, which increased the debt to $849.25. On that date appellant executed to appellee a deed of conveyance covering the same property, which said deed contained the following clause:

"To have and to hold the same unto the said Neal Peebles and unto his heirs and assigns forever, with all appurtenances and improvements thereto belonging, provided, however, that if said grantor pays to said grantee

on the first day of March, 1919, the sum of one hundred dollars, and on April 1, 1919, the sum of one hundred dollars, and on May 1, 1919, the sum of one hundred dollars, and on June 1, 1919, the sum of one hundred dollars, all of which said sums shall draw interest from date until paid at the rate of ten per cent. per annum, and shall fully pay off and discharge a certain deed of trust executed by the grantor herein, to the grantee herein, dated September 8, 1917, and recorded in deed of trust record, volume 38, page 630, said deed of trust having been given for the sum of four hundred eighty-five dollars, then this deed is to become null and void, but, should default be made in any of the payments as above stated, at the time either of them become due, then the title to the above described lands shall be vested absolutely in the said Neal Peebles, his heirs and assigns.''

The deed recited a cash consideration of $949.25, and receipt of same was acknowledged in the deed.

Appellant did not pay said sum of money as recited in the conveyance, and appellee, who was the plaintiff below, instituted this action in the chancery court of White County against appellant to confirm his title under the conveyance, or, if the court found that the conveyance was in effect a mortgage, that the same be foreclosed. Appellant pleaded usury and prayed that the conveyance be canceled. On the trial of the cause the court found the issues on the plea of usury in favor of appellee, but also found that the conveyance was intended as a mortgage and decreed a foreclosure for the amount found to be due on the debt of appellant to appellee, including both the original mortgage debt and the amount of the added loan made by appellee at the time of the last conveyance.

It is conceded that the sum recited in the conveyance was $100 in excess of the actual amount due by appellant to appellee, but the contention of appellee, and he so testified in the trial of the cause, was and is that $50 was added to cover the estimated amount of taxes

and improvement taxes which he was to pay on the property and that the other $50 was added by mistake of the attorney who prepared the deed. He testified that this mistake was discovered after appellant had signed the deed and before the parties separated, appellee being a resident of the city of Little Rock and was anxious to return home on a train which was about to leave Searcy at that time, and that, in order to obviate the necessity of rewriting the papers to correct the mistake, it was agreed that he should credit the sum of $50 on the note, and he testified that this credit was later entered on the note. Appellant denied that this mistake occurred, but testified that $50 was added to the note as an additional consideration for the loan in excess of the highest rate of interest.

There was a sharp conflict in the testimony, and the only testimony bearing on this issue was that of the two parties themselves. We can not say that the finding of the chancellor is against the preponderance of the testimony, and we therefore, under well settled rules here in such cases, accept the finding as correct. If the additional amount was added by mistake, without any intention on the part of either of the parties to the transaction to charge and pay excessive interest, then it would not constitute usury. *Garvin* v. *Linton,* 62 Ark. 370; *Jones* v. *Phillips,* 135 Ark. 578; *Tompkins* v. *Vaught,* 138 Ark 262.

Appellee cross-appealed from that part of the decree which declared the conveyance to be a mortgage. It is unnecessary for us to determine what the character of the instrument was on its face, for the reason that the evidence clearly shows that it was intended as a mortgage to secure a pre-existing debt and the debt created at the time of its execution for borrowed money. That being true, it was the duty of a court of equity to carry out the intention of the parties, regardless of the particular form of the instrument.

Our conclusion, therefore, is that the decree is correct in all respects, and the same is affirmed.

WESTERN UNION TELEGRAPH COMPANY v. CITIZENS' BANK OF HARRISON.

Opinion delivered June 28, 1920.

1. TELEGRAPHS AND TELEPHONES—AUTHORITY TO SEND TELEGRAM.—In the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence in a like situation regarding the authority of the person who presents a message for transmission to send it, the exercise by a telegraph company of reasonable care to receive and transmit genuine and authorized messages only does not require it to investigate or ascertain the identity or authority of one who tenders a message for transmission, whether it is in writing, or spoken directly to the operator, or communicated to him by telephone.
2. SAME—BURDEN OF PROOF AS TO FORGED MESSAGE.—In an action against a telegraph company for damages caused by an unauthorized message, plaintiffs, by proving its delivery to them, and their loss resulting from reliance and action upon it without negligence on their part, and that no such message was authorized by the purported sender, establish a *prima facie* case against the telegraph company, and the burden of proof was cast upon it to show that it was not guilty of negligence in the premises.
3. SAME—NEGLIGENCE IN RECEIVING MESSAGE.—Where a telegraph operator had been in the habit of receiving telegraphic messages by telephone, and did receive an unauthorized message in the absence of any suspicious circumstances, it was error not to direct a verdict for the telegraph company.

Appeal from Boone Circuit Court; *J. M. Shinn*, Judge; reversed.

STATEMENT OF FACTS.

The Citizens' Bank of Harrison, Arkansas, and W. S. Pettit, sued the Western Union Telegraph Company for damages caused by its receipt and delivery of an unauthorized message. On September 4, 1917, an attorney went to W. S. Pettit, the cashier of the Citizens' Bank of Harrison, Arkansas, with regard to having the bank sign

a bond to replevin a car load of junk at Crickett, Arkansas. The cashier told the attorney that he would have to have instructions from someone to protect the bank and himself. The attorney replied that he would have the Ozark Savings Bank of Ozark, Missouri, call him up and authorize him to make the bond. Later on in the day someone representing himself to be an official of the Ozark Savings Bank called up the cashier of the Citizens' Bank at Harrison and authorized his bank to sign the bond as surety and agreed to protect it against any loss. The cashier of the Citizens' Bank answered over the telephone that he would require a letter or telegram confirming the authority given over the telephone. On the next day he received a telegraph message signed by the Ozark Savings Bank directing him or his bank to sign the replevin bond and agreeing to protect them against all damages on account thereof. Pettit, at the request of his bank, signed the replevin bond as surety for the plaintiff. On the final hearing of the replevin suit, judgment was rendered against the plaintiff and against Pettit as surety on the replevin bond in the sum of $883.07 with the accrued interest. The Citizens' Bank of Harrison, having requested and authorized Pettit to sign the replevin bond, paid off and discharged the judgment. It turned out that the telegraph message, purporting to have been signed by the Ozark Savings Bank authorizing the Citizens' Bank to sign the replevin bond and agreeing to protect it against costs and damages, was not sent by that bank, but was a forgery.

The operator of the Western Union Telegraph Company during the month of September, 1917, at Ozark, Missouri, was a witness for the defendant. According to his testimony the telegraph message, purporting to have been signed by the Ozark Savings Bank and directed to the Citizens' Bank of Harrison, Arkansas, in which the former bank authorized the latter to sign a certain replevin bond and agreeing to protect it against costs and damages, was in his handwriting. The railroad station

and the telegraph office of the defendant were about a mile from the business section of the town of Ozark, Missouri, in which the Ozark Savings Bank was situated. At that time it was the practice to deliver messages by telephone from the business section of the town to the defendant's telegraph office at the railroad station to be there transmitted by the defendant over its lines to the point of destination. An additional charge of ten cents was made when the message was received at the railroad station over the telephone. It was the practice of the Ozark Savings Bank at that time to send messages over the lines of the defendant by calling up the defendant's office over the telephone and dictating the message to the operator. The operator would write down the dictated message and then send it over the defendant's wire. If the message in question had been sent in any other way it would have been written in the handwriting of some other person than that of the telegraph operator. If the message in question had been delivered by a person at the railroad station to the telegraph operator there would have been a mark on the telegram to indicate that the charges were paid at the station. No such mark was on the telegram in question. The absence of such a mark indicates that the message was not paid for at the railroad station, but the number checking the amount indicates that the message was sent paid, and the absence of the check, or charge mark, indicates that it was sent to the office of the defendant by telephone. The telegraph operator had only been in the service of the company at Ozark since the 7th of July, 1917, and had not become familiar with the voices of any of the officials of the bank who had been accustomed to telephone messages to him. There were no facts or circumstances in connection with the transaction to arouse the suspicion of the operator that the message was not genuine. The operator would not have sent the message if he had believed, or had any reason to believe, that the message was not being sent by the Ozark Savings Bank.

The trial of the case was had on the 16th day of January, 1920, and the operator admitted that he had no distinct personal recollection of the message in question. We quote from the record of the testimony of the telegraph operator the following:

"Q. Mr. Lemmons, I believe you stated on cross-examination that you remember very little in fact about the message?

"A. Yes, sir.

"Q. If there had been any circumstances or any fact calculated to arouse your suspicion at the time, you would have remembered it, would you?

"A. Certainly and would probably have made an investigation of it.

"Q. The party sending the message over the telephone stated it was the Ozark Savings Bank, did he not?

"A. Yes, sir; I would not have signed it there if he had not.

"Q. (*Col. Crump.*) Would you have known that telephone or telegraphic message had been ever sent had you not seen it here at this time?

"A. I doubt it very much.

"*Mr. Hudgins:* We offer the original telegram in evidence."

The jury returned a verdict for the plaintiff, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

Francis R. Stark of New York City and *Rose, Hemingway, Cantrell & Loughborough* and *A. W. Dobyns,* for appellant.

1. The telegraph company was not liable for damages resulting by its delivery of a telegram fraudulently telephoned to its agent in the absence of notice of facts or suspicious circumstances to awaken inquiry or arouse suspicion in the mind of a person of ordinary prudence and intelligence regarding the authority of the party who sends it. All the authorities agree there is no liability, and the court erred in not directing a verdict for defend-

ant. 141 Fed. 522; 61 Ala. 158; 32 Am. Rep. 1; 142 Pac. 156.

Telegraph companies are not insurers of the correctness of messages or of their safe and correct delivery, and are bound to use only ordinary care and diligence. 41 Ark. 79; 50 *Id.* 434; 100 *Id.* 7; 108 *Id.* 8. Under these decisions appellant was not an insurer of the genuineness of the message sued on, and was bound to use only reasonable care. The peremptory instruction should have been given.

George J. Crump, for appellees; *John I. Worthington,* of counsel.

The court properly instructed the jury, the instructions clearly state the law. The jury were properly left to determine whether the agent of the company used ordinary care and prudence in determining whether or not the message was sent by the Ozark Savings Bank or not. If it did not, as the within shows, the judgment is right and should be affirmed. 109 Fed. 377; 132 Ark. 335; 141 *Id.* 533. On the whole case, the question of negligence was properly submitted to the jury, and their verdict is conclusive.

HART, J. (after stating the facts). With regard to the duties of telegraph companies in the case of a forged message, it is generally held that, in the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence in a like situation regarding the authority of the person who presents a message for transmission to send it, the exercise by a telegraph company of reasonable care to receive and transmit genuine and authorized messages only does not require it to investigate or ascertain the identity or authority to send it of the person who tenders a message for transmission, whether it is in writing or spoken directly to the operator, or is communicated to him by telephone. 26 R. C. L., p. 557, § 62. This is conceded to be the law by both

parties, and the court instructed the jury in accordance therewith.

It is insisted, however, by the defendant that, under the evidence given by its operator, the court should have directed a verdict in its favor. On the other hand, the judgment is sought to be upheld on the ground that the burden of proof was upon the defendant, and for that reason the question was properly a jury one, and the court did not err in submitting the issue of defendant's negligence to the jury.

When the plaintiffs proved the delivery of the message, the loss resulting from reliance and action on it, without negligence on their part, they made out a case against the telegraph company, and the burden of proof was cast upon it to show that it was not guilty of negligence in the premises. The reason is that the means of showing that there was no negligence on the part of the telegraph company was within the exclusive possession of the company. To require the plaintiff to show negligence after having made out a *prima facie* case would in many cases enable the company to evade a just liability. *Western Union Tel. Co.* v. *Short,* 53 Ark. 434, and *Little Rock & Fort Smith Tel. Co.* v. *Davis,* 41 Ark. 79.

Under a state of facts in all essential respects similar to the case at bar the United States Circuit Court of Appeals, Eighth Circuit, in *Bank of Havelock* v. *Western Union Tel. Co.,* 141 Fed. Rep. 522, 5 Ann. Cas. 515, held that a verdict was properly directed in favor of the telegraph company. Judge Sanborn in discussing the question said:

"The great purpose of telegraphy is the quick transmission of messages from senders to addressees. In the conduct of this business all other considerations are subordinate. The telephone furnishes the most speedy and convenient means of communicating these messages from the senders to the offices of the telegraph companies, and from these offices to the addressees of the messages. For this reason its use for this purpose has become general

throughout the land. The persons who operate the telephones are not generally the business men or officers of corporations in whom the authority to send the telegrams is vested in the first instance, but young men and women to whom this authority is delegated by parol, frequently through several intermediaries. An inquiry and decision by telegraph operators of the identity and authority of those who speak the messages over the telephone are utterly incompatible with their rapid receipt and transmission, and a new duty to investigate and determine this authority before sending the messages, a duty which would be so deleterious to the prime object of the business of telegraphy, ought not to be imposed without great hesitation. It is true that the use of new inventions often creates new rights and imposes new duties. But the duty was never imposed upon telegraph companies before the use of telephones to ascertain the genuineness of the signatures to written messages, and the authority of those who presented them to direct their transmission, and no reason occurs to us why a duty of this nature should now be imposed upon them in receiving messages by telephone."

It appears from the record in the present case that the telegraph company had its office at the railroad station about one mile from the business section of the town and was in the habit of receiving messages over the telephone from its customers to be transmitted over the wires of the company to the point of destination. The Ozark Savings Bank was one of its customers, and was in the habit of sending messages in that way. When messages were telephoned from the business part of the town in which the Ozark Savings Bank was situated to the Ozark station, an additional charge of ten cents was made. When a message was delivered to the company at the station, a mark was placed on it to indicate the fact, and the absence of such a mark indicated that the message was sent in by telephone to the station. The trial was had in the circuit court nearly two years after the

transaction in question. The operator testified that he did not have much personal recollection about the matter. The original telegram was introduced in evidence and was in the operator's handwriting. This indicated that he had received it over the telephone. The absence of a charge mark from the message also indicated that it was received over the telephone.

It is insisted that this testimony should not be considered as overcoming the *prima facie* case of negligence because the operator had but little personal recollection of the matter. We can not agree with counsel in this contention. It was the duty of the operator to reduce to writing messages sent in over the telephone for transmission by the company. This the operator did in the present case. His duties also required him to put a mark on messages delivered at the station, so that the extra charge of ten cents for telephone transmission would not be made. The absence of such a mark showed that the message had been sent in by telephone and that the ten cents additional should be charged against the sender of the message.

