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CASES DETERMINED

IN THE

# Supreme Court of Arkansas

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# JUDGES AND OFFICERS

OF THE

# SUPREME COURT

## OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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|---|---|
| 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 |
| J. S. UTLEY, | Attorney General |
| WILLIAM P. SADLER, | Clerk |
| T. D. CRAWFORD, | Reporter |

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# CASES DETERMINED

IN THE

# SUPREME COURT OF ARKANSAS

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## DILLON *v.* HAWKINS.

Opinion delivered January 10, 1921.

1. DISMISSAL AND NONSUIT—EFFECT ON COUNTERCLAIM. — Under Kirby's Dig., § 6231, defendants had a right to proceed to trial on their counterclaim, although plaintiff had taken a nonsuit.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT ON COUNTERCLAIM.—A verdict awarding damages on a counterclaim should not be disturbed on appeal if there is any evidence to sustain it under any view of the law applicable to the case.
3. SALES—VERDICT SUSTAINED BY EVIDENCE.—Evidence *held* to sustain verdict for damages on buyer's counterclaim after plaintiff had taken a nonsuit.
4. DISMISSAL AND NONSUIT—EFFECT OF TAKING NONSUIT.—Where plaintiff in an action on certain notes elected to take a nonsuit and not to defend a counterclaim filed by defendants, the court had no jurisdiction to render judgment in his favor offsetting the counterclaim by the amount of the notes.
5. NEW TRIAL—EFFECT OF TAKING NONSUIT.—Where plaintiff took a nonsuit and declined to reply to a counterclaim, and thereupon defendant had verdict and judgment on the counterclaim, plaintiff can not, by motion for new trial, bring back into the record matters which passed out of it when he took a nonsuit.
6. ATTORNEY AND CLIENT—ATTORNEY'S KNOWLEDGE OF COURT'S ORDERS.—A litigant is charged with knowledge possessed by his attorney in regard to the orders of the court relating to the trial of causes, though the attorney failed to communicate the knowledge to him.
7. APPEAL AND ERROR—REMITTITUR OF EXCESS.—Where the plaintiff took a nonsuit, but defendant introduced testimony to sustain his counterclaim showing damages in excess of the amount prayed for, without amending the prayer, and a verdict was rendered for the full amount so proved, the prayer of the complaint will not be treated as amended to conform to the proof, but a remittitur of the excess of the judgment will be ordered.

Appeal from Poinsett Circuit Court, First District; *R. H. Dudley,* Judge; affirmed.

*J. F. Gautney,* for appellant.

1. The verdict is so excessive as to show it was the result of passion, prejudice, recklessness or mistake. 9 Ark. 405; 25 *Id.* 49; 26 *Id.* 309; 39 *Id.* 511; 21 S. W. 36; 92 Ark. 345; 102 *Id.* 603.

2. It was error to give instruction No. 1, stating that the evidence was undisputed, etc. 93 Ark. 277.

3. The court erred in overruling the motion for new trial. The evidence on behalf of Dillon on the motion was not disputed by Seeley. A complete defense was offered and not denied. The trial court having found that the verdict was excessive should have set it aside in its entirety. 96 Ark. 379, 383; 126 *Id.* 427.

4. Dillon offered a complete defense to every item set up in the cross-complaint.

5. Dillon exercised due diligence.

*Mardis & Mardis,* for appellees.

1. The verdict is not so excessive as to show passion or prejudice, etc. The evidence showed that defendants were entitled to damages in the sum of $27,481. It was in strict conformity with the law and the evidence. 102 Ark. 603.

2. There was no error in giving instruction No. 1. The evidence was undisputed, and no objection was made to it. 131 Ark. 121; 135 *Id.* 602.

3. The trial court had the right to reduce the judgment without setting it aside in its entirety. 107 Ark. 422; 133 *Id.* 223.

WOOD, J. The appellant instituted this suit in March, 1920, in the Poinsett Circuit Court against the appellees. He alleged that he sold and delivered to the appellees one California Heavy Style Rig with drill stems for the sum of $22,000, $10,000 of which was paid in cash and the balance evidenced by three promissory notes of $4,000 each, payable in thirty, sixty, and ninety days, which

notes were past due and upaid. The appellees answered on May 10, 1920, and denied all material allegations of the complaint. They filed a counterclaim in which they alleged that at the time they purchased the drilling outfit from the appellant they had a contract to drill an oil well in the State of Louisiana; that appellant failed to deliver the machinery according to contract, which caused the appellees to forfeit their contract in Louisiana to their damage in the sum of $10,000; that they were damaged in the further sum of $981 for freight and demurrage and a further damage of $500 on account of having to remove the machinery from Shreveport, Louisiana, to Harrisburg, Arkansas; that one of the appellees, Seeley, since the purchase, in order to put the rig in condition for use in drilling, had purchased additional machinery in the sum of $6,000 and that it would require the expenditure of $6,500 more to make the rig complete as per contract. The record shows that on May 10, 1920, by special request the court set the cause for a hearing on May 14th. On the latter date the cause was called for trial. After the jury was impaneled, one of the counsel for the plaintiff below, appellant here, announced that he desired to take a nonsuit. The court thereupon informed counsel that the defendants below, appellees here, had filed an answer and cross-complaint in which they were asking for affirmative relief against the plaintiff, and that his action in dismissing the complaint would not interfere with defendants' right to prosecute their cross-complaint. The court further informed counsel for the plaintiff that he would be given time to file a reply to the cross-complaint and prepare for trial. Counsel for plaintiff thereupon announced that there was no service on the plaintiff (defendant in the cross-complaint), and that they would not do anything to enter plaintiff's appearance. Thereupon, counsel for the defendants, cross-complainants, announced that they were ready to offer evidence on the counterclaim set up in the cross-complaint, which was done.

It is unnecessary to set forth, in detail, the testimony tending to prove the damages alleged in the cross-complaint. The testimony established the contract of sale as set up in the complaint and tended to show that, on account of the failure of appellant to deliver the drilling outfit as per the terms of the contract, the appellees were damaged in the sum of $10,000 in the loss of profits on a certain contract to drill an oil well in Louisiana, and that on account of the delay appellees were required to pay a demurrage of $981 and additional freight bill of $500; that there was a difference of $16,000 between the drilling outfit which they had purchased of the appellant and the outfit which was delivered to them under their purchase from the appellant. In other words, the drilling outfit that they actually got was of the value of about $6,000.

No exceptions were saved on the trial of the cross-complaint to any of the rulings of the court in admitting evidence or in giving instructions. The jury returned a verdict in favor of the appellees in the sum of $27,481.

The appellant filed a motion for a new trial containing various assignments of error and among them that the verdict of the jury was contrary to the law and the evidence. These are the only assignments that we can consider, for there were no objections or exceptions during the progress of the trial to the rulings of the court which were assigned as error in the motion for a new trial. After hearing the evidence that was adduced on motion for a new trial, the court required a remittitur to be entered in the sum of $10,500, which was entered by the appellees. Thereupon, the court overruled the motion for a new trial and entered a judgment in favor of the appellees in the sum of $16,981, from which is this appeal.

Under section 6231 of Kirby's Digest, the appellees had the right to proceed to the trial of their counterclaim, although appellant had taken a nonsuit on the notes. The record shows that the court expressly advised appellant that he had the right to file a reply or an-

swer to the counterclaim of appellees and offered to give appellant time to do so and to prepare for a trial on the counterclaim. But the appellant announced that he did not care to file any further pleadings; that there was no service on the appellant, and that he did not wish to do anything to enter his appearance. It appears, therefore, that counsel for appellant misapprehended the law and allowed the trial on the counterclaim to proceed as though he were not a party to these proceedings. In its instructions the court told the jury that the only issue for them to determine was as to the amount of the damages. "If there is any evidence to sustain the verdict under any view of the law applicable to the case, then it should not be disturbed." *Chicago Crayon Co.* v. *Choate,* 102 Ark. 603-605.

Appellee Seeley testified that appellant's delay in delivering the drill rig according to contract caused the appellees to pay $981 demurrage, and that there was a difference between the contract price of the drill rig purchased by the appellees from the appellant and the outfit that was actually delivered to the appellees of $16,000. The testimony was therefore sufficient to sustain the verdict and the judgment for $16,981. After the appellant took the nonsuit and deliberately elected not to defend the action for damages, nor to ask for judgment for the balance of the purchase money, the court had no jurisdiction to render judgment in his favor in this proceeding offsetting the counterclaim by the amount of the notes. Appellant, by his conduct, allowed the cause on the counterclaim to proceed to judgment as an entirely independent action, and he could not by his motion for a new trial bring into this record matters which passed out when he took his nonsuit and elected not to challenge the allegations of the counterclaim. The judgment is correct, and it is therefore affirmed.

HART, J., dissenting.

WOOD, J. (on rehearing). A petition for rehearing has been filed, in which counsel insist that the testimony offered in support of the motion for a new trial was such

that this court should hold that the court below abused its discretion in refusing to grant the prayer for a new trial. It is conceded that the testimony offered at the trial before the jury, and which was heard and passed upon by the jury, is legally sufficient to support the verdict returned. But it is insisted that a showing was made upon which this court should find that the court below abused its discretion in refusing to grant the new trial.

In support of this contention, it is shown that Dillon had not expected to try the case at that term, and had directed his regular attorney, who resided in Texas, to take a nonsuit, and that attorney went to Harrisburg expecting to take that action; but on his arrival there he found that a jury had been empaneled to try the case. This was shown to have been a surprise to the Texas attorney as well as to Dillon; but the local attorney representing Dillon had had the case set for trial and had made up the jury to try the case, when a recess was taken until the arrival of the train on which Dillon and his regular attorney were expected.

No question is made about the authority of the local attorney to represent Dillon, nor is his good faith questioned. But there was a misapprehension of the law on the part of Dillon's attorneys, which resulted in their failure to take advantage of the court's offer to give them time to prepare for trial.

Ordinarily litigants appear by attorneys, who act for them. Litigants are, therefore, necessarily charged with any knowledge possessed by their attorneys in regard to the orders of the court relating to the trial of the causes, and Dillon must, therefore, be charged with the knowledge of his local attorney, although that attorney had failed to communicate the knowledge to him.

It does appear, however, that in the counterclaim there was a prayer for a judgment for only $11,981, and that even after a remittitur of $10,500 had been ordered, judgment was rendered for $16,981, which was $5,000 in excess of the sum sued for. This excess can not be per-

mitted to stand, and the judgment here must be reduced by that amount. The counterclaim was never amended. Permission was neither asked nor granted to amend, and we can not say that the pleadings may be treated as amended to conform to the testimony, nor that the testimony was offered without objection. *American Bonding Co.* v. *Morris,* 104 Ark. 276; *Patrick* v. *Whitely,* 75 Ark. 465; *McMurray* v. *Boyd,* 58 Ark. 504; *S. R. Morgan & Co.* v. *Pace,* 145 Ark. 273.

Dillon's attorneys had assumed the mistaken attitude of not being before the court for any purpose. The attorneys declined to take any action which would have the effect of entering their client's appearance. As we have said, they were mistaken in this, but it can not be said that there was either consent or failure to object, because the whole conduct of the attorneys was one of protest. The court should not, therefore, have rendered judgment in excess of the amount claimed in the counterclaim, and the judgment will be reversed unless appellee shall within fifteen days consent that the judgment be reduced to $11,981.

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## UNION & MERCANTILE TRUST COMPANY *v.* HUDSON.

Opinion delivered January 10, 1921.

1. APPEAL AND ERROR—TIME FOR TAKING APPEAL.—Where a demurrer to a complaint was sustained, but no judgment entered at that term, and at the following term a *nunc pro tunc* order was entered which showed that the demurrer to the complaint was sustained, and that plaintiff excepted to the judgment sustaining such demurrer, and was granted an appeal, but failed to show that plaintiff rested or elected to stand on his complaint, or that the complaint was dismissed, an appeal from a judgment rendered at a third term dismissing the complaint for want of equity was in apt time.
2. EQUITY—JURISDICTION.—Where an executor and a bank fraudulently withheld from the testator's wife a deposit in the bank in which the wife had an estate in entirety, a bill to recover such fund is peculiarly one of equitable jurisdiction.

3. COURTS—PROBATE JURISDICTION.—The probate court has no jurisdiction of contested rights and matters of litigation as to the title of property between executors or administrators and others claiming the title as against the estate of a deceased person.

4. HUSBAND AND WIFE—ESTATE BY ENTIRETY.—The statutes removing the disabilities of married women (Crawford & Moses' Dig., §§ 5574, 5577, 5580) were intended, not to destroy any rights of married women existing at common law, but to enlarge them, and do not affect estates by entirety.

5. HUSBAND AND WIFE—DEPOSIT OF JOINT FUNDS IN HUSBAND'S NAME.—Where a husband deposited in his own name funds jointly belonging to himself and his wife, without her consent, his acts constituted a fraud upon her rights, and upon his death the remainder of the deposit was held by the bank as trustee for her, as soon as the character and source of her title was brought to its knowledge.

Appeal from Independence Chancery Court; *Lyman F. Reeder,* Chancellor; reversed.

*Earl C. Casey,* for appellant.

The law of tenancy by the entirety applies to personal property and is not affected by the passage of the married women's enabling statutes. 13 R. C. L. 1106-8 and cases cited; 188 Pa. St. 33; Freeman on Co-Tenancy and Partition, §§ 62 to 68; 173 Mo. 91; 61 L. R. A. 166; 173 Mo. 91; 61 L. R. A. 166; 73 S. W. 202; Schouler on Per. Prop. (3 ed.) 191.

The courts of this State hold that the "married women's acts" are not intended to destroy the common law unity of husband and wife but merely to enlarge the privileges of the wife. 134 Ark. 167; 31 S. W. 117; 124 Ark. 167. See, also, 159 Mass. 415; 99 Wis. 388; 75 N. W. 163; 232 Pa. St. 89; 81 Atl. 145; Ann. Cas. 1912 C, 1240; 189 Mass. 563; 76 N. W. 206; 34 Am. Rep. 245; 117 Mich. 449; 13 R. C. L. 1196. These cases show that it was error to sustain the demurrer to the amended complaint. 200 Mo. 474; 98 S. W. 527; 68 Ind. 245; 34 Am. Rep. 245; 117 Mich. 449; 13 R. C. L. 1106.

*Samuel M. Casey,* for appellees.

1. The decree sustaining the demurrer should be sustained for any one of three reasons. (1) The chancery

court had no jurisdiction. (2) The facts as alleged do not show an estate by entirety in the money claimed, and (3) plaintiff by taking dower out of said fund is estopped to claim the whole fund.

The probate court had exclusive jurisdiction and chancery can not take cognizance. 34 Ark. 63; 45 *Id.* 505; 84 *Id.* 192; 74 *Id.* 520; 70 *Id.* 444.

2. The doctrine of estate by entirety can not be extended to personal property in this State. 138 Mich. 112; 136 N. Y. 61; 36 Am. St. 700; 33 Harvard Law Review 983.