The operator testified that he had only been in the service of the company at Ozark, Missouri, a short time before the message in question was sent and that he was not familiar with the voice of the cashier of the bank or other officer who was in the habit of sending messages over the telephone for transmission over the wires of the telegraph company. The operator stated that, if there had been any circumstance calculated to have aroused his suspicions at the time that the message was not genuine, he would have remembered it and would probably have made an investigation of it. He testified that the party sending the message stated that it was from the Ozark Savings Bank, and that, if he had not done so, he would not have received the message for transmission to the point of destination. This testimony is clear and consistent in itself and shows an entire absence of suspicious facts or circumstances which would require ac-

tion on the part of the telegraph company. While the operator did not recollect in detail the transaction in question, he stated positively that if there had been any suspicious circumstances attending the transaction he would have remembered that fact. This is natural. He could not be expected to carry in his mind all the details relating to the receipt and transmission of every message, but, knowing that it was his duty to investigate any case where the circumstances were calculated to arouse a suspicion that the message was not genuine, he could carry in his mind that he always performed that duty. The question was not whether he made an investigation, but whether anything happened in connection with the transaction that required him to make an investigation. The operator had been in the habit of receiving such messages from the officers of the bank, and, in the absence of suspicious facts or circumstances in connection with the matter, the telegraph company was not guilty of any negligence and was not liable to the plaintiffs. There is nothing in the record to indicate that the message was not genuine. The business of transmitting messages over telephone and telegraph wires is very important, and good faith and diligence in the discharge of the duties of such companies are essential to the interest of the public. Sound public policy, however, forbids any recovery in cases of this sort where there are no facts or circumstances in the record calculated to arouse the suspicion of the operator that the message was not genuine. There is nothing in the case of *Western Union Tel. Co.* v. *Totten,* 141 Fed. 533, that cast any doubt upon the rule laid down. On the other hand, the opinion in that case was also written by Judge Sanborn and was delivered on the same day as the opinion above referred to. In the Totten case Barnes had been in the habit of sending messages to the telegraph company by telephone relative to the business of the bank. The message in question stated that the bank would honor the drafts of Barnes for three cars of stock. The evidence

was conflicting upon the question of whether the bankers were informed by the telegraph company before these messages were sent that Barnes was sending telegrams in the name of the bank. The operator knew that Barnes had been sending messages in the name of the bank about the business of Barnes, but the testimony was conflicting as to whether the bank knew that fact. For that reason the court held that the question of whether or not the operator exercised reasonable care to receive and transmit a genuine message was for the jury.

It follows that the court erred in not directing a verdict for the defendant and for that error the judgment must be reversed and the cause remanded for a new trial.

HUMPHREYS, J. (dissenting). Proof that the telegram was not authorized by the Ozark Savings Bank made a *prima facie* case for appellee. The burden was thereby cast upon appellant to show that the message was received in the due and ordinary course of business, unattended by any fact or circumstance which might have put it on guard or apprised it of the unauthenticity of the telegram. This burden can not be met by surmise or circumstances not leading to a conclusion certain. The witness produced to overcome the burden had no personal recollection of receiving the message, much less the circumstances attending its reception. He surmises that it came to him over the telephone, because in his handwriting and without having a mark on it indicating that it was delivered to him at the station by the sender. For aught that is known, the sender was present and requested the witness to write the message, under circumstances which would have put a prudent man upon notice that something was wrong. The witness may have complied with the request, and, in the hurry, omitted to make the mark on it customarily made on messages received at the office when delivered by the sender in person. The circumstances detailed by the witness do not lead to a definite and certain conclusion that the telegram

was delivered to appellant without attendant circumstances which might have put a prudent business man upon notice that it was a forgery; or that the message was received over the telephone at all. Just as well abolish the rule of *prima facie* case made as to permit it to be swept away by surmises or circumstances not leading to a definite or certain conclusion. It will not do to lay down a rule which will permit one to guess himself out of a liability fixed by legal presumption. In my humble judgment, that is the effect of the rule laid down in this case by the majority.

ROGERS v. WILLIARD.

Opinion delivered June 28, 1920.

1. TORTS—LIABILITY OF WILFUL WRONGDOER.—In the case of a wilful tort the wrongdoer is responsible for the direct and proximate consequences of his act, without regard to his intention to produce the particular injury.
2. DAMAGES—PHYSICAL PAIN FROM FRIGHT.—While there can be no recovery for bodily pain and suffering resulting from fright caused by an unintentionally negligent act if the fright is not accompanied by bodily injury, such damages may be recovered where fright was caused by a wilful wrong, though no bodily injury accompanied the fright.
3. DAMAGES—COMPLAINT MISCARRIAGE ALLEGING CAUSED BY FRIGHT.—A complaint which alleged that defendant wilfully and wantonly engaged in a quarrel with another and flourished a pistol, threatening to shoot the other in plaintiff's presence, when he knew her to be in an advanced stage of pregnancy, thereby frightening plaintiff and causing her to faint and to suffer a miscarriage, *held* to state a cause of action.

Appeal from Sebastian Circuit Court, Fort Smith District; *John Brizzolara,* Judge; reversed.

STATEMENT OF FACTS.

U. S. Rogers and Edna Rogers brought suit against C. S. Williard to recover damages because of the miscarriage of Edna Rogers as the result of the alleged negli-

gence and wrongful acts of the defendant. Their complaint alleges a state of facts substantially as follows:

During the year 1919, U. S. Rogers and Edna Rogers lived on the farm of Edwin McDole and cultivated a part of it as his tenants. C. S. Williard lived on an adjoining farm. On the 22d day of April, 1919, Edna Rogers was about eight months advanced in pregnancy, and her condition was known to the defendant, Williard. On that day Williard unlawfully entered on the premises occupied by U. S. and Edna Rogers, and wilfully and wantonly engaged in a quarrel with Edwin McDole. While in the presence of Edna Rogers and while knowing her condition, Williard wilfully and wantonly and maliciously challenged Edwin McDole to fight and drew and flourished a pistol threatening to shoot McDole. On account of the fright produced by his actions Edna Rogers received such a shock as to cause her to faint and to bring on a threatened miscarriage. She was attended by her physician for a week and suffered mental and physical pain constantly. At the end of the week she gave premature birth to a child, and said child had died in her womb prior to its delivery. Her mental and physical suffering was caused by the wilful, wanton and malicious conduct of Williard by drawing and flourishing his pistol and threatening to fight McDole while a trespasser on the premises and in the presence of Edna Rogers.

The court sustained a demurrer to the complaint and the plaintiffs declined to plead further. Their complaint was dismissed, and from the judgment rendered the plaintiffs have duly prosecuted an appeal to this court.

A. A. McDonald, for appellant.

While this court has held that mere fright unattended by personal injury or other elements of damage will not warrant a recovery. 67 Ark. 23; 84 *Id.* 42; 94 *Id.* 489. Yet the right to recover for bodily pain and suffering resulting from fright caused by a wilful wrong is clearly established in this State. See 66 S. W. 661; 94 Ark. 489; Am. Ann. Cases 1913 E, p. 500; 97 Am. St. 509; 45 L. R.

A. 87; 42 Am. Rep. 388; 97 Am. St. 509; 70 Ark. 136; 66 S. W. 661; 94 Ark. 489; 127 S. W. 707. See also 48 N. Y. App. Div. 572; 12 A. & E. Ann. Cases 745.

Jas. Seaborn Holt, for appellee.

The court properly sustained the demurrer to the complaint. No recovery can be had for damages for bodily pain and suffering resulting from fright unaccomcompanied by physical injury or bodily impact. 69 Ark. 402; 45 So. 675; 15 S. E. 901; 51 N. E. 657; 47 *Id.* 694; 76 *Id.* 792; 85 N. W. 618; 112 S. W. 600; 147 *Id.* 742; 47 N. E. 88; 81 N. W. 335; 9 So. 823; 49 Atl. 450; 45 N. E. 354; 5 S. C. 134; 85 N. E. 499; 23 Atl. 340; 61 *Id.* 1022; 73 *Id.* 4; 25 S. W. 419; 84 Ark. 42; 69 *Id.* 402; 118 *Id.* 153; 8 R. C. L., § 80, p. 525; 151 Pac. 591; 150 Pac. 1926; 148 *Id.* 100; 238 Fed. 14; 12 A. & E. Ann. Cas. 742. Unless this court desires to reverse its former rulings, it should affirm the ruling of the court below.

HART, J. (after stating the facts). The right to recover damages for bodily pain and suffering resulting from fright without actual physical violence has been the subject of frequent adjudications by the courts of last resort of the various States, and the decisions are conflicting and to a great extent confusing.

In the case of the *St. L., I. M. & S. Ry. Co.* v. *Bragg,* 69 Ark. 402, this court held that damages could not be recovered at law for mental pain and anguish unaccompanied by physical injury and caused by unintentional negligence. The court said that where the law allows no recovery for the mental anguish or fright it would seem logically to follow that no recovery could be had for the consequences or results of the fright since such consequences merely show the degree of the fright and the extent of the damages. To sustain the decision, the court cites the cases of *Mitchell* v. *Rochester Railway Co.,* 151 N. Y. 107, 34 L. R. A. 781, and *Spade* v. *Lynn & Boston Rd. Co.,* 168 Mass. 285, 38 L. R. A. 512.

In discussing the first mentioned case in the subsequent case of *Preiser* v. *Wielandt,* 62 N. Y. Supp. 890, the court said that the doctrine there stated applies only to actions based on negligence, and not to cases of wilful tort. The court said that the rule does not include wanton wrong, nor apply to the acts of a trespasser. There the court had under consideration the case of a wilful and violent trespass upon the plaintiff's house. The court said, that the defendants knew the condition of the plaintiff's wife and the risk to her which was involved in their contemplated act. The court further said that if the death of the plaintiff's wife could be clearly and directly traced to the wilful trespass of the defendants, as a natural and necessary consequence which they might or should have reasonably anticipated, the defendants would be liable, even though there was no actual blow struck by them.

The decision in *Mitchell* v. *Rochester Railway Co., supra,* was followed in *Spade* v. *Lynn & Boston Rd. Co., supra,* and the Supreme Court of Massachusetts held that there could be no recovery for bodily injury caused by fright and mental disturbance in a case of unintentional negligence on the part of the defendant. The reason for the rule given was that it would be unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims, which could not successfully be met. Continuing, the court said:

"It is hardly necessary to add that this decision does not reach those classes of action where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard* v. *Lennox,* and *Fillebrown* v. *Hoar,* already cited; *Meagher* v. *Driscoll,* 99

Mass. 281, 96 Am. Dec. 759. In the present case no such considerations entered into the rulings, or were presented by the facts."

In *Drum* v. *Miller* (N. C.), 65 L. R. A. 890, 102 Am. St. Rep. 528, the court distinguishing negligence from wilful torts said:

"In the case of wilful or intentional wrongdoing, we have an act intended to do harm, and harm done by it, and the inference of liability from such an act may seem a plain matter under the general rule of liability, and, assuming that no just cause of exception to it is present, 'it is clear law that the wrongdoer is liable to make good the consequences, and it is likewise obvious to common sense that he ought to be. He went about to do harm, and, having begun an act of wrongful mischief, he can not stop the risk at his pleasure, nor confine it to the precise objects he laid out, but must abide it fully and to the end.' The principle is commonly expressed in the maxim that a man is presumed to intend the natural consequences of his acts."

It will be observed that in the case of a wilful tort the wrongdoer is responsible for the direct and proximate consequences of his act, without regard to his intention to produce the particular injury. *May* v. *Western Union Tel. Co.* (N. C.), 37 L. R. A. (N. S.) 912, and *Meagher* v. *Driscoll* (Mass.), 96 Am. Dec. 759. Many other cases sustaining the right to recover for bodily pain and suffering resulting from fright which is caused by wilful wrongdoing may be found in 12 A. & E. Ann. Cas. at p. 744. In his introductory to the case note at page 741 of the same volume, the annotator said:

"In passing upon the question whether damages may be recovered for physical pain and suffering resulting from fright without actual violence, the decisions distinguish between fright caused by a negligent act and fright caused by a wilful wrong. Though the decisions practically agree as to the right to recover when the fright is due to a wilful wrong, there is a difference of

opinion as to the right to recover when the fright is due to negligence merely."

In the case of *Watson* v. *Dilts* (Iowa), 57 L. R. A. 559, 93 Am. St. Rep. 239, the court had under consideration a case where the defendant in the night time wilfully invaded the home of the plaintiff and her husband and held that it was a question for the jury to say, under the circumstances, whether the prostration resulting from the fright so called was not the proximate or probable result of the defendant's act. The court said:

"Proximate cause is probable cause; and the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrongdoer." 1 Thompson on Negligence, 156. It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently, one who voluntarily caused a diseased condition of the latter must anticipate the consequences which follow it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright."

But it is claimed that this rule is contrary to the principles decided in *St. L., I. M. & S. Ry. Co.* v. *Taylor*, 84 Ark. 42. In that case the court held that mental suffering alone, unaccompanied by physical or other evidence of recoverable damages, can not be made the subject of an independent action against a carrier for damages, even where the act or violation of the duty complained of was wilfully committed. There the court did not have under consideration a case where the mental disturbance produced bodily injury, and that case has no

application to the facts in the present record. This is shown by the subsequent case of *C., R. I. & P. Ry. Co.* v. *Moss,* 89 Ark. 187. In that case the court recognized that where there was a connection between the recoverable element and the mental suffering the damages might be recovered for the mental suffering and the bodily injury which resulted therefrom.

Again in the case of *Pierce* v. *St. L., I. M. & So. Ry. Co.,* 94 Ark. 489, the rule laid down in the Taylor and Moss cases was reaffirmed. In none of these cases was the Bragg case referred to, and it is evident that the court did not intend to overrule the case of the *St. L., I. M. & S. Ry. Co.* v. *Bragg,* 69 Ark. 402.

From the views expressed in that case and the cases cited in support of it, while it is held that there can be no recovery for bodily pain resulting from fright caused by an unintentional negligent act where the fright is not accompanied by bodily injury, still it is inferable from that case and cases cited in the decision that the right to recover for bodily pain and suffering resulting from fright which is caused by a wilful wrong may be regarded as established in this State.

Therefore, under the allegations of the complaint, the court erred in sustaining the demurrer, and for that error the judgment must be reversed and the cause remanded for a new trial.