3. Having elected to take dower, plaintiff can not claim the whole property. 66 Ark. 305; 31 *Id.* 580.

WOOD, J. V. G. Richardson and his wife, Willie A., owned certain lands in entirety in Independence County, Arkansas. On the first of May, 1918, they mortgaged these lands to secure a loan of $15,000. Richardson, without the knowledge or consent of his wife, deposited this sum in the First National Bank of Batesville, Arkansas, in his own name, when it should have been deposited in their joint names. Richardson died on the 13th of May, 1918. At that time there remained on deposit in the bank $8,062.23 of the $15,000. On the 28th day of May, 1918, Roy Hudson was appointed administrator of the estate of Richardson, and S. A. Ruddell, W. K. Ruddell and John A. Hinkle were his bondsmen, and the $8,062.23 remaining in the bank was placed to Hudson's credit as administrator of the estate of Richardson. Mrs. Richardson instituted this action against Hudson, as administrator of the estate of her husband, the bank, and Hudson's bondsmen, to have the bank declared a trustee and to have the money transferred and deposited to her account.

The above are substantially the facts set forth in the complaint. The defendants entered a general demurrer to the complaint. Mrs. Richardson died, and the cause was revived in the name of the Union & Mercantile Trust Company of Little Rock, the executors of her estate. At the June term, 1919, the demurrer to the com-

plaint was sustained, but at that term no judgment was entered to that effect. At the December term following a *nunc pro tunc* order was entered, showing that at the former June term the demurrer was sustained to the plaintiff's amended complaint, that plaintiff excepted and prayed and was granted an appeal. But this order failed to state that the plaintiff refused to plead further, and that the complaint was dismissed after the demurrer was sustained. At the June term, 1920, the court entered an order dismissing the plaintiff's complaint for want of equity. From that judgment is this appeal, and the transcript was lodged in this court August 27, 1920.

1. The appeal was in apt time. While the *nunc pro* tunc order of the December term, 1919, shows that the demurrer to plaintiff's amended complaint was sustained, and that plaintiff excepted to the judgment sustaining such demurrer, and prayed and was granted an appeal to the Supreme Court, such *nunc pro tunc* order does not show that, after the demurrer was sustained, the plaintiff "rested thereon," that is, elected to stand upon his complaint, and refused to plead further. Herein lies the distinction between the case at bar and the case of *Melton* v. *St. L., I. M. & S. Ry. Co.*, 99 Ark. 433-37, upon which appellee relies. A careful reading of the opinion in that case will show that it sustains our holding that the appeal herein was in time.

2. The facts set forth in the complaint, though not skillfully pleaded, were nevertheless sufficient to state a cause of action within the jurisdiction of a court of chancery. The plaintiff below was not undertaking to correct errors and irregularities in the settlements of the administrator, or to interfere in the management of the estate of Richardson by the probate court. The allegations show that the purpose of this suit was to try the title to the funds deposited in the bank to the credit of the administrator and to have the bank declared a trustee of those funds for the benefit of Mrs. Richardson. According to the allegations, the administrator was seeking to hold and have the probate court administer as

funds of the estate of Richardson the proceeds of the loan which the plaintiff alleged had been deposited without her knowledge and consent in the name of Richardson, whereas the same should have been deposited in their joint names. She averred that Hudson and the bank had been notified that she claimed the funds. She alleged facts showing the source of her claim of title and prayed that the bank be declared a trustee.

If Mrs. Richardson had an estate in entirety in the funds after the death of Richardson, then, under the facts stated in the complaint, it would have been a fraud upon the part of Hudson, after being notified by Mrs. Richardson of her claim, to continue to claim the funds as the property of the estate of Richardson, and likewise a fraud upon the part of the bank to allow him to do so. The case, under the facts stated, is peculiarly one of equitable jurisdiction. The probate court has no jurisdiction of contested rights and matters of litigation as to the title of property between executors, or administrators and others claiming the title as against the estate of a deceased person. *Morse* v. *Sandefur*, 15 Ark. 381; *Clarke* v. *Shelton*, 16 Ark. 474; *Mobley* v. *Andrews*, 55 Ark. 222; *Fancher* v. *Kenner*, 110 Ark. 117; *Shane* v. *Dickson*, 111 Ark. 353; *Fowler* v. *Frazier*, 116 Ark. 350.

3. This brings us to a consideration of the question as to whether or not Mrs. Richardson had an estate by entirety in the funds in controversy. The question of whether there can be an estate by entirety in personal property does not seem to have been heretofore decided by this court. That Mrs. Richardson had an estate by entirety in the lands which were conveyed to her husband and herself jointly is well settled in this State. *McWhorter* v. *Green*, 111 Ark. 1; *Robertson* v. *Robinson*, 87 Ark. 357; *Roulston* v. *Hall*, 66 Ark. 305; *Branch* v. *Polk*, 61 Ark. 388; *Robinson* v. *Eagle*, 29 Ark. 202.

According to the allegations, the funds in controversy were proceeds of a loan which the lands held by entireties were mortgaged to secure, and which funds should have been deposited in the joint names of Richardson and

his wife. Our statutes enfranchising married women and virtually destroying the unity of husband and wife, so far as the separate property and rights of the wife are concerned, were not intended to, and do not, affect estates by entirety. Ch. 86, Crawford & Moses' Digest, §§ 5574, 5577 and 5580. These statutes were intended, not to destroy any estate, or restrict any right or privilege that married women had at the common law, but to enhance them. *Baker* v. *Rowland,* 114 Ark. 280; *Fitzpatrick* v. *Owens,* 134 Ark. 167; *Frost* v. *Frost,* 200 Mo. 474; *Phelps* v. *Simons,* 159 Mass. 415; *In re Myers Estate,* 232 Pa. St. 89; Ann. Cas. 1912, C. 1240; *Re Rachel A. Branberry's Estate,* 156 Pa. 628, 22 L. R. A. 594.

The funds in controversy had not, by the knowledge and consent of Mrs. Richardson, been reduced to the separate possession of Richardson, nor had they been reduced to her separate possession. He was to deposit them in the bank in their joint names, and in equity it is the same as if he had done so, and it was a fraud on her rights for him not to have done so. He was a trustee of her interests, and the bank likewise, after having knowledge of the character and source of her title, held the same as a trustee for her after Richardson's death. *Frost* v. *Frost,* 200 Mo. 474-84.

Mr. Bishop says: "If real estate is conveyed by deed to husband and wife, this creates in them a peculiar kind of tenancy known as tenancy by the entirety, and, on a dissolution of the coverture by the death of one of them, the survivor takes the whole estate. Nothing of this sort is known in respect to personal property, since the wife can not own personal property in her own right, and whatever title she has to personal property vests in the husband. If the chattel is given or sold to husband and wife jointly, the title vests wholly in him." 1 Bishop on Law of Married, Women, § 211. He cites, to support the text, *Pope* v. *Allen,* 19 Mo. 467. There are a few other authorities to the same effect. *Morrow* v. *Morrow,* 138 Mich. 112; *Matter of Albrecht,* 136 N. Y. 91, 33 Harvard Law Review, 983. On the other hand, Mr. Freeman, an equally

eminent author, challenging the views of Mr. Bishop, says: "No decision of this purport exists in England, so far as we are aware. The reports, English and American, new and old, abound in cases recognizing tenancy by entirety in all kinds of personal estate and enforcing the right of the surviving husband or wife to the entire property." Freeman on Cotenancy and Partition, § 68. He cites *Bricker* v. *Wheatly,* 1 Vern. 233; *Cowper* v. *Scott,* 3 P. Wms. 121; *Atty. Genl.* v. *Bacchus,* 9 Price 30. Counsel for appellant in his excellent brief has collated nearly all of the following authorities: *Frost* v. *Frost, supra; Phelps* v. *Simons,* 159 Mass. 415; 38 Amer. State Reports, 430; *Boland* v. *McKowen,* 189 Mass. 563; *Baker* v. *Stewart,* 40 Kan. 442; *Johnson* v. *Johnson,* 173 Mo. 91; *Parry's Estate,* 188 Pa. St. 33; *Re Bramberry's Est., supra; Fielder* v. *Howard,* 99 Wis. 388; 13 Rul. Case Law, §§ 128, 129, p. 1106; Schouler on Personal Property, § 156, p. 223; *Draper* v. *Jackson,* 16 Mass. 480; Childs, Personal Property, § 136; *Patton* v. *Rankin,* 68 Ind. 245; *Dickey* v. *Converse,* 117 Mich. 449. In addition to the above, see the very recent case (January 7, 1920) of *George* v. *Estate of Dutton,* 108 Atl. 515, where it is said: "The marital rights of the husband at common law, in the personal property acquired by his wife during coverture, are not inconsistent with the theory that estate by entirety may exist in personalty; for the wife may hold such property by virtue of a gift or bequest to her sole and separate use; or she may so hold it by reason of surrender and waiver by the husband of his marital rights therein; or, if her property consists of choses in action, the husband may not reduce it to possession within his lifetime." This case is reported with extensive notes in 8 Am. Law Reports, pp. 1014-1017.