PRIOR *v.* NEWSOM.

Opinion delivered June 28, 1920.

1. GIFTS—PAROL GIFT OF LAND.—There can be no valid parol gift of land in the absence of a present conveyance; that is, a conveyance made with the intention that it take effect at once and not at a future time; and hence where one married an owner of land and took possession under a verbal agreement that he should acquire title at his wife's death, there was no perfected gift.
2. GIFTS—AGREEMENT TO CREATE RIGHT OF SURVIVORSHIP.—An agreement to create a right of survivorship in land is not a gift because the present right of possession and the possession do not pass thereby.

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

Bevens & Mundt, for appellant.

The verdict is contrary to the law and the evidence, and the court erred in its instructions to the jury both in giving and refusing instructions. 50 Ark. 340; 82 *Id.* 33; 106 *Id.* 21; 131 *Id.* 335. The proof shows clearly that appellee did not have seven years adverse possession. Adverse possession to constitute title must be exclusive, and there is no exclusive possession by the husband against the wife when both of them are living upon the land. 131 Ark. 335. See also 2 C. J. 120; 1 R. C. L. 201. See also 126 Ala. 381; 89 Okla. 283; 93 Ala. 452; 61 Cal. 109; 215 Ill. 552; 68 Neb. 14; 14 Ore. 280; 179 Pa. St. 89. A parol gift of land to be valid must be a then present gift, and not to take effect *in future.* 20 Cyc. 1211; 82 Ark. 33. The evidence of appellee shows that there was no present transfer of title.

Fink & Dinning, for appellee.

1. Appellant did not plead or refer to the statute of frauds nor object to the introduction of testimony to establish a verbal sale of the property to appellee, and if there was a verbal sale to appellee by Molly Pollard appellant can not recover. There was ample testimony to sustain the finding for appellee.

2. There is no error in the instructions, and the answer of defendant set up two good defenses to the suit: a verbal conveyance and title by adverse possession.

SMITH, J. This litigation involves a twenty-acre tract of land owned by Mary Newsom in her lifetime, and the parties to the litigation are her husband, the appellee, and appellant, who claims to be her nephew and sole heir-at-law. Suit was brought by appellant, who alleged that he was the sole and only heir-at-law of Mary Newsom; and was defended by appellee upon two grounds, first, that he had title to the land by a

parol gift, and, second, that he had title to the land by adverse possession.

The parties are colored people. Appellee testified that he was old and had no children, and that Mary Pollard was old and had no children. That he frequently visited her at her home, and that she told him she had no heirs at all, and in reliance upon this statement they agreed to marry, and did marry, and that he would not have married her had he known that she had any heirs, and he denied that appellant was a nephew of his wife. He further testified that Mary Pollard had allowed the house and the place to get in bad repair, and that the outhouses were also in bad repair; that he repaired the buildings before the wedding at a cost to himself of $225, and that he expended this money under the agreement that the land would be his after the wedding.

We are of the opinion, however, that when the testimony of appellee himself, as well as that offered in his behalf, is considered in its entirety, it fails to show a parol gift. We think it clear that this old couple had the idea that they could marry and by verbal agreement create a right of survivorship in their joint property. Appellee testified that after spending the $225 repairing the place he was married to Mary Pollard in 1909, and that he and his wife lived on the land together until her death in 1912. Taxes for the years 1909, 1910, 1911 and 1912 were paid on the land in the name of Mollie Newsom, she being known both by the names of Mollie and Mary. Since 1912 taxes have been paid in appellee's name.

Appellee had four policies of insurance in different fraternal orders, and it was agreed that his wife should have the benefit of these policies, and that she should have all other property owned by him at the time of his death. In regard to the land, on his cross-examination appellee testified as follows:

"Q. Did you have an agreement with your wife that if you happened to die first that the land would still be hers? A. I had an agreement; I knew it was hers;

I had an agreement with her this way: I belonged to three or four organizations, and I told her if I died why my policies all would go to her; that was the agreement we made about it. Q. I asked you in the event of your death what went with the lands? A. It went to her. Q. You had no children at all you say? A. No, sir. Q. But you have got other kin folks haven't you? A. Yes, sir. Q. Brothers and sisters? A. I got only one brother, half brother. Q. You say you would not have married her if you had known she had any kin folks at all? A. That was the agreement, that she didn't have any. Q. And, in the second place, the agreement was if she died first the land should go to you? A. Yes, sir. Q. And if you died first the land should go to her? A. My policies would go to her. Q. And the land? A. The land was already hers,—because I was her husband." Upon redirect examination he testified as follows: "Q. You made these improvements on the house before you went on the place, didn't you? A. Yes, sir. Q. You made them after the agreement was made that if you did these things the property was to be yours? A. Yes, sir, to be mine. Q. And in the event of her death the property was to be yours throughout your lifetime? A. Yes, sir." And upon his recross-examination he testified as follows: "Q. You say this land was given to you before you were married along in 1908 or 1909? A. Yes, sir. Q. Let me get that clearly. She said that if you died, notwithstanding the fact that she had given it to you, that if you died, the land was to go to her? A. If I died before she died, I considered the land was hers after I died. Q. Now that trade that you made with her was in 1908 or 1909, was it? A. Yes, sir, in 1909." And upon redirect examination he further testified: "Q. You state that you gave your wife the money and she went to the courthouse and paid the taxes? A. Yes, sir. Q. And it was your understanding when the wife dies the husband takes the land? A. Yes, sir, comes into possession. Q. That was the understanding by her and you? A. Yes, sir. Q. But all the land belonged to you

as soon as you made these improvements? A. Yes, sir. Q. But if you died, she as your wife would come into possession of it? A. Yes, sir." And upon recross-examination he further testified: "Q. And it was also your land if your wife died and she didn't have any relatives; the law gave you the land? A. Gave me the land. Q. Because she told you she had no relatives, you thought, as a matter of law, the land descended to you? You thought regardless of anything the land went to you? A. What, after she died? Q. Yes. A. Yes, sir."

A witness named Porter testified that Mary Newsom told him after her marriage that she had no relatives and that she wanted her husband to have the land.

An instruction given to the jury correctly declared the law to be that there could be no valid parol gift unless there was a present conveyance, that is, a conveyance made with the intention that it take effect at once, and not at a future time, and it is insisted that the verdict of the jury under this instruction is conclusive of that question. But, as we have said, we do not think the testimony warranted the submission of that issue to the jury, and does not support the verdict of the jury in appellee's favor. There was a manifest purpose to give appellee this land, but there was no present attempt to effectuate that purpose by surrendering and delivering the possession and passing the title thereof. Appellee did marry Mary Pollard, and did enter upon and take possession of the land, as the jury might have found, but he was not to acquire the title until the death of his wife, and there was, therefore, no perfected gift under which the title could and did pass. *Young* v. *Crawford,* 82 Ark. 33. An agreement to create a right of survivorship is not a gift, because the present right of possession, and the possession, do not pass thereby.

If appellee did not acquire the title to the land as a gift, and we so hold, he could not have acquired title by adverse possession, as this suit was brought within less than five years from the date of the death of his wife.

The court erred in submitting these defenses to the jury and the judgment will, therefore, be reversed and the cause remanded for a new trial.

McEACHERN v. STATE.

Opinion delivered June 28, 1920.

1. CRIMINAL LAW—MOTION FOR NEW TRIAL—ASSIGNMENT OF ERROR.—An assignment of error that a verdict convicting defendant of arson was "against the law and evidence" in the case presents the question of the sufficiency of the testimony, but is not sufficient to raise the question that appellant was discriminated against, in that persons of her color were not allowed to serve as jurors.
2. ARSON—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to support a verdict convicting defendant, a negress, of arson, as against her attempted defense of an alibi.

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

A. W. Spears, for appellant.

The exclusion of all persons of the African race from the grand jury because of race denied appellant of the equal protection of the laws and is in violation of our Constitution. *Carter* v. *Texas,* Adv. Sheets U. S. Rep., p. 690, April 16, 1900; 100 U. S. 303; 103 *Id.* 370-397; 162 *Id.* 565; 16 Sup. Ct. Rep. 904; 109 U. S. 65-7. See, also, 162 U. S. 592; 170 *Id.* 213. The testimony fails to establish the guilt of appellant.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. The jury commissioners testified that they selected the best men obtainable for jury service without discrimination as to race or color, and thus fulfilled the requirements of the constitutional provision. This question has been settled. 100 U. S. 313.

2. The verdict is fully sustained by the evidence and is conclusive.

SMITH, J. Appellant has prosecuted this appeal to reverse a judgment sentencing her to the penitentiary upon a conviction for arson. Appellant is a person of color, and she complains that she was discriminated against on that account in the trial of the cause in the court below, in that no member of her race was permitted to serve upon either the grand jury which indicted her, or upon the petit jury before which she was tried. She also complains that the testimony was not sufficient to support the verdict.

The only error assigned in the motion for a new trial is that "the verdict is against the law and evidence in said case." This assignment of error presents the question of the sufficiency of the testimony, but does not present for review the question of discrimination on account of color.

This court has held in a very large number of cases that where the error complained of does not appear from the face of the record, but is one which can be presented only by bill of exceptions, that the error will be treated as waived unless it is raised in the motion for a new trial; and an assignment that the verdict is against the law and the evidence is not sufficient to raise the question that appellant was discriminated against in that persons of her color were not allowed to serve as jurors. *Deitz* v. *Lensinger,* 77 Ark. 274; *Howcott* v. *Kilbourn,* 44 Ark. 213; *Ferguson* v. *Ehrenberg,* 39 Ark. 420; *Naylor* v. *McNair,* 92 Ark. 345.

Upon the question of the sufficiency of the testimony it may be said that the evidence on the part of the State was to substantially the following effect. Dr. J. W. John owned a tract of land near Pine Bluff, known as the Tuttle place, on which there was a dwelling house, and there were some stacks of hay about three hundred yards from the house. This dwelling house was burned between nine a. m. and noon on a day in August. At the time of the fire title to the property was involved in litigation between appellant and John. Appellant, when arrested, stated that the building belonged to her and

she had the right to do whatever she pleased with it, and that Dr. John was trying to take the property away from her, and that no one who took it from her would have any luck with it. Appellant was seen going toward the house between 8:30 and 9 a. m. on the morning of the fire. Another witness saw appellant on the same morning raise a window and enter the house, and testified that he saw appellant in the house, and saw her start a fire, and that when he returned a few hours later the building had burned, and that the hay was burned the following night.

The defense interposed by appellant was an alibi, and, according to the testimony offered in her behalf she was either in Pine Bluff at the time of the fire, or on the way there. It was conceded by the State that appellant did go to Pine Bluff, but the testimony is conflicting as to the time when she went, and the jury has resolved the conflict in the testimony against appellant; and as the testimony offered by the State was legally sufficient to support the verdict, it follows that the judgment must be affirmed, and it is so ordered.

McLAIN v. SHORT.

Opinion delivered June 28, 1920.

1. GUARDIAN AND WARD—PERSONS WHO MAY BE APPOINTED.—Other things being equal, the next of kin, rather than strangers, are preferred as guardians of children.
2. GUARDIAN AND WARD—NEXT OF KIN PREFERRED.—It was error to appoint a stranger guardian of a child when his grandfather was an applicant and was not shown to be an unsuitable person.

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

C. E. Elmore and *Oscar E. Ellis,* for appellant.

It having been determined by the court trying the case that the only grounds of objection to appellant to be appointed guardian was tuberculosis and the evidence having utterly failed to sustain that issue, and appellant

being competent and of blood kin to the orphans and appellee being of no kin but a stranger by blood, the court erred in refusing to appoint appellant guardian of the orphans. 18 Ark. 600; 22 *Id.* 368; 92 Iowa 202; Woerner on Guardianship, § 32; 10 Sm. & M. (Miss.), 624; Hopkins, Chy., 226; 44 Ga. 485; 63 Mich. 319; 14 *Id.* 249; 45 Atl. 980; 2 N. J. Eq. 78; 146 Pa. St. 585; 2 Atl. 315; 25 Miss. 290; 9 A. & E. Enc. L. 92.

HUMPHREYS, J. On the 17th day of June, 1918, appellant, the paternal grandfather of William Custer McLain, six years of age, and James Luster McLain, four years of age, filed a petition in the probate court of Fulton County for appointment as guardian of their persons and property. Letters of guardianship were issued to him in vacation, by the clerk, and he qualified as guardian.

At the August, 1918, term of said court, a remonstrance against the confirmation of the appointment of appellant as guardian of said minors, which remonstrance had been filed on July 12, 1918, by Rilda Brewington, the maternal grandmother of said minors, was considered by the court, who refused to confirm the appointment of appellant as guardian, and rejected the letters of guardianship theretofore issued to him by the clerk. From that order, appellant duly prosecuted an appeal to the circuit court. At the same term of the probate court, appellee, a distant relative of the minors, by marriage, on his written application, was appointed guardian of their property and persons by the court. From that order, appellant also duly prosecuted an appeal to the circuit court.

In the circuit court, the causes were consolidated and transferred to the chancery court. During the pendency of the litigation, the temporary custody of the minors was awarded to their maternal grandmother, aforesaid. A decree, rendered in the chancery court, awarding the custody of the children to appellee was reversed by the Supreme Court on the ground that the

chancery court had no jurisdiction of the cause on appeal from the probate court, and the cause was remanded with directions to transfer it to the circuit court. The cause was tried *de novo* in the circuit court, which resulted in an affirmance of the judgment rendered in the probate court. From the judgment of affirmance, an appeal has been duly prosecuted to this court.

The facts developed in the trial are, in substance, as follows: Appellant's son, Preston McLain, was the father of said minors. He died in April, 1915, at his own home, of tuberculosis, contracted while waiting on a neighbor. Soon thereafter, his widow, Betsie McLain, and children went to live with her mother, Rilda Brewington, who owned a small farm and a little personal property. In May, 1918, Betsie McLain also died with tuberculosis. Two married daughters of appellant died with tuberculosis—one away and the other at his home. The one who died at home was there six weeks during her last illness. She was under the treatment of a specialist, and every precaution was used to prevent the spread of the disease. Her sputum was burned twice a day. After her death, the room she occupied, with all of its contents, was thoroughly fumigated with sulphur and formaldehyde. Appellant's immediate family consisted of himself, wife and eight children. The family was regarded as hale and hearty. The services of a physician in the family had only been necessary on two occasions for temporary ailments within the past seven years. Dr. R. S. Spears, of West Plains, Missouri, and Dr. Stewart, Superintendent of the Arkansas Tuberculosis Sanatorium, testified, in response to hypothetical questions relative to the condition and history of appellant's family, that there would be no risk or danger to the health of the children if removed to the home of appellant. Appellant was 51 years of age at the time he gave his testimony, and owned a farm of the value of $8,000, and personal property of the value of $3,500. The children have no property of their own, and it is appellant's purpose to take them into his own home and rear them.