The case of *Draper* v. *Jackson, supra,* reviews several very old cases occurring in the reign of Edward Third (1216) and Fourth (1416), and of Henry Sixth (1422). These reigns were long before the fourth year of James the First (1607), and the decisions show that tenancy by entirety could and did exist at the common

law in personal property. See Crawford & Moses' Dig., § 1432. It appears, therefore, that the great weight of authority is in accord with the statement of the law *supra* by Mr. Freeman.

4. The allegations of the complaint do not show that Mrs. Richardson was estopped by claiming or taking dower out of the funds in controversy. The vague allegations as to dower are not sufficient to estop her. It follows that the court erred in sustaining the demurrer to the complaint and in dismissing the same for want of equity. The decree is therefore reversed, and the cause is remanded with directions to overrule the demurrer.

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HICKS v. FLETCHER.

Opinion delivered January 10, 1921.

1. DOWER—TRANSITORY SEIZIN.—Where the seizin of the husband is merely transitory, and where the same act which gives him the estate conveys it out of him, or where he is only a mere conduit for the passage of the title, the wife is not entitled to dower.
2. DOWER—AGREEMENT OF HUSBAND TO RECONVEY.—Where a husband agreed to reconvey a portion of land conveyed to him as soon as he received the conveyance, his seizin as to such portion was transitory, and did not entitle his wife to dower.

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

1. The execution and delivery by Hicks and wife of the option deed was not a part of the consideration for the execution and delivery of the warranty deed from the Fletcher heirs to Hicks, and Mrs. Hicks' dower right attached under the warranty deed. If Hicks ever owned this land, even for a moment, in his own right, then dower certainly attached to his wife. Title to these lands never passed to Hicks, and his wife was not endowed. *Elliott* v. *Hogue,* referred to in 113 Ark. 591, 73 Ark. 211. For distinction between conditions precedent and subsequent, see 26 Ark. 617; 28 *Id.* 48.

The date of a deed and not the date of its acknowledgment is *prima facie* the date of its delivery. 61 Ark.

104. The recital in the deed of payment of the consideration is *prima facie* evidence that he paid that amount for the land. 123 Ark. 537.

The producton of a deed by a grantee raises a presumption of delivery which can be overcome only by clear and convincing evidence. The statement of the amount of consideration in the deed and acknowledgment of its receipt are *prima facie* evidence which may be overthrown by parol evidence. 82 Ark. 492; 101 Ark. 603. The case in 125 Ark. 441 is right in point as to the consideration expressed in the warranty deed from the Fletcher heirs to Hicks and sustains our contention. On this line, see 71 Ark. 494; 99 *Id.* 350.

2. Dower has from early times always been highly esteemed in the law. 9 R. C. L. 563 and notes. To support a claim for dower it must be shown that during the marriage the husband was seized of a freehold estate in the real estate and that the seizin was of beneficial quality. 9 R. C. L. 574 and notes, 582 and notes.

Dower can not be defeated or impaired by any act of the husband or any title emanating from him. The dower right prevails over any conveyance made by the husband in the execution of which she does not share and remains unaffected by any lien or other claim based on a contract made by him or by execution sale on a judgment against him. 9 R. C. L. 584, 590 and notes.

The right of dower becomes immediate when the husband is seized. Tiedeman on Real Property (enlarged edition), §§ 123-129; 5 Ark. 508; 60 *Id.* 461; 67 *Id.* 15; 96 *Id.* 540; 87 *Id.* 344; 116 *Id.* 400; 5 Ark. 610-11.

3. The option could not have been given and was not part of the original consideration, for the reason as shown that all the lands were owned by a number of heirs, and none of them were parties to the proposed deal between appellee and appellant, and the title to all the lands passed to appellant where it remained until appellee decided to avail herself of the option, and, even if the option be binding on Hicks, the right of dower vested in his wife and codefendant, while appellee was considering

the question of his option, and the court below was powerless to divest her of her dower right. Taking into consideration all the circumstances in connection with the purported option deed, the contract between appellee and appellant was void. 124 Ark. 313.

*Frauenthal & Johnson,* for appellee.

From the nature of this case and the agreement between the parties as to this forty-acre tract, Mr. Fletcher had a right to obtain this land free from any dower interest in Roxanna Hicks, the wife. Before any dower interest in land can attach, it is necessary that the husband have seizin. According to the transaction and agreement, the conveyance of this forty to Hicks was made under the understanding and with the purpose of Hicks conveying it to Fletcher, and his agreement to do this was a part of the consideration of the conveyance by the Fletchers to Hicks of this very tract. When the seizin of the husband is merely transitory or he is a mere conduit for the passage of title, the wife has no dower. 19 C. J. 465; 31 Ark. 580.

The simultaneous delivery of a deed for land and the execution of a mortgage to the vendor by the purchaser to secure payment of any portion of the purchase money does not create such seizin as will entitle a wife to dower. 19 C. J. 466. See 29 Ark. 591; 25 *Id.* 52; 52 L. R. A. (N. S.) 555. In a foreclosure suit of a vendor's lien on land for unpaid purchase money it is not necessary to make the wife of the purchaser a party as she has no dower rights or interest. 126 Ark. 313. Seizin in the husband is a prerequisite of dower in the wife. 139 Ark. 469; 71 *Id.* 576; 98 *Id.* 118. Under the facts and the law of this case, the wife of Hicks obtained no dower interest in the land as against the appellee, Fletcher.

WOOD, J. The appellee, J. R. Fletcher, and his brothers and sisters and their descendants were the owners of 520 acres of land in Pulaski County, which appellant, James T. Hicks, desired to purchase. The lands were in the hands of J. A. Gurley as agent of the Fletcher

heirs. He, in connection with the appellee, conducted the negotiations for the vendors. In the tract was a forty acres on which were a spring, swimming pool and target range. Appellee desired to retain his own interest and to obtain the interest of the other owners in this forty. Gurley informed appellant of this fact, and that appellant would have to execute to the appellee a written instrument giving him the right to acquire the forty acres of land which he desired. An agreement was entered into between them to the effect that, when the deed was delivered, appellant was to sell to appellee the forty acres desired by him at $4 per acre, the same price per acre appellant was paying for the entire tract. The deed to the entire tract of 520 acres was duly executed. An instrument called an option deed was prepared which provided that for the consideration of $1 and the undertaking upon the part of the appellee to pay $160, the appellant conveyed to appellee a certain forty acres of land described in the instrument. Gurley took these instruments to the appellant, whereupon the appellant executed the option deed, and Gurley delivered to him the warranty deed to the 520 acres. Gurley informed the appellant that he was not to deliver the warranty deed to the 520 acres until appellant signed the option deed. Appellant definitely understood that he would have to execute to appellee the option deed to the forty acres of land described therein before the deed to the 520 acres could be delivered to him. That was the condition upon which it was delivered to him. The appellant afterward refused to execute a warranty deed to the appellee in compliance with the written contract. The appellee tendered to him $160 and demanded a deed. Thereupon the appellee instituted this suit in the Pulaski Chancery Court against appellant and his wife, Roxana I. Hicks. In his complaint he alleged substantially the facts as above set forth, set up the written contract, and prayed that the appellant be required to specifically perform the same by executing to the appellee a warranty deed to the lands described, and that Roxana I. Hicks be re-

quired to relinquish dower, and that, in the event they failed to do so, all right, title and interest be divested out of them and be invested in the appellee.

The appellant and his wife answered, denying all material allegations of the complaint, and alleging that the option deed executed by appellant was without consideration and void, and that Roxana I. Hicks, his wife, was not a party to the option contract or deed and had no knowledge of the same, and therefore had not relinquished her dower in the lands described. They prayed that the complaint be dismissed for want of equity, and that the option contract or deed to appellant be canceled as a cloud upon their title. Upon the issues thus raised by the pleadings and the facts as above set forth, which are proved by a preponderance of the evidence the court rendered a decree divesting the title to the land out of the appellants and vesting the same in the appellee. From that decree is this appeal.

The effect of the agreement between the appellee and the appellant was that the appellant was to purchase the entire 520 acres of land for the sum of $4 per acre, and that when the deed to this tract was delivered by the vendors the appellant at the same time should sign the written contract or option deed conveying to the appellee the forty acres in controversy which the appellee desired to acquire for himself. These transactions by which the title to the 520 acres was to pass to the appellant, and by which the title to the forty acres was to pass to the appellee, were intended by the parties to the contract to be concurrent or simultaneous. The arrangement was tantamount to constituting the appellant a trustee or conduit through which the title to the forty acres was to pass to the appellee at the same time the title to the 520 acres passed to the appellant. "Where the seizin of the husband is merely transitory, and where the same act which gives him the estate conveys it out to him, or where he is only a mere conduit for the passage of the title, the wife is not entitled to dower." 19 Corpus Juris, 465, and numerous cases cited in note. In

*Cockrill* v. *Armstrong,* 31 Ark. 580-585, we said: "The seizin, to be effective, must be substantial, not a mere transitory seizin for an instant, as where the husband takes a conveyance in fee and at the same time mortgages the land back to the grantor. In such case the husband is not deemed sufficiently, or beneficially seized, by an instantaneous passage of the fee in and out of him, to entitle the wife to dower."

Under the facts of this record as above stated, which a preponderance of the evidence tended to prove, the appellant had no beneficial seizin in the land in controversy, for, according to the terms of the contract, at the same time he received title to the 520 acres including the forty acres in controversy, he was to convey that forty at the price he paid for the same to the appellee. "In order to entitle a wife to dower, there must be a beneficial seizin, not a mere transitory seizin in the husband." *Tate* v. *Jay,* 31 Ark. 576. See *McGuire* v. *Cook,* 98 Ark. 118.

It follows that the decree of the chancery court was correct, and it is therefore affirmed.

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LITTLE ROCK LUMBER & MANUFACTURING COMPANY *v.* BOYNTON & CO.

Opinion delivered January 10, 1921.

1. SALES—ACCEPTANCE OF ORDER.—Where an order for a carload of lumber directed shipment by a designated route, and was acknowledged by the seller in a letter which stated that the quoted prices were based on the through rate, and that there was no through rate by the designated route, requesting a reply by return mail, there was no unconditional acceptance of the order, which is essential to a binding contract made by letters or telegrams.
2. SALES—LETTERS AS EVIDENCE OF BINDING CONTRACT.—Subsequent letters between buyer and seller, in which the seller stated that it was doing everything possible to get the buyer's car on the way, being uncontradicted, *held* sufficient to show that the parties had previously entered into a binding contract for the sale of a carload of lumber.

3. SALES—DIRECTING VERDICT—CONFLICT OF EVIDENCE.—In an action for breach of a contract for the sale of a carload of lumber, it was error to direct a verdict for the plaintiff where, though the contract and its breach were undisputed, there was a conflict as to whether plaintiff suffered any damages.

4. SALES—MEASURE OF DAMAGES.—The measure of the buyer's damages for the seller's failure to perform his contract is the difference between the actual market value of the undelivered goods at the time of the seller's failure to perform his contract and the amount which the buyer agreed to pay, with 6 per cent. interest from the date of the breach to the date of judgment.

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

*Richard M. Mann,* for appellant.

1. The court erred in instructing a verdict for the plaintiff because (1) no contract of purchase was shown; (2) there was no evidence showing the market price of lumber in Chicago, the place of delivery; (3) appellant did not show by the testimony either the time of breach of the contract or the market price of lumber at the time of the breach.

2. The court erred in permitting S. W. Rogers, attorney for appellee, to read in evidence the letters set out in the abstract. There was no meeting of minds and no contract. 112 Ark. 380; 166 S. W. 533.

3. There was no evidence showing the market price of lumber in Chicago, the place of delivery, at the time of the breach, if any. The rule is that plaintiff can only recover the difference between the contract or sale price and the market price at the *time* and *place* of delivery. 70 Ark. 39; 66 S. W. 348; 79 Ark. 337; 96 S. W. 413; 92 Ark. 111; 122 S. W. 239.

3. Appellant did not show by the testimony either the time of the breach of the contract or the market value of lumber at the time of the breach. 70 Ark. 39.

4. It was error to permit S. W. Rogers, attorney for appellee, to introduce the letters set out in the abstract. It was conceded that there was no ratification unless it

was shown by these letters. The letters were not identified, and they were not competent.

5. The court erred in not sustaining appellant's objections to the testimony of F. P. Boynton and H. P. Heesch as to the market price of lumber. 70 Ark. 39; 66 S. W. 347.

6. Appellee could have purchased lumber elsewhere without loss or damage. Appellee could have saved itself from loss by simply paying cash, and it was its duty to do so. 96 Ark. 78. Under the evidence a clear case was made for a jury.

*Rogers, Barber & Henry,* for appellee.

1. It is too late to deny for the first time on appeal the existence of the contract.

2. Appellee proved the prevailing market price of lumber by two competent witnesses. The evidence is not disputed. Appellee actually went into the market and bought at said market price, immediately following the breach the identical lumber to replace the lumber bought from appellant. Appellant's objections to the questions and answers were too general. 76 Ark. 276; 58 *Id.* 353; 142 Fed. 320; 2 Words and Phrases (2 series), p. 1206.

3. There was no error in permitting the attorney for appellee to read the letters. They were properly identified and competent and cumulative of uncontradictd testimony.

HART, J. Appellee sued appellant to recover damages for an alleged breach of contract for the sale of a car of lumber by the latter to the former. The court directed a verdict in the sum of $195 in favor of appellee, and the case is here on appeal.

It is first insisted by counsel for appellant that the court erred in directing a verdict for appellee because no contract of purchase was shown. We can not agree with counsel in this contention. On the 13th day of November, 1916, appellee sent to appellant an order for a car of oak lumber and directed that the car should be

routed to it at Chicago via Peoria, Ill. On November 16, 1916, appellant wrote to appellee acknowledging the receipt of the order, and calling attention to the fact that there was no provision in the railroad tariff carrying through rates for routing via Peoria, and that such routing carried a higher rate than a through rate to Chicago. The letter also stated that the quotation of prices by appellant to appellee was based on the through rate to Chicago, and that any additional charges would have to be taken care of by appellee. The letter concluded with the following: "Kindly advise regarding this feature by return mail and oblige." The record does not show any reply to this letter by appellee. The language quoted shows that there was no unconditional acceptance by appellant. A binding contract of sale may be made by letters and telegrams, and an acceptance by letter or telegram of an unconditional offer made in the same manner constitutes a binding contract. Each party, however, must agree to the same proposition and the agreement must be mutual as to every essential term. *Southern Cotton Oil Co.* v. *Frauenthal,* 145 Ark. 394.