Appellee is no blood kin to the minors. His wife is their distant cousin. He supplied the money to pay the burial expenses of their mother, Betsie McLain. After obtaining letters of guardianship, he left them with their grandmother, where they have been since the death of their father. Appellee visits them on an average of twice a month and has contributed many times toward their support, on account of his friendship for their grandmother. The grandmother looks after the children and has been sending the elder one to school—the younger not being of scholastic age. The judgment of the circuit court contains the recital that there is no evidence that appellant's family has tuberculosis; that appellee is extremely friendly to Rilda Brewington, and, because of said friendship, the court could not say the probate court abused its discretion in appointing appellee as guardian.

We think the circuit court was in error in affirming the action of the probate court. So far as the record discloses, both appellant and appellee are proper and suitable persons to be appointed guardian over said minors. Appellant is of blood kin,—their own grandfather; appellee is of no blood kin, and, save the distant relationship by affinity, is what the law terms a stranger. All other things being equal, the general rule of law is that the next of kin, rather than strangers, are preferred as guardians over children. The rule is well stated by Mr. Woerner on Guardianship. It is as follows: "After the parents the next of kin are preferred as guardians of children under fourteen. * * * The appointment of a stranger, where a relative also applies who is not shown to be unsuitable, is error, which will be reversed on appeal." Section 32.

Viewing the situation from the standpoint of the best interest of the children, the custody should be awarded to the grandfather. He is in the prime of life, able and willing to rear them in his own home. The children are both boys and will not only receive the care of a mother during their tender years, but the advice and

admonition of a father. Should appellant die, they would likely be regarded as a part of the family and find a protector related by consanguinity.

On the other hand, if left with their maternal grandmother, while they will receive the mother care and influence, yet they will grow into boyhood and manhood without the counsel and restraining influence of a father. Should she die, they would be without a home, or protector related by consanguinity.

So, also, their opportunities will be somewhat enlarged if placed in the custody of their grandfather, and limited, to some extent, if left in the custody of their grandmother.

Reading the future in the light of the wisdom of the past, it was to the best interest of the children to confirm the appointment of appellant as guardian, and the probate court should have done so in the exercise of a sound discretion. For the manifest error in not doing so, the judgment of the circuit court is reversed with direction to reverse the action of the probate court and to remand the cause to said court with instruction to appoint appellant as guardian of said orphans.

SMITH, J., dissenting.

BRADLEY v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered June 28, 1920.

1. APPEAL AND ERROR—NECESSITY OF BILL OF EXCEPTIONS.—Where a judgment was rendered for defendant sustaining a demurrer to the complaint, no bill of exceptions was necessary to prosecute an appeal from such judgment, as the errors complained of appear upon the face of the judgment.
2. PLEADING—AMENDMENT.—Where, after a demurrer to the complaint has been sustained and before judgment thereon has been entered, plaintiff (1) asked leave to amend his complaint and (2) that the demurrer be considered as applying to the amended complaint, the fact that his request covered two matters should not prevent the court from granting the first request, even though the second was properly refused.

3. PLEADING—AMENDMENT.—Where a demurrer to the complaint was sustained, and plaintiff two days later and before the judgment was entered asked leave to amend his complaint, it was error to refuse permission to amend though defendant's attorney had gone away.

Appeal from Greene Circuit Court; *R. H. Dudley,* Judge; reversed.

W. W. Bandy, for appellant.

This cause should be reversed (1) because the court erred in refusing to allow appellant to file his amended complaint, and (2) because the complaint states a cause of action. Kirby's Digest, § 6095. The demurrer admits that appellant was in appellee's employ as a section hand under the foremen of the company, and appellee negligently failed to furnish a sufficient number of colaborers so that the required work might be performed with reasonable safety to the employees engaged; that the injuries resulted from such negligence. The demurrer admits this. It was the positive duty of the master to furnish a sufficient number of competent and proper persons to perform the service with safety. 46 Pa. 374-6; 116 U. S. 642; Labatt on Master and Servant, § 204; 82 S. W. 808. The question as to whether a servant comprehends the danger is one for the jury. Labatt on M. & S., §§ 270-1, and note 1; 53 Ark. 117. If the servant did not know the danger, it was the duty of the company to have notified him, and on failure the company was liable. 106 Ark. 25. The servant did not assume the risk of the master's negligence unless the danger is so impending and obvious that an ordinarily prudent person would not undertake the risk, and that is a question for a jury. 102 Ark. 562; 118 *Id.* 49; 77 *Id.* 367. As to whether the employee assumes the risk is one of fact for a jury. 96 Ark. 387; 88 *Id.* 548; 37 N. W. 823-5; Labatt on M. & S., § 205.

Troy Pace and *Gordon Frierson,* for appellee.

No bill of exceptions was filed in the case. The motion for a *nunc pro tunc* order was properly overruled,

as its purpose was not to supply any omission from the record but to make the record speak what plaintiff contends it should have spoken. The motion or application comes squarely within the rule in 87 Ark. 438. This power can never be used to make the record speak what it should have spoken, but what it did not in fact speak. 40 Ark. 224; 78 *Id.* 364; 93 *Id.* 234. This is a collateral attack on a judgment and comes within the rule that a judgment can be collaterally attacked only for want of jurisdiction which must be shown by the record itself. 114 Ark. 551; 105 *Id.* 5; 101 *Id.* 39; Black on Judgm. (2 ed.), § 245.

2. The complaint does not state facts sufficient to constitute a cause of action. 82 S. W. 208; *Stenoog* v. *Ry. Co.,* 25 L. R. A. (N. S.); 11 Negl. Cases Ann. 646. There were no latent dangers in the article or the tools or in the manner of work. 35 Ark. 602; 57 *Id.* 503; 86 *Id.* 289; 91 *Id.* 260; 108 *Id.* 483; 113 Id. 60.

HUMPHREYS, J. Appellant instituted suit against appellee in the Greene Circuit Court, under the provisions of the Federal Employers' Liability Act, to recover damages in the sum of $3,000, on account of injuries to the arches of his feet, occasioned by loading heavy rails for shipment, resulting from the alleged negligent failure of appellee to furnish sufficient hands to perform the work with safety to the employees engaged therein.

The sufficiency of the complaint was challenged by demurrer of appellee.

The court sustained the demurrer over the objection and exception of appellant. About two days thereafter, at the same term of court, appellant asked permission to file an amended complaint and to treat the demurrer as having been filed to it. Attorney for appellee had gone when the request was made. The court denied the request, to which ruling appellant excepted. Prior to the adjournment of court in course, the court entered an order sustaining the demurrer to the original complaint,

in which it was recited that appellant refused to plead further in the action, whereupon the complaint was dismissed, at appellant's cost, to which ruling of the court, the appellant at the time excepted and prayed an appeal to the Supreme Court, which was granted, providing in the order that 120 days was allowed appellant in which to file his bill of exceptions. No bill of exceptions was filed.

On the 11th day of March, at the regular March, 1920, term of court, appellant filed a motion for a *nunc pro tunc* order of the court to correct the judgment entry made at the October term, 1919, of court, so as to show that he offered to file an amended complaint two days after the demurrer was sustained to his original complaint, and before the judgment sustaining the demurrer to the original complaint and dismissal thereof was entered of record, which request was denied over the objection and exceptions of appellant.

The motion for a *nunc pro tunc* order was overruled by the court, to which ruling appellant at the time excepted and prayed an appeal to the Supreme Court, which was granted.

A transcript embracing the proceedings from the inception of the suit was filed in this court on March 26, 1920, within six months from the judgment sustaining the demurrer to and dismissing the original complaint.

It is insisted by appellee that, because no bill of exceptions was filed by appellant within 120 days from the rendition of the original judgment at the October, 1919, term of court, no appeal is, or can be, prosecuted from it; that the only appeal before the court is from the judgment refusing to issue a *nunc pro tunc* order at the March, 1920, term of said court; that, for that reason, the appeal from the judgment refusing to issue a *nunc pro tunc* order is a collateral attack upon the judgment rendered at the 1919 term of said court, and that said latter judgment is not subject to collateral attack. We can not agree with learned counsel for appellee in this contention. No bill of exceptions was necessary in order

to prosecute an appeal from the original judgment. The case went off on demurrer. The errors complained of will appear on the face of the record, if it was error on the part of the court to refuse to enter the *nunc pro tunc* order requested by appellant at the subsequent term of court.

It is insisted by appellant that the court erred in refusing to enter the *nunc pro tunc* order correcting the original judgment so as to show that, before the order was entered sustaining the demurrer to his original complaint, he offered to file an amended complaint, which request was denied over his objection and exception. The request was made only two days after the order was made sustaining the demurrer and at the same term of the court. It is true it was accompanied by a request that the demurrer to the original complaint be treated as a demurrer to the amended complaint. The latter request might easily have been denied and the first granted. The mere fact that the request was a joint one, or covering two matters, did not prevent the court from granting one and refusing the other. The fact that the attorney for appellee had gone was no reason why appellant should be denied the right of filing an amended complaint within so short a time after a demurrer had been sustained to his original complaint. Appellant should have been permitted to file the amended complaint with reasonable opportunity to appellee to plead thereto. The provision for amendments to pleadings, under the statutes of this State, is liberal. It is provided in section 6095 of Kirby's Digest that "If the court sustains the demurrer, the plaintiff may amend, with or without costs, as the court may order." It was said, in the case of *Burke* v. *Snell,* 42 Ark. 57, that "The primary object of the Code is the trial of causes upon their merits, and to that end the provisions for amendments are exceedingly broad and liberal;" and, in the case of *Dickerson* v. *Hamby,* 96 Ark. 163, that "It is a general rule that it is almost a matter of course to permit parties to amend their pleadings upon a demurrer

thereto being sustained and before trial." Treating the amendment of pleadings as a matter within the sound discretion of trial courts, we think the court erred in denying appellant the privilege of filing an amended complaint in the instant case, and in dismissing his complaint after an offer by him to file an amended complaint.

The demurrer also challenges the sufficiency of the original complaint, but we deem it unnecessary to pass upon that, as appellant has requested the privilege of filing an amended complaint.

For the error indicated, the judgment is reversed and the cause remanded with instructions to reinstate the cause, correct the original judgment to reflect the facts, to permit appellant to file an amended complaint, and for further proceedings not inconsistent with this opinion.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY v. ADAMS.

Opinion delivered June 28, 1920.

1. APPEAL AND ERROR—FINDING ON FORMER APPEAL.—Where, on a former appeal, this court held that it was a question for the jury whether plaintiff's intestate was guilty of contributory negligence, and there was no material change in the facts on the second trial, the trial court properly refused to direct a verdict for the defendant on this issue.
2. RAILROADS—DUTY TO SIGNAL—INSTRUCTION.—In an action for the death of plaintiff's intestate alleged to have been caused by the negligence of defendant's trainmen, it was not error to refuse to instruct that if intestate heard the train whistle for the station no other signals were required, since the duty to signal was a continuing one.
3. TRIAL—REPETITION OF INSTRUCTIONS.—It was not error to refuse requested instructions fully covered by instructions given.
4. RAILROADS—DUTY TO LOOK AND LISTEN—INSTRUCTION.—An instruction that it was the duty of a driver of a team, in attempting to cross a railroad track, to look and listen and to ascertain if a train was approaching and otherwise to use ordinary care to prevent his being injured, *held* sufficiently to state the duty to look and listen and to stop for that purpose if necessary.

5. RAILROADS—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE. Proof that plaintiff's intestate, killed in a collision with defendant's train, looked first to the east when if he had first looked to the west he might have seen defendant's train approaching, did not of itself establish contributory negligence where intestate had as much reason to apprehend danger from one direction as from the other.

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

W. F. Evans, W. J. Orr and *Ponder & Gibson,* for appellant.

1. The law of this case is well settled and properly by the former appeal. 206 S. W. 45. A traveler crossing a railroad track must "look and listen." 101 Ark. 321; 117 *Id.* 464; 99 *Id.* 170; 16 S. W. 169. The evidence on the second trial is materially different from that on the first trial.

2. The court erred in its instructions given and refused. 84 Ark. 270. The evidence supported the instructions refused for defendant and it was error to refuse them.

David L. King, for appellee.

1. The law of this case is settled. 136 Ark. 1; 206 S. W. 43. The testimony (set out in full) makes out a complete case for the jury and justifies the verdict. The train was running at excessive speed, and the bell was not rung nor whistle blown as required by law, and negligence is conceded. Billingsley stopped, looked and listened; did his whole duty. 96 Ark. 638; 66 Fed. 502; 124 Ark. 413; 137 *Id.* 217; 97 *Id.* 160; 101 *Id.* 321. The question of due care on Billingsley's part is settled by the jury, as they were properly instructed. 20 Ann. Cases 1200; 124 Ark. 417; 92 N. E. 337.

The instructions are not abstracted, and hence are presumed correct. 121 Ark. 274. But there was no error in them. 11 L. R. A. 364; 74 N. E. 34; R. C. L. 100; Ann. Cases 1913 A, 49; 92 N. E. 337; 44 L. R. A. 815. Correct instructions should have been asked, and, as ap-

pellant did not ask them, it can not complain now. 117 Ark. 579; 97 *Id.* 180; 74 *Id.* 444; 94 *Id.* 6; 120 *Id.* 497. But if error it was not prejudicial. 111 Ark. 550. The evidence shows that Billingsley was guilty of no negligence, and the verdict is very small.

HUMPHREYS, J. Appellee, in her own right and as guardian of Troy L. Billingsley, her minor child, instituted suit against appellant in the Sharp Circuit Court, to recover damages for the death of her husband, caused by a collision, at a public crossing in the town of Hardy, between one of defendant's passenger trains and her husband's team and wagon, which he was driving, through the alleged negligence of appellant's employees in operating the train.

Appellant filed answer, denying negligence in the operation of said train, and alleging that the injury occurred through the contributory negligence of appellee's husband, Louis Billingsley.

On change of venue, the cause was tried in the Eastern District of Lawrence County, which resulted in a directed verdict in favor of appellant and a judgment in conformity thereto, dismissing appellee's complaint.