It is contended by counsel for appellee that, while there was no direct reply to appellant's letter of November 16, 1916, subsequent correspondence between the parties recognized that a binding contract had been entered into between them. Counsel refers to a letter written by appellant to appellee of the date of December 9, 1916. In this letter appellant purports to reply to a letter of appellee dated December 5, 1916. Appellant states in the letter that it will be three weeks before appellee's car of lumber can be loaded. It advises appellee that it is doing everything possible to get the car on the way and will notify appellee a little later just when the car will move. This letter shows that the parties had previously entered into a binding contract for the sale of the car of lumber.

There is no testimony in the record tending to contradict this letter. On the other hand, its contents are corroborated by the subsequent correspondence between

the parties. Hence the undisputed testimony as disclosed by the record shows that a valid and binding contract for the sale of the lumber was entered into between the parties.

It is also contended that the court erred in directing a verdict for appellee for $195. The undisputed evidence establishes the fact that appellant failed to ship the car of lumber according to contract, but it does not conclusively show that appellee was damaged in the sum of $195. It is true that appellee's own testimony shows that it was damaged in this sum, but it can not be said that the testimony on this point was uncontradicted. On the part of appellant it was shown by Leo Yount, one of its employees, that he was familiar with the market price of lumber of the description called for in the contract since November, 1916; that there was practically no advance in the price of lumber for six or seven months after November 13, 1916; that some lumber of the same grade was sold at a lesser price; that the market did not begin to advance until the fall of 1917, and that appellee could have purchased lumber of the same character and for the same price, had it desired to do so.

In *Lanier* v. *Little Rock Cooperage Co.*, 88 Ark. 557, the court held that the measure of the vendee's damages for the vendor's failure to perform his contract is the difference between the actual cash market value of undelivered goods at the time of the vendor's refusal to fulfill its contract and the amount which the vendee agreed to pay therefor, together with six per cent. damages thereon from the date of such breach to the date of the judgment.

Tested by this rule, the testimony on the question of the measure of damages was not undisputed, and the court erred in not submitting that question to the jury. The testimony of Yount tended to show that appellee only suffered nominal damages by appellant's breach of the contract, and it constituted prejudicial error for the court to instruct the jury to return a verdict in favor of appellee for $195.

It is also contended by counsel for appellant that no proper foundation was made for the introduction of certain of the letters by appellee. We do not deem it necessary to discuss or to decide this question. The alleged failure of proof on this point, if any, was the result of inadvertence, and it does not appear that there will be any difficulty whatever in showing that the letters in question were written by appellant, if such were the fact.

For the error in directing a verdict for appellees, as indicated in the opinion, the judgment must be reversed, and the cause will be remanded for a new trial.

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## MOSAIC TEMPLARS OF AMERICA v. BEAN.

Opinion delivered January 10, 1921.

1. STATUTES—PROSPECTIVE OPERATION.—All statutes are to be construed as having only a prospective operation unless the Legislature expressly declares, or otherwise shows a clear intent, that it shall have a retrospective effect.
2. INSURANCE—STATUTE DEFINING BENEFICIARIES OF FRATERNAL POLICY—CONSTRUCTION.—Acts 1917, p. 2091, § 6, providing that payment of death benefits shall be confined to wife, husband and certain other designated relatives or dependents of the member, of a fraternal beneficiary association, has no application to a benefit certificate issued prior to its passage, and a member, after its passage, could change the beneficiary in a benefit certificate previously issued if he had that right before the act was passed.

Appeal from St. Francis Circuit Court; *R. J. Williams,* Special Judge; affirmed.

STATEMENT OF FACTS.

Frank Bean and Amanda Bean sued the Mosaic Templars of America to recover the sum of $300 alleged to be due them on a benefit certificate.

The material facts are as follows: The Mosaic Templars of America is a fraternal beneficiary life association, and has been legally authorized to do business in the State of Arkansas since the beginning of the year 1916. On the 22d day of March, 1916, it issued a benefit certificate in the sum of $300 on the life of Maggie Starks,

and Mary Young was designated as the beneficiary. Mary Young was a kinswoman of Maggie Starks, but the degree of their relationship is not stated. On the 19th day of August, 1919, Maggie Starks was in failing health and applied to Frank Bean and Amanda Bean for financial help to take care of her for the balance of her life and to pay the assessments upon her benefit certificate. The plaintiffs agreed to help Maggie Starks and wrote to C. E. Bush, National Grand Scribe and Treasurer of the defendant association, advising him that Maggie Starks wished to change the name of the beneficiary in her policy to the names of the plaintiffs. The letter further stated that the plaintiffs were not related to Maggie Starks in any manner, and that the consideration for the change of beneficiaries was that they should pay the premiums on her policy and take care of her during the balance of her life. Bush advised the plaintiffs that he had authority to change the beneficiary to plaintiffs provided Maggie Starks would go before a notary public and make a will changing the beneficiary to plaintiffs. This was done, and thereafter plaintiffs expended the sum of $275 in taking care of Maggie Starks and paying the premiums on her policy. The premiums were paid until the death of Maggie Starks, and proof of her death was duly made to the association.

The defendant refused payment on the ground that the attempted change of beneficiaries was contrary to the statutes of the State, and that, the appointment of plaintiffs as beneficiaries being prohibited by the statutes of the State, they have no right to share in the benefit fund of the association.

The court found in favor of the plaintiffs, and judgment was rendered for the plaintiffs for the amount sued for. The defendant has appealed.

*Scipio A. Jones* and *Thos. J. Price,* for appellant.

The court erred in its declaration of law and in refusing to declare the law as requested by defendant. C. E. Bush, as national grand scribe, had no authority

to change the beneficiary to plaintiffs. Acts 1917, act 462, § 6. Where the provision restricting the beneficiaries is a statutory one, the company can not waive it and has no authority to issue a benefit certificate to a person who is not of the prescribed class. 2 Joyce on Ins., p. 1875; 140 Mass. 580, 5 N. E. 634; 10 *Id.* 166; 143 Mass. 216-21; 60 Mich. 44; 26 N. W. 826; 43 Ohio St. 1, 1 N. E. 11; 79 Kan. 493, 25 L. R. A. 814; 101 Pac. 1. No one has the authority to waive or suspend the statute laws of this State. The statute governing fraternal societies must be given full force and effect. 219 S. W. 767. The beneficiaries must come within the classes designated by our statute.

*Jas. R. Bussey,* for appellees.

The policy here was issued prior to the passage of the act of 1917, and any subsequent law can not affect its validity. The act is not retroactive. The court properly expounded the law. 14 R. C. L., p. 1166, par. 346. *Ib.* 1182, par. 359; 96 Ark. 154.

HART, J. (after stating the facts). 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. Section 6 provides that the payment of death benefits shall be confined to wife, husband and certain other designated relatives or dependents of the member.

The record shows that the plaintiffs are not in any of the classes permitted by the statute to be made beneficiaries. Therefore counsel for the defendant contend that the plaintiffs can not recover on the benefit certificate sued on because the statute in question became a part of the contract of insurance, and there is no power to make a beneficiary one who is not within any of the classes designated by the statute. Counsel rely upon the rule laid down by the Supreme Court of Minnesota, in *Logan* v. *Modern Woodmen of America,* 2 A. L. R. 1676, and cases cited in the opinion. We need not decide upon the correctness of the rule announced in those cases, for

we are of the opinion that the statute relied upon has no application under the facts of the present case. The benefit certificate sued on was issued prior to the passage of the act. So far as the record discloses, at the time the benefit certificate was issued, the member had the right to change the beneficiary to the plaintiffs, and this right or privilege was recognized by the Grand Scribe of the order, in 1919, at the time the change of beneficiaries was made.

It is a well settled rule of this court to construe all statutes as having only a prospective operation unless the Legislature expressly declares, or otherwise shows a clear intent that it shall have a retrospective effect. *Duke* v. *State,* 56 Ark. 460; *State* v. *Wallis,* 57 Ark. 64; *State* v. *McNally,* 67 Ark. 580; *Rhodes* v. *Cannon,* 112 Ark. 6, and *Black* v. *Special School Dist. No.* 2, 116 Ark. 472.

In *White* v. *United States,* 191 U. S. 545, the court said that where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the law-making power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men, rather than review and affix new obligations to that which has been done in the past.

Again in the case of *Cameron* v. *United States,* 231 U. S. 710, it was said that a retrospective operation of statutes is not to be given except in clear cases, unequivocally evidencing the legislative intent to that effect.

The statute under consideration pertains to the regulation and incorporation of fraternal beneficiary associations, and is very lengthy, containing thirty-two sections. There is nothing in any of them that tends to show that the Legislature intended the statute to have a retroactive effect. On the other hand, considering the language used in the light of the well known rule of construction above stated, it is apparent that the Legislature did not intend to give a retrospective effect to the statute. At the time

of the passage of the act there were doubtless many members of fraternal societies who were acting under the rules and constitutions of the societies as they then existed. There is nothing to indicate that the Legislature intended the statute to affect the rights of such members. Given a prospective operation, as we think it should be given, the statute has reference to the regulation of the rights and privileges between the societies and such members as should thereafter join them, and did not attempt to cut off or destroy the rights or privileges of those members who had already joined and secured benefit certificates under the constitution and by-laws of the associations as they then existed.

As stated in *State* v. *Wallis,* 57 Ark. 64, whether, if the Legislature had so intended, the statute could have a broader application and could have affected the rights of members in benefit certificates issued before the passage of the act, we need not determine. It is sufficient to say that the statute relied upon by the defendant has no application to the facts presented by the record. So far as the record discloses, the member complied with the constitution and by-laws of the society in making the change of beneficiaries, as they existed before the passage of the act in question, and this was recognized by the grand scribe of the order.

No other error is assigned for a reversal of the judgment, and it follows that the judgment will be affirmed.

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EVANS *v.* BLYTHEVILLE, LEACHVILLE & ARKANSAS SOUTHERN RAILROAD COMPANY.

Opinion delivered January 10, 1921.

1. APPEAL AND ERROR—REVIEW OF DIRECTED VERDICT.—Upon review of an order directing a verdict for defendant, the Supreme Court views the testimony and the inferences deducible therefrom in the light most favorable to the plaintiff.

2. MASTER AND SERVANT—QUESTION FOR JURY.—In an action against a railroad company for the negligent death of a servant in a switch yard at night *held* that there was no testimony from which the jury could have found that deceased had a lantern which would have revealed his presence on the track, although deceased had stated to a witness shortly before he was killed that he was going to fill his lantern and go to the place where he was killed.
3. MASTER AND SERVANT—QUESTION FOR JURY.—In such action it was *held* a question for the jury whether the failure to give a back-up signal was negligence, although the railroad company had no rule requiring such a signal.
4. NEGLIGENCE—DEGREE OF CARE.—The degree of care must always be measured by the exigencies of the particular case.
5. MASTER AND SERVANT—NONEXISTENCE OF RULE AS NEGLIGENCE.—In an action against a railroad to recover damages for the death of an employee at night in a switchyard, it was competent to prove the nonexistence of a rule or custom to give a back-up signal, as tending to show that the failure to give such signal was not negligence; but the absence of such rule or custom is not conclusive on such subject.
6. MASTER AND SERVANT—RAILROAD'S DUTY TO PROVIDE RULES.—Negligence can be predicated on a failure to provide rules for the protection of a servant if a thing is not done which some rule should require to be done; but the absence of a rule or custom requiring a back-up signal in a switchyard will not prevent the failure to give such signal from being negligence.
7. MASTER AND SERVANT—QUESTION FOR JURY.—Evidence *held* to present a question for the jury whether a rule or custom required a back-up signal in a switchyard at night.
8. NEGLIGENCE—COMPARATIVE NEGLIGENCE.—In an action against a railroad company for the death of an employee in a switchyard at night, where deceased carried no lantern and the trainmen gave no back-up signal, whether or not the negligence of deceased was greater than that of the railroad company was for the jury.

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

*Barham & Adams, A. F. Barham* and *J. T. Coston,* for appellants.

The court erred in directing a verdict for defendant. Evans was on duty, where he had a right to be, and he was killed by defendant's train; that makes a case of negligence in defendant which was not overcome by

any evidence showing the exercise of due care to prevent the injury. The company was negligent and is liable. Evans was not guilty of contributory negligence, and it was error to direct a verdict. A proper lookout was not kept. 102 S. W. 701-2. The killing by a train raises a presumption of negligence against the company. 99 S. W. 81. A case for a jury was made by the evidence. 3 Labatt on Master and Servant, § 1127; 15 S. W. 110; 2 Thompson on Neg, § 1574. Negligence of the company was shown. 84 Fed. 96; 54 Ark. 300; 58 *Id.* 214; 148 S. W. 648; 78 *Id.* 481; 15 *Id.* 110; 49 S. E. 87; 98 N. W. 244. See, also, 18 S. W. 683; 43 N. W. 332; 44 S. E. 664; 31 *Id.* 7.

*W. R. Satterfield* and *Buck & Lasley,* for appellee.

No negligence is shown on part of the defendant, and the negligence of the deceased was greater than that of defendant, and the court was correct in instructing a verdict on the contributory negligence of the deceased. A proper lookout was maintained, and there was nothing to submit to a jury. The burden was on appellant to show that if a closer lookout had been maintained the peril of deceased could have been discovered in time to have avoided the injury. 107 Ark. 431; 110 *Id.* 519; 117 *Id.* 483; 129 *Id.* 77. See, also, 113 Ark. 353. There is no evidence that appellee was negligent. Deceased was guilty of gross negligence, barring recovery, and a directed verdict was proper.

SMITH, J. Appellant is the widow and administratrix of John Evans, who was killed November 4, 1917, while employed by appellee railroad company, and she sues to recover damages for his death. There was a trial before a jury, which terminated in a verdict for the railroad company under the direction of the court.

It is insisted for appellee that the killing was caused solely and entirely by the negligence of Evans; that a proper lookout was being kept, and that sufficient warning was given that the train which killed him was about to move, by ringing the bell; and that no negligence was

shown on the part of the railroad company, and that, therefore, the negligence of Evans was greater than that of the railroad company, and that the court below was therefore correct in instructing a verdict on account of the contributory negligence of Evans.

Learned counsel for appellant invoke act 175 of the Acts of 1913, page 734, and say that under this act the contributory negligence of Evans can be considered only for the purpose of diminishing the recovery. But the last section of this act provides that it shall not apply to railroad corporations, and shall not amend or repeal any part of act 288 of the Acts of 1911 (page 56 of the General Acts of 1911). This last-named act provides that, when an employee is guilty of contributory negligence, such negligence shall not bar a recovery, provided the negligence of such employee was of a lesser degree than the negligence of such carrier, its officers, agents or employees.