From that judgment, an appeal was duly prosecuted to this court, under the style of *Billingsley* v. *St. Louis & San Francisco Railway Company*, reported in 136 Ark. 1. On appeal this court ruled that the circuit court erred in holding the undisputed evidence, when viewed in its most favorable light to this appellee, showed that, as a matter of law, the injury and death of her husband resulted from his contributory negligence, reversed the judgment and remanded the cause for a new trial.

Upon remand, the cause was submitted upon the pleadings, evidence and instructions of the court, which resulted in a verdict for appellee in her own behalf in the sum of $750 and in behalf of her minor child for $5,000. A judgment was rendered in accordance with the verdict, from which verdict and judgment an appeal has been duly prosecuted to this court.

On the former appeal, the facts developed on the first trial were elaborately stated. It is insisted that the facts developed upon retrial differed in two material respects from the facts stated by this court in the original appeal.

First. On the former appeal, it was stated that "There was a freight train on the passing track east of the crossing, and the passenger train was coming in from the west." The original evidence justified that inference. The evidence in the instant case makes it clear that the freight train, referred to as standing on the passing track east of the crossing, had moved, before the accident, from the passing track to the extreme west end of the yard with its rear end several hundred yards west of this crossing. Appellants are correct then in saying that the evidence on the former trial and on this trial was different in this respect. There is an element of danger in the direction of the east revealed by the evidence in the instant case more favorable to appellee's cause than the freight train erroneously shown on the former trial to have been standing on the passing track east of the crossing. In the instant case, it developed that about the time Mr. Billingsley approached the crossing where he was killed, a local freight train was expected from the east. In the exercise of ordinary care this would have justified him looking to the east first, to see whether the train was coming from that direction. He was familiar with the schedule time of the trains.

Second. On the former appeal, it was stated the evidence showed the distance to be fourteen feet between the north rail of the commercial track and the north rail of the main line. This statement was a mere clerical error, as shown by the several measurements that formed the sum total of the distance between these points. The statement referred to is as follows: "The distance between the commercial track and the passing track is eight feet, and the distance between the rails is five feet, and there is nine feet between the passing and main track, making a distance of fourteen feet between the

north rail of the commercial track and the north rail of the main track." By adding the several measurements referred to, the total distance would be twenty-seven feet, instead of fourteen feet. The distance between the rails of the commercial track was five feet; likewise, the distance between the rails of the passing track was five feet; the distance between the commercial track and passing track was eight feet; and the distance between the passing track and the main track was nine feet; which, taken together, makes a total of twenty-seven feet, showing that the addition was a mere clerical error. Appellant is therefore not correct in saying that the evidence in the present case in this respect is materially different from the evidence on the former trial.

With the modification suggested as to the absence of the freight train standing on a passing track east of the crossing, and that it was about the schedule time of the local freight train coming from the east, reference is made to the statement of facts in the original appeal as a correct statement of facts in the instant case. Under the modification, we think the facts are a little more favorable to appellee in the instant case than on the former appeal. There being no material change in the facts in the two trials, it can not be said now, any more than then, that the undisputed facts show that Mr. Billingsley, as a matter of law, was guilty of contributory negligence. For the reasons assigned in our original opinion, we adhere to our conclusion that, under the undisputed facts in the case, it was a question for the jury to determine whether or not Mr. Billingsley looked and listened for passing trains as he approached the railroad crossing. It was not error for the court to refuse to direct a verdict in favor of appellant.

Appellant insists that the judgment should be reversed because it was denied the benefit of contributory negligence on the part of Mr. Billingsley as a defense, on account of the instructions given and refused by the court. The action of the court, in refusing to give in-

struction "B" as requested by appellant, is first challenged. Instruction "B" is as follows:

"If you find and believe from all the facts and circumstances in evidence that Mr. Billingsley heard the train whistle for the station, if you find it did so, then no other signals were required to warn him of the approaching of the trains, because signals are intended for those who do not already know that a train is approaching."

This instruction was not a correct declaration of the law. Other signals were required to be given, under the law, announcing the approaching train. This court said, on the former appeal of this case, that the statutory signals were warnings which Billingsley had the right to rely upon in determining whether a train was approaching. The whistling of the train a mile or half-mile from the station was not necessarily sufficient notice to require travelers who heard the whistle to stop to look or listen for a train, or to wait for the train to pass before proceeding on their way. If near the crossing, there might have been ample time, after the whistle sounded a half-mile away, for travelers to pass over and on before a train reached the crossing. Thus the necessity for continuing to give statutory signals as a train approaches a crossing. Again, the question presented in appellant's request "B" was correctly and fully covered by instruction 10 given by the court, which is as follows: "If you believe from the evidence that Mr. Billingsley heard the train or knew it was approaching the crossing and attempted to cross the track ahead of the train without stopping, looking or listening, the plaintiff can not recover."

Instruction 10 is criticised by appellant because it is said the logic of it was to permit Billingsley to excuse his contributory negligence in rushing over the crossing in front of the train, if he knew it was approaching, by first stopping, looking and listening. We do not think the instruction susceptible of that construction or that the jury could have so understood it. We think the only reasonable meaning attributable to the instruction was

that, if Mr. Billingsley was aware of the approaching train, then it was his duty to stop, if necessary, to look or listen, in order to determine whether it was safe to cross ahead of the train.

The action of the court in refusing to give instructions "C" and "D," touching upon the defense of contributory negligence on the part of Billingsley, is also challenged. The first part of instruction "C" carries the same error pointed out in instruction "B." In so far as these instructions correctly declared the law, they were fully covered by instruction 9, given by the court, which is as follows: "Even though you may find that the engineer and fireman failed to sound the whistle or ring the bell as required by law, and that the train approached the crossing and station at a greater rate of speed than usual, still you can not find for the plaintiff if you find that Mr. Billingsley was guilty of any negligence which contributed to his injury and death. It was his duty under the law, upon approaching the crossing, to look and listen for the approach of trains, and if the situation was such that ordinary care required him to stop in order to effectively hear or see the train, to stop his wagon before going on the track, and if you find that he failed to comply with this duty, and such failure contributed to his death, your verdict should be for the defendant."

We think this instruction was a fair and complete declaration of the law on contributory negligence applicable to the facts in the case. Having fully covered the subject, it was not error to refuse to give instructions "C" and "D."

The correctness of instruction No. 2, given by the court, is challenged because it did not tell the jury travelers on highways crossing railroads are required to look and listen for trains and to stop, if necessary, in order to see and hear. The instruction inferentially imposes that very duty upon the traveler. It is as follows: "You are instructed that before you can find that the deceased Billingsley was guilty of contributory negli-

gence you must believe from the testimony that the deceased at the time of the injury failed to look and listen for approaching trains or to use ordinary care to avoid the injury, and ordinary care is such care as a reasonably prudent man would have used under the circumstances and conditions as shown by the testimony."

It plainly tells the jury that unless Billingsley looked and listened for the approaching train and exercised such care to avoid the injury as a reasonably prudent man, under the same circumstances, would have done, such negligence would prevent a recovery. The jury must have understood that the duty rested upon Billingsley to look and listen and to stop to look and listen if he could not see or hear without doing so. The first part of instruction No. 5, given by the court, directly and unmistakably imposes that duty upon Billingsley. It was as follows: "You are instructed that it was the duty of the deceased Billingsley in attempting to cross the defendant's track, to look and listen and to ascertain if a train was approaching, to the end that he might avoid a collision and otherwise to use ordinary care to prevent his being injured."

Instruction No. 2, given by the court, is challenged as misleading, because unsupported by the evidence. It is contended that, if Billingsley had first looked west, instead of east, when his wagon passed the box-cars on the commercial track, he would have seen the approaching train in time to stop his team and avoid the injury, and that it was inexcusable negligence on his part to look east first, because the evidence failed to show there was any danger to be apprehended from that direction. There was evidence in the record tending to show that the local freight train from the east, due about the time of the accident, was irregular and apt to come in any time. It did arrive at 3:30 p. m. that day, a short time after the accident, so it can not be said that no danger was to be apprehended in the direction Billingsley first looked.

We have alluded to and discussed all suggestions of error in giving and refusing instructions which we regard as important. We do not believe it would serve any useful purpose to comment upon numerous other exceptions and objections to instructions given by the court. Suffice it to say, we have considered them carefully and regard none of them well taken. We think, upon the whole, the case was submitted under proper and correct declarations of law.

No error appearing, the judgment is affirmed.

HOLMES v. STATE.

Opinion delivered July 5, 1920.

1. CRIMINAL LAW—POSTPONEMENT FOR ABSENCE OF SENIOR COUNSEL.—It was within the trial court's discretion to refuse to postpone a criminal trial on account of the absence of defendant's senior counsel.
2. CRIMINAL LAW—VENUE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a finding that certain hogs were stolen from the county of the venue.
3. CRIMINAL LAW—CIVIL JUDGMENT NO BAR.—In a prosecution for larceny of hogs, the record of a replevin suit between the alleged owner and one who purchased the hogs from defendant, resulting adversely to the alleged owner, was incompetent to show the ownership of the property alleged to be stolen.

Appeal from St. Francis Circuit Court; *J. M. Jackson,* Judge; affirmed.

Morrow & Gatling, for appellant.

1. It was error to force defendant to trial in the absence of his counsel, to his prejudice.

2. The court refused to permit defendant to introduce in evidence the judgment of the justice of the peace of Wodruff County. This judgment was *res judicata* as to the ownership of the hogs claimed to be stolen, and a bar to the criminal prosecution, and it was error also to refuse to permit counsel for defendant to ask the witness

Coopwood if he did not bring a suit in replevin in Woodruff County for the hogs in question.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. No proper motion was filed for a continuance showing that due diligence had been used, or that there was any abuse of the court's discretion in refusing a continuance on account of the attorney's absence. 90 Ark. 1; 95 *Id.* 62; 23 Cal. 105; 10 Ga. 85.

2. The record of the justice was not admissible in evidence, as appellant was not a party to the suit. Wharton on Evidence, § 776-7; 35 Fed. 107. A judgment in a criminal action can not be given in evidence in a civil action to establish the truth of the facts on which it is rendered. 35 Fed. 107; 72 Vt. 253; Black on Judg., § 529. The converse is also true. *Ib.*

3. The evidence fully sustains the judgment.

McCULLOCH, C. J. This is an appeal from the judgment of conviction under an indictment charging appellant with the crime of grand larceny, alleged to have been committed by stealing certain hogs, the property of Henry Coopwood.

The first ground for reversal urged is that the court erred in compelling the accused to go to trial in the absence of one of his attorneys. The law firm of Morrow & Gatling, of the Forrest City bar, were employed to represent appellant in his defense, but it appears from the record that Mr. Morrow was absent when this case was called, being in attendance on the Federal Court at Helena. He had been summoned as a witness in that court. When the case was called for trial, Mr. Gatling requested a postponement of the case until Mr. Morrow's return, but the court refused to grant it and the trial proceeded to final judgment in the absence of Mr. Morrow. This was a matter fairly within the discretion of the court, and it does not appear that there was any abuse of the discretion.

The indictment was returned by the grand jury of St. Francis County on September 20, 1918, and the trial occurred at the March term, 1920—two terms of court having intervened between the return of the indictment and the trial of the cause. The convenience or necessity of counsel in a case can not always be accommodated by postponement of the trial, and it was a matter within the discretion of the court in the present case. The accused was represented at the trial by the junior member of the firm of Morrow & Gatling, and it was a matter within the court's discretion to decide whether or not under those circumstances it was proper to postpone it for the return of the senior member. In the exercise of the court's discretion in such matters, it is not a question of whether the accused is represented by any particular counsel, but if he is represented by counsel of his own choice the question is whether there should be a postponement to permit the presence of other counsel. We do not find any reversible error in this ruling of the court.

It is next contended that the evidence was not sufficient to sustain a finding that the crime was committed in St. Francis County. Coopwood, the owner of the stolen property, testified that he resided in St. Francis County, about three and a half miles east of the Woodruff County line and that the hogs ranged about a mile or a mile and a quarter west of his house. He testified that he missed the hogs from the range, and after a search found six of them in the possession of a Mr. Mitchell, at McCrory in Woodruff County. He identified the hogs as his own which he had missed from the range. His testimony was sufficient to warrant the finding that they were his hogs and that the mark had been changed. It is earnestly argued that the evidence was not sufficient to warrant the jury in finding that the hogs were stolen in St. Francis County, as they were near enough the Woodruff County line to range over in that county. We are of the opinion, however, that the facts and circumstances related by the witness Coopwood were sufficient to warrant the inference that the hogs

ranged in St. Francis County and were stolen there. According to the testimony of Coopwood the hogs ranged about two miles east of the Woodruff County line. Appellant admitted that he sold the hogs to Mitchell and testified that they were his own property, and that he had raised the hogs. This, however, was a question of fact for the determination of the jury. We think that the evidence was legally sufficient to sustain the verdict.

It is lastly contended that the court erred in refusing to permit appellant to introduce in evidence the record of a replevin suit between Coopwood and Mitchell, in which the hogs were adjudged to be the property of Mitchell. It appears from the record introduced that Coopwood brought a replevin suit before a justice of the peace against Mitchell to obtain possession of the hogs and that the trial resulted in Mitchell's favor. Appellant offered this testimony as an adjudication of the fact that the hogs alleged to have been stolen were the property of Mitchell under his purchase from appellant. The evidence was not competent, and the court was correct in excluding it. The judgment in the replevin suit was not a bar to the prosecution by the State for the larceny of the property. The civil case was between third parties who had no connection with the record in this criminal prosecution. Under no rule of evidence would that adjudication be binding on the State or the defendant in this case, nor is it *prima facie* evidence of ownership of the property alleged to have been stolen. 2 Wharton on Evidence, § 776.

There is nothing in the record to call for a reversal, and the judgment is therefore affirmed.

HAYES-THOMAS GRAIN COMPANY v. A. F. WILCOX CONTRACTING COMPANY.

Opinion delivered July 5, 1920.

1. PARTNERSHIP—WHEN CREATED.—A contract whereby two partners agreed to furnish certain equipment and to finance a contracting corporation in constructing a street improvement, the parties agreeing to share the profits on specified terms, *held* to create a partnership between the partners and the corporation.
2. PARTNERSHIP—LIABILITY OF PARTNERS.—Individuals who entered into a partnership agreement with a corporation are liable on a partnership debt contracted by it in furtherance of the purposes for which the corporation was organized, and can not take advantage of the fact that the contract was beyond the powers of the corporation.
3. GARNISHMENT—FUNDS OF IMPROVEMENT DISTRICT.—Funds paid by an improvement district as earnings of a street improvement contractor under a contract with the district were subject to garnishment in equity, though the suit was originally brought at law.

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

Mehaffy, Donham & Mehaffy, for appellant.

1. As to the liability of the Vinsant Company, the matter is settled by the case of 93 S. W. 427. The contract was one of partnership. *Ib.* It was a joint enterprise with a division of profits and clearly a partnership. 211 S. W. 148; 93 *Id.* 427; 80 Ark. 23; 87 *Id.* 412; 63 *Id.* 518; 44 *Id.* 427; 145 U. S. 611; 64 S. W. 1007; 9 Leigh 424; 45 S. E. 371; 22 N. W. 809; 89 Fed. 140; 48 S. W. 548. The Vinsant Company was clearly liable. 93 Ark. 346; 107 *Id.* 118; 46 *Id.* 132; 49 *Id.* 457; 121 *Id.* 705-711. It was not only a partner engaged in the joint enterprise, but it finally took charge of the business and all the property and thereby made itself liable. 136 J. 243; 233 Fed. 231; 142 U. S. 396; 170 Fed. 240. See also 2 Ark. 370; 19 *Id.* 671; 26 *Id.* 360; 31 N. E. 44; 68 S. W. 936; 113 N. E. 337; 2 Elliott on Cont., § 1358; 13 C. J. 714.

2. There is really no contention as to the right of the equitable garnishee in this case as the garnishment

was improper. 31 Ark. 387; 22 Minn. 452; 56 Ark. 476; 90 *Id.* 236; 107 *Id.* 189. The garnishment and attachment should be sustained.

D. K. Hawthorne, for appellee, Vansant Company.

1. The contract did not create a partnership, and the court below properly so held. 211 S. W. 148; 54 Ark. 384; 207 *Id.* 221; 63 Ark. 518; 80 *Id.* 23; 87 *Id.* 412.

2. The contracting company being a corporation, could not form a partnership with the construction company. 95 Ark. 1; *Ib.* 368. See also as to no partnership. 54 Ark. 384; 44 *Id.* 423. Mere participation in the profits is not sufficient to create a partnership. *Ib.* It is a question of intention, and there must be an agreement from which a community of profit and loss arises. 91 Ark. 26; 30 Cyc. 372-3; 18 L. R. A. (N. S.) 975-1055.

McCULLOCH, C. J. Appellee A. F. Wilcox Contracting Company, a foreign corporation domiciled at Kansas City, Missouri, entered into a contract with a street improvement district in Little Rock to construct the improvement authorized by the organization of the district. Appellees J. R. Vansant and A. J. Rector are copartners doing business under the trade name of J. R. Vansant Construction Company, and they entered into a contract with appellee A. F. Wilcox Contracting Company (hereinafter referred to as the Contracting Company) which recited the contract between the Contracting Company and the improvement district and which provided in substance, that the Construction Company would finance the Contracting Company in the performance of said contract and assist the latter by furnishing bond to guarantee performance of the contract and to advance such sums of money to pay all bills incurred during the progress of the work for labor and materials; and the Contracting Company agreed to indemnify the Construction Company against losses in the performance of said contract, and further agreed to diligently construct the improvement in accordance with the contract with the district.

The clause of the contract providing compensation reads as follows: "For and in consideration of the Construction Company advancing said money and assuming the risks and obligations connected hereto and to the extent as hereinafter stated, and to aid and assist in performing said work as hereinafter designated, the corporation agrees to pay the Construction Company all the net profits accruing from said work up to and including the sum of $3,000, and it is further agreed that if the net profits from the performance of said work shall equal or exceed $9,000, then the Construction Company shall have and receive one-third of the entire profits accruing therefrom."

There is another provision in the contract which defines the net cost of the work and the profits, by specifying that the following items should be considered as a part of the cost of construction:

"First: The actual cost of labor employed on the job, exclusive of any overhead expenses.

Second: The actual cost of material used on this job.

Third: The actual cost of indemnity and maintenance bond and employer's liability.

Fourth: Reasonable up-keep and necessary repairs of the equipment made on the job. It being further understood by all parties hereto that the equipment now owned and intended to be used by the corporation on said job shall be and is now in good serviceable condition.

Fifth: The freight and labor necessary to transport the equipment to the place where said work is to be performed. It being understood that if the equipment referred to herein is used for other jobs in the vicinity of the work contemplated by this contract and the Construction Company has no interest therein, then there shall be a proper adjustment of the freight and labor items herein mentioned and a proper refund made to the Construction Company. It being further agreed that if the equipment is shipped back to Kansas City upon the

completion of this job, that the freight and labor necessary so to do shall be charged as an item of expense against said job.

Sixth: The lump sum of $1,600 which represents and is intended to cover the overhead charges of the corporation in the performance of said work.

Seventh: The sum of $200 which item represents the overhead charges of the Construction Company on said work.

The last two items are to be paid to the respective parties only upon the completion of the work. The above items of overhead expenses have been arrived at with the understanding and agreement that the work required of the corporation can be fully performed in a period of six months from the time said work actually began. If, however, the contract of the city shall be altered in such a manner as to require a longer period than six months for the full performance of said work, then said items of overhead expense shall be increased in proportion to the time actually required for the full performance of said contract."

There is a further provision that A. F. Wilcox should give his personal attention to the supervision of the job of work specified in the contract with the improvement district and that the Construction Company "shall have the right to inspect the books of the corporation at all times, insofar as they refer to this work and shall have the right to investigate working conditions of the men, purchase of material, employment of labor and shall have the right to be fully informed as to all sub-contracts and be kept at all times fully acquainted with the conditions of said work and shall be kept fully informed as to the manner in which said work is being discharged and said contract is being fulfilled. Should the Construction Company be able to purchase material and labor at a lower price or suggest methods of handling the work more economically, said suggestions are to be taken into consideration and acted upon by the corporation."

This contract was entered into between the parties on December 12, 1917, and the Contracting Company proceeded with the construction of the improvement.

During the months of July, August and September of the year 1918, appellant, a corporation engaged in the grain and feed business in the city of Little Rock, sold feed to the Contracting Company while the latter was proceeding with the performance of its contract with the improvement district; and this is an action instituted by appellant to recover a balance of $396.45 due on the account. The feed stuff was delivered to the Contracting Company, and, according to the testimony, was used in feeding live stock which constituted a part of the equipment used in the construction of the improvement.

On September 9, 1918, the Construction Company filed a complaint in the Pulaski Chancery Court against the Contracting Company and the board of commissioners of the street improvement district and a bank in Little Rock where the funds were deposited, setting forth their contract with the Contracting Company, alleging that the latter had violated the terms of the contract and asked an injunction prohibiting the board of commissioners of the improvement district from paying any further money to the Contracting Company. Subsequently under an order of the chancery court entered in that action by consent, the Construction Company was authorized to take charge of the work of constructing the improvement, and the commissioners were directed to make all payments on estimates to the Construction Company. Thereafter the work of constructing the improvement was conducted by the Construction Company and the Contracting Company had nothing further to do with that work.

Funds were accumulated in the bank as the result of the earnings under this work of construction, and appellant instituted the present action in the circuit court of Pulaski County and caused a writ of garnishment to be issued and the depositary of the funds was sum-

moned as garnishee. There was also an order of general attachment issued and levied on a motor truck used in the construction of the improvement. The suit was instituted against the Contracting Company, but appellees Vansant and Rector intervened, claiming the funds as a part of their earnings under the contract after they took it over pursuant to the decree of the chancery court; they also claimed the truck which was seized under the order of attachment as their own property. Appellant answered the intervention plea of Vansant and Rector, alleging that their contract with the Contracting Company constituted them copartners with the latter in the construction of the street improvement in which they were engaged at the time appellant furnished the feed and that the purchase of the feed was for the joint benefit of the copartnership. The cause was transferred to the chancery court without objection, and proceeded to a final decree, which was in favor of appellee, dismissing the garnishment and attachment.

The case is presented here on the contentions of the respective parties whether or not the contract between the Construction Company and the Contracting Company constituted a copartnership agreement. The decision of the cause turns on that question. A contract between parties relating to a joint enterprise, which does not in terms and by name create a partnership, is rarely ever free of doubt, and very frequently the determination of the relation between the parties is a very difficult one. There have been many such cases before this court. In *Roach* v. *Rector,* 93 Ark. 521, we said: "As between the parties themselves, before it can be said that the relationship of partners has been created, it is therefore essential that the parties themselves intended by the effect of their contract to form such partnership business, and that they should have common ownership and community of interest in the properties of the business, and that they should share in some fixed proportion in the profits thereof only as profits of the business." But in the very recent case of *Mehaffy* v.

Wilson, 138 Ark. 281, we held that a partnership might exist under a contract, regardless of the actual intention of the parties as to the character of relationship established thereby, if the substance of the contract made them in fact copartners. In stating that rule we said that "if the language of the contract, when considered as a whole, creates the partnership relation, then it should be so construed, even though the parties expressly provide that such is not their intention."

In that case the contract contained an express provision that the parties did not intend to create a partnership, and in that respect the contract was different from the one now under consideration.

It is urged by learned counsel for appellees that the case just cited is decisive of the present one, but we do not think that the facts in the two cases are similar to a controlling extent. In the case cited Wilson, the party sought to be held as a co-partner with Russell, owned timber lands and a saw mill outfit and certain buildings, and he furnished the same to Russell for the purpose of cutting the timber and manufacturing it into lumber. The contract specified that Wilson was to be paid for his timber at a stipulated price and that he was to receive a part of the net profits as compensation for use of the mill and the buildings on the land. In disposing of the case we held that Wilson was not a copartner of Russell, and we said: "Wilson was the sole owner of the mill and the machinery that caused the injury. There was no community of interest in the property existing at the time of the injury, no division of profits or losses as such. Wilson was not responsible for any losses and did not share in the profits as profits, but only was to receive a certain price for this timber and then compensation for his services and use of the mill, residences, etc., out of a certain proportion of the profits, if there were profits. These conditions would not make him a partner of Russell."

Now, in the present case the contract with the improvement district was the subject-matter of the con-

tract between these parties, and there was complete community of interest between them as to that subject-matter and the profits to arise therefrom. The Construction Company, it is true, was to furnish certain equipment for use, but this was merely an incident to the main contract. There was no provision in the contract for the sharing of losses, but that was not necessary in order to constitute a partnership, for the law imposed such an obligation if a partnership exists. There is in the contract all the elements of a joint enterprise and one of joint contribution to a common end and the sharing of profits on specified terms. They are the elements which make a partnership in law, and it is difficult to conceive of a partnership more complete than this one, unless there be an express provision in so many words to create a partnership.

Upon consideration of the contract as a whole, we are of the opinion that Vansant and Rector were copartners with the Contracting Company and are jointly liable as such for the debt due appellant.

It is contended that no partnership could have existed because it was beyond the power of the Contracting Company as a corporation to enter into a partnership agreement. Conceding that the contract was *ultra vires* so far as the corporation was concerned, yet the latter was liable because the purchase of the feed stuff from appellant was in furtherance of the purposes for which the corporation was created, and Vansant and Rector as individuals can not take advantage of the fact that the contract was beyond the power of the corporation. *Bluff City Lbr. Co.* v. *Bank of Clarksville,* 92 Ark. 1.

It is also contended that the garnishment was improper, because the improvement district was not subject to garnishment at law. *Sallee* v. *Bank of Corning,* 134 Ark. 109. The answer to that is that the cause was transferred to equity where a garnishment of the funds would lie, and the fact that the cause was originally brought at law does not defeat enforcement of that rem-

edy in a court of equity by the transfer of the cause. The garnishment held the funds, even though the suit was brought in the wrong court, and the remedy became complete when the cause was transferred.

Our conclusion is that the decree of the chancery court was erroneous, and it is therefore reversed and the cause remanded with directions to enter a decree in favor of appellant in accordance with this opinion.

HOTOPP v. ADAIR.

Opinion delivered July 5, 1920.

1. SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF LOTS.—Under the statute of frauds (Kirby's Dig., § 3654) an oral contract for the sale of lots witnessed only by checks drawn by buyer and seller, which fail to describe the lots sold and furnish no means of identifying them, is not enforceable against the seller, though the property intended was the only land owned by him.
2. SPECIFIC PERFORMANCE — CONTRACT MUST BE DEFINITE.—Before equity will enforce a written contract for the sale of land, it must be definite and certain.

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

Culbert L. Pearce and *Gardner K. Oliphint,* for appellant.

1. The complaint does not disclose a contract which falls within the statute of frauds, and the court erred in sustaining the demurrer and dismissing the complaint. 128 Ark. 433 is not applicable. 30 Ark. 249; 79 *Id.* 100; 45 *Id.* 17.

2. The description of the property is sufficient. 136 Ark. 447-451. Parol evidence was properly admissible to identiy and describe the property. *Ib.;* 40 *Id.* 237. This case does not fall within Kirby's Digest, § 3654.

John E. Miller and *C. E. Yingling,* for appellees.

1. The contract is within the statute of frauds. Kirby's Dig., § 3654; 128 Ark. 433-6; 85 *Id.* 1-3; 16 Ark.

340; 45 *Id.* 17; 56 *Id.* 130. See, also, *Stanford* v. *Sager*, 141 Ark. 458.

2. A contract can not rest partly in writing and partly in parol. It must contain all the terms of the contract. 16 Ark. 340; 45 *Id.* 17; 56 *Id.* 130. The complaint shows on its face that if a contract for sale of the lots exists it will have to be proved by parol testimony and the demurrer was properly sustained.

McCULLOCH, C. J. This is an action instituted by appellant in the chancery court of White County against appellees to compel specific performance of a contract alleged to have been entered into by the parties, whereby appellees agreed to sell and convey certain real estate to appellant. The chancery court sustained a demurrer to the complaint and dismissed it for want of equity.

The allegations of the complaint are, in substance, that appellees owned certain lots in the town of Bald Knob on which a dwelling house was situated, that this was the only real estate owned by them in White County, that the parties entered into negotiations which resulted in an oral agreement between them for the sale and purchase of the property for a stipulated price, and that they subsequently met for the purpose of consummating the sale by the execution of a deed by appellees to appellant, but that the abstract of title was not ready, and that it was thereupon further orally agreed that they would await the preparation of an abstract, and, "as an evidence of their contract of purchase and of sale, that the plaintiff would put up his check for the sum of $50, and that the defendants should put up a check for $50 with certain writing thereon, and that each of the said checks, both singly and collectively, should be placed in an envelope which was to be endorsed upon the back by the cashier of the Bald Knob State Bank, and that the said envelope and the said checks and the endorsements and writings on each appearing, should, singly and collectively, constitute and be an evidence of the

contract of purchase and sale of the above described property."

It is further alleged that the parties went to the Bald Knob State Bank and there executed checks pursuant to said agreement and delivered the same to the cashier, who made the endorsement on the envelope which contained the checks and deposited the same in the vault of the bank for safe-keeping, but that subsequently appellees refused to comply with the contract.

The checks referred to were exhibited and read as follows:

"No..... Bald Knob, Ark., 8/5/1919.

BALD KNOB STATE BANK

Pay to the order of Wm. C. Hotopp $50.00. Fifty and no/100 Dollars. For bonus on house and lots.

(Signed) Claud Adair."

No. 2. Bald Knob, Ark., August 5, 1919.

BALD KNOB STATE BANK

Pay to the order of Claud Adair $50.00. Fifty Dollars.

(Signed) Wm. C. Hotopp."

The written endorsement alleged to have been made on the envelope containing the checks is as follows:

"Cks. to be held in forfeit: 50—Adair is to make out deed to W. C. Hotopp. 50—Hotopp is to buy place of Adair."

The chancellor sustained the demurrer on the ground that the contract was one that fell within the statute of frauds, and we are of the opinion that the decision was correct.

The complaint sets forth an oral agreement except so far as the exhibited checks and memoranda on the back of the envelope containing them constitute a written contract. The statute provides that a contract for the sale of lands "shall be made in writing and signed by the party to be charged therewith, or signed by some other person for him thereunto properly authorized. Kirby's Digest, § 3654. The only writings set forth as constituting the contract fall short of

compliance with the statute, in that the property is not described and no means of identification are furnished. Defects in this respect can not be cured or supplied by oral testimony. The check signed by Claud Adair, one of the appellees, recites that it was given "for bonus on house and lot." This is not sufficient identification, nor does it furnish any means for identification.

It is alleged in the complaint that the property described therein was the only real estate owned by appellees, but, accepting that as true, it does not follow that the recitals of the check are sufficient to identify it. Even though appellees owned but one piece of property, it does not follow from this language as a matter of law or as a matter of fact that the contract necessarily was intended to describe that particular property. Moreover, the check is not sufficient as a contract for the reason that it does not set forth the terms in any other respect. Before a court of equity will compel the performance of a contract for the sale and purchase of real estate, it must be definite and certain. The memorandum endorsed on the envelope by the cashier of the bank was not signed by appellees nor by the cashier for them, and they are not bound by it, but even if that memorandum had been signed, it is insufficient to constitute an enforceable contract. This subject has been thoroughly discussed in the recent case of *Sanford* v. *Sager*, 141 Ark. 458, and it is unnecessary to cite other authorities.

Decree affirmed.

NETTLES v. HAZELWOOD ROAD IMPROVEMENT DISTRICT NO. 2 OF GREENE COUNTY.

Opinion delivered July 5, 1920.

1. HIGHWAYS—JURISDICTION OF COUNTY COURT.—An improvement district created by Road Laws of 1919, No. 126, was not void because authority to maintain as well as construct the road was vested in the commissioners, such authority not being an invasion of the jurisdiction of the county court.

2. HIGHWAYS—ASSESSMENT OF BENEFITS.—An act creating a road improvement district is not void for failure to limit the power of the assessors with respect to the amount of benefits assessed where it confers authority only to appraise the value of the actual benefits and affords a remedy against the abuse of such power.
3. CONSTITUTIOAL LAW—DUE PROCESS.—Road Laws of 1919, No. 126, creating a road improvement district, in providing for a public hearing after notice and giving specified time for review of assessments in a court of competent jurisdiction, *held* not invalid as depriving the property owner of due process.
4. HIGHWAYS—ATTACKS ON ASSESSMENTS—LIMITATION.—An act creating a road improvement district is not invalid because it provides that all actions to correct assessments must be brought within twenty days after adjournment of the board of assessors.
5. HIGHWAYS—ATTACK ON ROAD DISTRICT—PLEADING.—In a suit attacking the validity of a road improvement district created by special act, allegations in the complaint that eight or ten miles of the proposed road are covered with water and that it is a physical impossibility to build any improved road upon that part of the established route are merely the statement of a conclusion.
6. HIGHWAYS—ROAD DISTRICT—INVALIDITY OF DRAINAGE DISTRICT.—Though a drainage district which embraced a portion of a road district was declared invalid, this did not prevent the road district from proceeding with the improvement as authorized by special statute where it is not alleged that the carrying out of the drainage scheme was essential to the construction of the highway.

Appeal from Greene Chancery Court; *Archer Wheatley,* Chancellor; affirmed.

W. W. Bandy and *Geo. A. Burr,* for appellants.

The special act, No. 126, Acts 1919, is void, and all acts done and performed under said act and threatened and about to be done are illegal, null and void, because—

1. It takes away the jurisdiction of the county court. Art. 7, § 28, Const. 1874.

2. It is a legislative invasion and usurpation of the judicial power forbidden by § 1, art. 14, Const. 1874.

3. The act was never read at length on three separate days, as required by § 22, art. 5, Const. 1874.

4. It is confiscatory and violates §§ 21 and 22, art. 2, Const. 1874, and arts. 5 and 14, amendments to the Constitution of the United States, because there is no limitation upon the power of the commissioners to reassess benefits or betterments.

5. It violates § 25, art. 5, of our State Constitution, as it is a special law applicable to public improvements which are provided for by a general law, and, further, the county court has full and complete jurisdiction under our general laws to grant all necessary powers and privileges and relief under said special act.

6. It is a special act and a local one and no published notice was published as required by law. Art. 5, § 26, Constitution 1874.

7. The assessments are excessive and confiscatory and the act takes property, without proper compensation, for public use, in violation of arts. 5 and 14 of the State Constitution and amendmennt to Constitution United States.

8. The assessments and taxes are illegal, null and void, because all the lands in the Hazelton road district are not correctly described in the published notice.

9. They are void because the report of the assessors was not filed with the chairman of the board of commissioners at the time the published notice of the filing of such report was first printed and distributed.

10. Certain of the commissioners were not land owners of the Hazelton district, nor are all of said commissioners residents of the improvement district. See 212 S. W. 333; 83 Ark. 54; *Hicks* v. *Knight,* 142 Ark. 286.

The appellee, *pro se.*

1. The act does not violate our Constitution, either State or United States, and all the contentions of appellant have been passed on by this court. 92 Ark. 93; 130 *Id.* 507, 513; 89 *Id.* 513; 102 *Id.* 560.

2. The act is not confiscatory. 130 Ark. 410. See, also, 213 S. W. 767; 214 S. W. 23; 86 Ark. 1; 83 *Id.* 54;

181 U. S. 371; 103 Ark. 127; 52 Ark. 107; 113 *Id.* 195; 85 *Id.* 12; 83 *Id.* 344; *Ib.* 54; 81 *Id.* 562; 113 *Id.* 363-370. Acts 1920 validates and confirms all that was done under the original act.

McCULLOCH, C. J. This case involves an attack on the validity of a road improvement district in Greene County created by a special statute (Act No. 126, regular session of 1919) and the proceedings of the board of commissioners and assessors under authority of that statute. The statute in question creating the road improvement district describes the boundaries and the roads to be improved and names the commissioners. The roads to be improved are described as public roads and the route is mentioned in detail. It contains authority for the improvement and for assessment of benefits and the borrowing of money.

Section 10 of the statute provides, in substance, that when the assessors are appointed by the board of commissioners, they shall make an assessment of benefits and file the lists with the chairman of the board of commissioners, and said chairman shall give twenty days' notice in a weekly newspaper of a public hearing as to the correctness of the assessments, and that the assessors shall meet at the time and place mentioned in the notice for the purpose of hearing complaints of landowners, and that any errors or wrongful assessments will be adjusted on petition of landowners who are aggrieved by the assessments. It provides further that any landowner "aggrieved by the action of the board of assessors fixing the assessment, as herein provided, shall have the right for twenty days from the date of adjournment of said board of assessors sitting as a board of equalization as aforesaid to appeal from their decision to any court of competent jurisdiction to set aside said assessment list or to correct any void or erroneous assessment thereon; but after the expiration of the said twenty days the said list shall become final and incontestable either at law or in equity."

It appears from the allegations of the complaint that the assessments have been made by the board of assessors, and it is alleged in the complaint that the assessments are confiscatory by reason of the fact that the lands in the district are situated in numerous other improvement districts, that many of the farms are under mortgage, and that the interest on the mortgages and the assessments levied on these lands for various improvements, including this one, together with taxes, State and county, school and other local taxes, will amount to more than the income derived from the lands. It is also alleged in the complaint that a portion of the road to be improved is "covered with water, varying in depth from a few inches to ten or more feet," and that the condition just described prevents the construction of the improvement. It is also alleged that a certain drainage district which would drain this area has been declared to be illegal and void, and that this frustrates the scheme to improve the roads by reason of the fact that the improvement in this district was intended to drain these particular lands. The chancery court sustained a demurrer to the complaint, and an appeal has been prosecuted to this court.

Several of the points of attack have been definitely settled by previous decisions of this court. The contention that the authority to maintain the road, as well as its construction, is an encroachment on the jurisdiction of the county court was settled in the recent case of *Dickinson* v. *Reeder,* 143 Ark. 228, and the contention that the authority conferred on the commissioners to construct the public road constitutes an invasion of the jurisdiction of the county court is settled by decisions of this court too numerous to mention. The statute now under consideration is not different in any substantial particular from the statutes in the other cases thus decided.

It is earnestly argued in the next place that the act is void because it places no limitation upon the power of the assessors with respect to the amount of benefits assessed. The answer to this is that the statute only con-

fers authority upon the assessors to appraise the value of the actual benefits, and a remedy is afforded against any abuse of that power. A public hearing is provided for after notice, so as to give every property owner a hearing before the board of assessors, and in addition to that a specified time is given for review of the assessments in a court of competent jurisdiction. We recently held that the chancery court has jurisdiction in such cases. *Monette Road Imp. Dist.* v. *Dudley, ante,* p. 169. With these safeguards thrown around the action of the board of assessors it can not be said that the statute fails in any way to meet the requirements of the Constitution in regard to due process of law and the proper recognition of the rights of property. The attack upon the correctness of the assessments must fail because the action was not instituted within the period of time prescribed by the statute. We have upheld a similar statute as to the length of time given and as to the provision concerning the application to the court for relief. *Reitzammer* v. *Desha Road Imp. Dist. No.* 2, 139 Ark. 168. The allegations of the complaint were not sufficient to show that no benefits at all would accrue to the lands, but the allegations amount merely to an assertion that the assessments are grossly excessive. The remedy authorized by the statute must be pursued, that is, by appearing before the board of commissioners and thence to the chancery court within the time specified by the statute.

The last attack is the one embraced in the allegation that "eight or ten miles of the proposed road is covered with water varying in depth from a few inches to from eight to ten feet or more, and that it is a physical impossibility to build or construct, under any circumstances, any improved road upon that part of the established route." This allegation must be viewed in the light of the statute itself, which described the roads to be improved as established public roads, and it is a mere statement of a conclusion to say that on account of the water over a portion of the road it can not be improved. There may be methods of diverting this water from the

roadbed, and there is a failure to set forth a state of facts which would negative the feasibility of adopting such a plan. It is reasonable to assume that a public road established and maintained under orders of the county court is subject to some kind of improvement, and authority is conferred by this statute upon the board of commissioners to take the necessary steps to improve the roads. This does not embrace authority to provide general drainage for the district, but it embraces authority incidentally to drain the roadbed if it is feasible to do so as a part of the project of improving the road. At least it is not shown by the allegations of the complaint that this can not be done. Nor does the fact that the drainage district embracing a part of the road district was declared invalid prevent the commissioners from proceeding with the improvement authorized by this statute, as it is not shown by the allegations of the complaint that the carrying out of that improvement was essential to the construction of the one authorized by this statute. The fact that the special statute creating said drainage district declared that its purpose was to provide a method for draining the water from submerged sections of this road and its environs does not constitute a legislative determination that the road can not be improved without the drainage district first being put into operation.

We are therefore of the opinion that the statute is not void, and that the allegations of the complaint do not justify the interference by a court of equity with proceedings authorized by the statute. Affirmed.

HART, J. (dissenting). The complaint alleges that there are 29,000 acres of land in the district subject to assessment and that the roads to be built are twenty-four miles long. The complaint further alleges that from eight to ten miles, or even more, of the road which is contemplated in the improvement under said special act is, and was, covered with water varying from a few inches

to ten or more feet, and that it is a physical impossibility to build said proposed improved road, or any kind of a road, along said route, until the water is drained off with ditches or levied off by embankments.

This allegation is not a mere conclusion of law, but is the averment of a fact. Ten miles is a very substantial portion of a contemplated road improvement of twenty-four miles; and the attempt to construct a portion ten miles long where the ground is covered by water from a few inches to ten feet deep, coupled with the allegation that the construction of the improved road would not drain the water off, would amount to a confiscation of the land of the property owners.

The principle upon which special assessments for local improvements are sustained is that the lands upon which the assessments are levied receive a peculiar benefit equal to or in excess of the cost of the improvement and that, therefore, the land owners do not pay anything in excess of what they receive by reason of such improvement. It is true the language of the complaint is in general terms, but it is nevertheless the statement of a fact and not a mere conclusion of the pleader. The court might have treated the demurrer as a motion to make the complaint more definite and certain, if deemed defective, but it should not have sustained the demurrer. The law applicable to this branch of the case is clearly stated by Chief Justice HILL in *Coffman* v. *St. Francis Drainage Dist.*, 82 Ark. 54, as follows: "The complaint is drawn in general terms, and should have been met by a motion to make more specific and certain, if more certainty was desired. But the demurrer having admitted these general allegations, practically charging confiscation of property, and there being special denial of benefit, the court is constrained to believe that it is safer and more consonant to the justice of the case to overrule the demurrer and let a hearing be had as to whether there has been an abuse of the legislative discretion in charging these plaintiffs with the expense of a public improvement which

would not benefit them, but injured them, thereby amounting to a confiscation of their property." If nearly one-half of the road can not be improved before the water is drained off the ground, it is obvious that the expenditure of a large sum of money in a useless attempt to construct the improvement would not and could not confer special or peculiar benefits to the lands within the district, but would amount to a confiscation of the lands to the extent that such useless expenditure was made. The allegation is of a matter which is capable of ascertainment by proof, and, if true, it is certain that the Legislature to that extent abused its discretion in providing for the improvement. The complaint sets forth sufficient matter of substance for the court to proceed upon the merits of the case; and to advise the defendant of the facts upon which the plaintiff proposes to rely and will seek to prove.

In the case of *Coffman* v. *St. Francis Drain. Dist.*, 83 Ark. 54, the court held: "While the Legislature, creating a drainage district may provide what lands shall be assessed for improvement, and the extent of such assessments, the courts will interfere when the act of the Legislature is such an arbitrary abuse of the taxing power as would amount to a confiscation of property without benefit."

Therefore Judge WOOD and the writer respectfully dissent.

APPENDIX

I.

OPINIONS NOT REPORTED.

Hicks *v.* State; Sebastian Circuit Court; affirmed September 29, 1919, *per* Smith, J.

Camp *v.* State; Monroe Circuit Court; affirmed September 29, 1919, *per* Wood, J.

Bank of Hartman *v.* Eustice; Johnson Chancery Court; affirmed October 6, 1919.

Kirby *v.* Malone; Monroe Chancery Court; affirmed October 13, 1919, *per* Chief Justice.

St. Louis S. W. Ry. Co. *v.* Morgan; Prairie Circuit Court; affirmed October 20, 1919, *per* Wood, J.

Hartley *v.* Ford; Jefferson Circuit Court; affirmed October 27, 1919, *per* Hart, J.

Baker *v.* Brown & Hackney; Pulaski Circuit Court, Third Division; reversed October 27, 1919, *per* Humphreys, J.

Missouri Pac. Rd. Co. *v.* Bradley; Conway Circuit Court; affirmed November 3, 1919, *per* Humphreys, J.

Mama *v.* Rout; Sebastian Circuit Court, Greenwood District; affirmed November 3, 1919, *per* Humphreys, J.

Missouri Pac. Rd. Co. *v.* Hill; Conway Circuit Court; affirmed November 3, 1919, *per* Hart, J.

Cotton Bros. *v.* Kemper-Fair Milling Co.; Searcy Circuit Court; affirmed November 10, 1919, *per* Wood, J.

Treadwell *v.* Key; Saline Chancery Court; affirmed November 10, 1919, *per* Hart, J.

Caloway *v.* Sanders; Jackson Circuit Court; affirmed November 10, 1919, *per* Smith, J.

Byrd *v.* Smith; Logan Circuit Court; affirmed November 17, 1919, *per* Wood, J.

Stephens *v.* Springfield Bus. College; Clay Circuit Court, Western District; reversed November 17, 1919, *per* Hart, J.

McElrath *v.* Gomer; Clay Circuit Court, Western District; reversed November 17, 1919, *per* Smith, J.

Nick *v.* State; Scott Circuit Court; affirmed November 24, 1919, *per* Chief Justice.

A. L. Clark Lumber Co. *v.* Edwards; Pike Circuit Court; affirmed December 1, 1919, *per* Chief Justice.

Freer *v.* Fort Smith Light & Traction Co.; appeal from Sebastian Chancery Court, Fort Smith District; affirmed December 1, 1919, *per Curiam.*

Koontz *v.* Smith; Little River Chancry Court; affirmed December 22, 1919, *per* Chief Justice.

Robbins *v.* Union & Merc. Trust Co.; Pulaski Chancery Court; reversed December 22, 1919, *per* Smith, J.

Zenor *v.* Green; Sebastian Circuit Court, Fort Smith District; affirmed December 22, 1919, *per* Humphreys, J.

Labat *v.* Ford; LaFayette Chancery Court; affirmed January 12, 1920, *per* Humphreys, J.

Des Arc *v.* King; Prairie Circuit Court, Northern District; affirmed January 12, 1920, *per* Wood, J.

Mama Coal Co. *v.* Adams; Sebastian Circuit Court, Greenwood District; affirmed January 12, 1920, *per* Wood, J.

Newberger Cotton Co. *v.* Smith Trading Co.; Logan Chancery Court; affirmed January 12, 1920, *per* Wood, J.

Bowden *v.* Dennis; Miller Circuit Court; affirmed January 19, 1920, *per* Hart, J.

Scoggins *v.* State; Conway Circuit Court; reversed January 26, 1920, *per* Wood, J.

Payne *v.* State, St. Francis Circuit Court; affirmed February 2, 1920, *per* Chief Justice.

Hill *v.* State; Crawford Circuit Court; reversed February 9, 1920, *per* Chief Justice.

Porter *v.* Frazier; Crawford Circuit Court; affirmed February 9, 1920, *per* Chief Justice.

Jones *v.* Ross; Conway Chancery Court; affirmed February 9, 1920, *per* Smith, J.

Hines *v.* Reynolds; Ouachita Circuit Court; affirmed February 16, 1920, *per* Wood, J.

St. Pasteur *v.* Wilson; Little River Circuit Court; affirmed March 1, 1920, *per* Smith, J.

Kansas City So. Ry. Co. *v.* Wray; Sevier Circuit Court; affirmed March 1, 1920, *per* Wood, J.

Hare *v.* Stacy; Cross Chancery Court; reversed in part March 15, 1920, *per* Humphreys, J.

Haskns *v.* State; Mississippi Circuit Court; affirmed April 12, 1920, *per* Hart, J.

Russ *v.* Strickland; White Circuit Court; affirmed April 19, 1920, *per* Wood, J.

Union & Mercantile Trust Co. *v.* Hudson; Independence Chancery Court; appeal dismissed April 19, 1920, *per* Smith, J.

Brundidge *v.* Crutchfield; Hempstead Chancery Court; affirmed May 31, 1920, *per* Hart, J.

Bennett *v.* Smith; Clay Circuit Court; reversed June 28, 1920, *per* Smith, J.

II.

CASES DISPOSED OF ON MOTION.

De Queen Lumber Company *v.* T. J. Harville, *et al.*; Sevier Circuit Court; James S. Steel, Judge; appeal dismissed under rule seven, September 22, 1919; *per curiam.*

Missouri Lumber Company *v.* H. A. Dougherty Motor Company; Sevier Circuit Court; James S. Steel, Judge; appeal dismissed under rule seven, September 22, 1919; *per curiam.*

Sidney Smith *v.* W. S. A. Jackson, as Sheriff; LaFayette Circuit Court; Geo. R. Haynie, Judge; appeal dismissed for noncompliance with rule nine, September 29, 1919; *per curiam.*

G. W. Bishop *v.* Lee Woodard, *et al.*; Miller Circuit Court; Geo. R. Haynie, Judge; affirmed under rule seven, October 13, 1919; *per curiam.*

City National Bank of Fort Smith, *et al. v.* Arkansas Valley Trust Company; Sebastian Chancery Court, Fort Smith District; W. A. Falconer, Chancellor; settled and appeal dismissed on appellant's motion October 13, 1919; *per curiam.*

St. Louis-San Francisco Railway Company *v.* the State of Arkansas; Benton Circuit Court; W. A. Dickson, Judge; settled and appeal dismissed by consent, October 13, 1919; *per curiam.*

Maud M. Russell, *et al. v.* T. J. Loudermilk, *et al.*; White Chancery Court; J. E. Martineau, Chancellor; appeal dismissed for noncompliance with rule nine, October 13, 1919; *per curiam.*

Wallace Harger and Western Coal & Mining Company *v.* Doyle Gowing, minor, by Julius Gowing, next friend; Franklin Circuit Court; James Cochran, Judge; settled and appeal dismissed October 13, 1919; *per curiam.*

Arkansaw Kennel Club, *et al. v.* Jordan-Foster Printing Company; Pulaski Circuit Court, Second Division; Guy Fulk, Judge; settled and appeal dismissed on appellant's motion, October 20, 1919, *per curiam.*

G. W. Snow *v.* the State of Arkansas; Sevier Circuit Court; James S. Steel, Judge; affirmed October 20, 1919, for noncompliance with rule ten; *per curiam.*

M. A. Wood *v.* T. J. Ashley, *et al.*, Commissioners of North Arkansas Road Improvement District, No. 3; Sharp Chancery Court; L. F. Reeder, Chancellor; appeal dismissed October 20, 1919, for noncompliance with rule nine; *per curiam.*

W. J. Morrow *v.* I. Ware; Johnson Circuit Court; A. B. Priddy, Judge; affirmed under rule seven, October 27, 1920; *per curiam.*

Mack Sweet *v.* the State of Arkansas; Columbia Circuit Court; Geo. R. Haynie, Judge; appeal dismissed November 24, 1919, the appellant having been pardoned; *per curiam.*

The State of Arkansas *v.* Will Applegarth; Baxter Circuit Court; J. B. Baker, Judge; appeal dismissed December 8, 1919, on motion of the Attorney General; *per curiam.*

J. R. Gardner *v.* the State of Arkansas; Union Circuit Court; C. W. Smith, Judge; appeal dismissed, January 12, 1920, the appellant having been pardoned; *per curiam.*

Mitchell Combs *v.* the State of Arkansas; Poinsett Circuit Court; R. E. L. Johnson, Judge; appeal dismissed January 12, 1920, the appellant having been pardoned; *per curiam.*

Lawson Smith *v.* the State of Arkansas; Hempstead Circuit Court; Geo. R. Haynie, Judge; appeal dismissed, January 26, 1920, on appellant's motion; *per curiam.*

Sam Hodnett *v.* the State of Arkansas; Hempstead Circuit Court; Geo. R. Haynie, Judge; appeal dismissed February 2, 1920, on appellant's motion; *per curiam.*

C. E. Breslin, Administrator of the estate of Thos. H. Morrison, deceased, *v.* Fort Smith Commission Company; Sebastian Circuit Court, Fort Smith District; Paul Little, Judge; settled and appeal dismissed February 16, 1920, on appellant's motion; *per curiam.*

J. D. Eley and Preston Pickett *v.* W. H. Hood as next friend of James L. Hood, *et al.* minors; Hempstead Chancery Court; James D. Shaver, Chancellor; reversed and dismissed on confession of error, March 1, 1920; *per curiam.*

Lenon Auto Company *v.* J. A. Hooper, Roy Hooper and Hope National Bank; Hempstead Circuit Court; Geo. R. Haynie, Judge; appeal dismissed April 12, 1920, the judgment having been satisfied under execution; *per curiam.*

Annie Mabel Blanton, *et al. v.* Forrest City Manufacturing Company, *et al.*; St. Francis Chancery Court; A. L. Hutchins, Chancellor; appeal dismissed April 12, 1920, on appellant's motion; *per curiam.*

T. J. Griffin *v.* John B. Morris; Sevier Circuit Court; James S. Steel, Judge; appeal dismissed for noncompliance with rule nine, April 12, 1920; *per curiam.*

Roy Stockton *v.* the State of Arkansas; Nevada Circuit Court; Geo. R. Haynie, Judge; cause abated, April 12, 1920, on account of death of the appellant; *per curiam.*

Road Improvement District No. 5 of Crawford County *v.* John B. Brown; Crawford Circuit Court; James Cochran, Judge; appeal dismissed without prejudice April 19, 1920, on appellant's motion; *per curiam.*

Robert Anderson *v.* the State of Arkansas; Lincoln Circuit Court; W. B. Sorrells, Judge; appeal dismissed April 26, 1920, on Attorney General's motion, for failure to perfect appeal within the time limited by statute; *per curiam.*

M. M. Croom *v.* I. G. Robinson; Yell Circuit Court, Dardanelle District; A. B. Priddy, Judge; appeal dismissed for noncompliance with rule nine, May 24, 1920; *per curiam.*

George A. Burr and W. O. Poole *v.* Cache River Drainage District No. 2; Greene Chancery Court; Archer Wheatley, Chancellor; appeal dismissed, June 7, 1920, on appellant's motion; *per curiam.*

Road Improvement District No. 5 of Crawford County *v.* John B. Brown; Crawford Circuit Court; James Cochran, Judge; appeal dismissed on appellant's motion, July 12, 1920; *per curiam.*

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when service in another county than that in which suit brought *held* good. *Hoyt* v. *Ross*, 473.
where transitory action brought. *Rhyne* v. *Beloate*, 492.

WILLS:

judgment admitting will to probate in common form appealable within 12 months. *Jenkins* v. *Jenkins*, 417.
no saving clause as to infants. *Id.*
holographic will established by "unimpeachable evidence," when. *Murphy* v. *Murphy*, 429.
credibility of witnesses to establish such will *held* for jury. *Id.*
widow not entitled to contest after renouncing will. *Robertson* v. *Robertson*, 556.
right to contest is statutory. *Id.*
laws of each State govern, when. *Id.*

WITNESSES:

when impeachable as to collateral matter. *Young* v. *State*, 71.
rght to examine one's own witness as to conflicting statements, when. *Crofton* v. *State*, 164.
right to cross-examine accused as to statements before examining court. *Ellis* v. *State*, 504.

WORDS AND PHRASES:

co-appellee. *Myers* v. *Linebarger*, 389.
commission merchant. *G. H. Hammond Co.* v. *Joseph Merc. Co.*, 108.
common schools. *Special School Dist. No. 65, Logan County*, v. *Bangs*, 34.
company. *Harger* v. *Harger*, 375.
delivery. *Home Life & Acc. Co.* v. *Compton*, 561.
factor. *G. H. Hammond Co.* v. *Joseph Merc. Co.*, 108.
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fraud. *Lilly* v. *Barron*, 422.
interstate commerce. *Kansas City So. Ry. Co.* v. *Leinen*, 454.
master and servant relation. *Terry Dairy Co.* v. *Parker*, 401.

WORDS AND PHRASES—Continued.

may. *Bradley County Rd. Imp. Districts Nos. 1 and 2* v. *Jarratt*, 260.
mine. *Sovereign Camp Woodmen of the World* v. *Arthur*, 114.
overs. *G. H. Hammond Co.* v. *Joseph Merc. Co.*, 108.
place of business. *Terry Dairy Co.* v. *Parker*, 401.
present conveyance. *Prior* v. *Newsom*, 593.
proximate cause. *Rogers* v. *Williard*, 592.
public schools. *Special School Dist. No. 65* v. *Bangs*, 34.
remain continuously and strictly within the house. *Interstate Bus. Men's Acc. Ass'n* v. *Sanderson*, 271.
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waters of the State. *Milton* v. *State*, 1.