The question for us to determine, therefore, is whether the testimony made an issue of fact for the jury as to whether the negligence of Evans was of a lesser degree than the negligence of the carrier, its officers, agents or employees; and, as the verdict was directed against the plaintiff, we must view the testimony and the inferences reasonably deducible therefrom in the light most favorable to the plaintiff. As thus viewed, the testimony may be summarized as follows:

The deceased's duties consisted in watering, coaling, cleaning and preparing the engines in the switch yard at Leachville, Arkansas, and the discharge of those duties required him to go about the yards at all hours of the night. The tracks at that place run north and south, and consist of the main track and three sidetracks, known as the main track, the brown track, the tank track, and the coal track. The brown track is west and the other two are east of the main track. The train approached from the south, going north. It went to the depot and then backed down on the brown track. Leachville was the terminal for this train, and it broke up there. The train

was put in on the brown track, and they cut the engine and one car loose and moved them on the main track, passing the switch. Then the engine and car backed in on the tank track and coupled to a string of cars standing there. The impact caused the string of cars standing on the tank track to move several feet, and the body of Evans was found under the wheels of one of those cars shortly afterward. The engine moving the cars which struck Evans was No. 8, and at the time of its arrival Evans and one Persinger were engaged in coaling Engine No. 10, which was standing on the coal track a few feet east of the tank track where the accident occurred. Shortly before the engine backed in on the tank track, Evans told Persinger he was going to put oil in his lantern and go over and see if No. 8 had coal enough to run the next day, and in going over to see about engine No. 8 it was necessary for Evans to cross the tank track about where his body was found. When the engine backed in on the tank track, the bell was ringing, but the back-up signal was not given. That signal consists in three short blasts of the whistle, and its meaning was well known to all railroad men.

The engineer testified that when he started with his train back on the tank track he was leaning out of the cab window on his left arm, looking south in the direction he was moving. That he had a clear view of the track and the place where Evans' body was found, and that he did not see any one there, nor did he see any light in that direction, and that there were no roads or streets crossing the tracks in the railroad yards. The fireman testified that he, too, was keeping a lookout, and that he saw no light where Evans was found; and so also did Garner, the brakeman, who threw the switch for the train to move on to the tank track. The engineer also testified that he left his engine for the night about 7:45 p. m., and that he first heard Evans had been killed about 10 p. m., and that, upon leaving his engine at night, if it had enough coal to run it the next day, it would be left on the brown track, and, if it did not have enough to run it the next day, it

would be placed on the coal track. As has been stated, Evans was killed on the tank track, and it is argued that from his knowledge of the customs of the yard he would reasonably have supposed that the engine would have been left on the brown track, or the coal track, as he had no information that the train was too long to remain on the brown track, and that he would not have reasonably anticipated that the train would back in on that track in the absence of the customary and well known signal that the train was about to back up. The engineer also testified that no rule required the giving of this back-up signal while switching in the yards, and that it was not customary to give it.

We think there was no testimony from which the jury could have found that Evans had a lantern which would have revealed his presence on the tracks. It is true Persinger testified that Evans said he would fill his lantern and see if engine No. 8 needed coal. But no one testified that Evans had put oil in his lantern, or that he had his lantern with him when he was killed. Had Evans' lantern been found smashed or overturned, we might say that the jury could have inferred that he had a lighted lantern when he crossed the yards, although it was not burning when his body was found. But no witness testified that he had a lantern, nor that any lantern was found near him, and there was, therefore, no testimony upon which a finding could have been made that Evans had a lantern when he was killed, and, in the absence of testimony which would support that finding, there could be no issue of fact in regard to the failure to keep a lookout, as Evans was evidently passing between cars when killed, and, if he had no lantern, an ordinary outlook would not have disclosed his presence between the cars. We do think, however, that the failure to blow the back-up signal makes a case for the jury; and this is true, although the railroad company may have had no rule requiring the engineer to give the back-up signal before backing up in the yards.

The degree of care required must always be measured by the exigencies of the particular case. *Railway Co.* v. *Triplett,* 54 Ark. 300. It was competent to prove the nonexistence of a rule or custom to give the back-up signal as tending to show that the failure to give this signal was not negligence; but the absence of a rule or custom is not conclusive of the subject. *Yazoo & M. V. Ry. Co.* v. *Hill,* 141 Ark. 378. Ordinary care might demand that the signal be given, and, if so, the absence of such rule or custom would not prevent the failure to give it from being negligence. Negligence can be predicated upon a failure to provide rules for the protection of persons whose safety may be endangered if a thing is not done which some rule should require to be done. 3 Labatt, Master and Servant, § 1127; 2 Thompson on Negligence, § 1574; 1 White, Personal Injuries on Railroads, § 263; *Fordyce* v. *Briney,* 58 Ark. 214; *Railway Co.* v. *Triplett, supra; Bain* v. *Northern Pac. Ry. Co.,* 98 N. W. 244; *International & G. N. R. Co.* v. *Hinzie,* 18 S. W. 683; *Smith* v. *Atlanta, etc., R. Co.,* 44 S. E. 664; *Fort Smith Lbr. Co.* v. *Shackleford,* 115 Ark. 572; *Railway Co.* v. *Hammond,* 58 Ark. 324.

Moreover, we think the testimony of the engineer that he was not required by rule or custom to give the back-up signal was not undisputed. The brakeman, Garner, who threw the switch for the train to back on to the tank track, testified as follows:

"Q. Mr. Garner, how far were you from the side of the train at the time they started down in response to your signal? A. How far was I from the track when I throwed the switch, and they started to back in there? Q. Yes, sir. A. I was standing right by the side of the track. Q. You could not see what was beyond those cars, could you? A. If it had been right against the cars, I could not. Q. And you could not see what was between them, could you? A. If there had been a light there, I could have seen it. Q. If there had been a light there, you could have seen it shining? A. Yes, sir. Q. Mr. Garner, in backing up, if the view of the train crew

is obstructed, what would you do to let the people who might be on the track know you were coming? A. Sound the whistle."

This witness was asked, "Is it the rule when you back up in a yard like that to give the back-up signal?" and answered, "It is hardly ever done," but he did not say there was no rule on the subject. The witness further testified as follows: "Q. In all your experience did you ever know a back-up signal given when you set that train in there like you did that night? A. I don't remember it. Q. You never heard of it being done at that place, did you? A. No, sir; I don't remember it." We think this testimony in its entirety made an issue of fact as to whether there was a rule in regard to giving back-up signals.

Here there were four tracks; and while the ringing bell should have apprised Evans that the engine was in motion, or was about to be put in motion, it did not notify him the direction in which it was moving. Three blasts of the whistle would have given him that information unmistakably. The engineer testified that railroad employees understood that signal just like they did the English language, and we can not say, from the testimony, that Evans did not have the right to expect that this signal would be given.

If the exercise of ordinary care required that this signal be given, then the failure to give it was negligence; and, if Evans had the right to expect that signal to be given, that fact should be taken into account in measuring his negligence. We think the record presents these questions of fact, and that the jury should therefore have been allowed to say whether or not the negligence of Evans was greater than that of the railroad company, and for the error in directing the verdict the judgment will be reversed and the cause remanded for a new trial.

MCCULLOCH, C. J. (dissenting). The complaint contains no charge of negligence in failing to provide adequate rules for the safety of employees of the company

working in the yards. The only charge of negligence in the complaint is that the trainmen failed to keep a lookout and in failing to give a signal. But, even if there had been such a charge of negligence with respect to the failure to provide a rule, it would have been the duty of the court to determine the reasonableness of that rule and not submit it to the jury, and the omission to provide for the back-up signal did not make the rule unreasonable if there was a rule requiring that the bell be rung. There would have been nothing to submit to the jury in regard to negligence in failing to provide an adequate rule for the safety of employees, even if the complaint had contained such a charge of negligence.

It seems to me that, according to the undisputed evidence, there was no rule requiring a back-up signal to be given in the yards for the protection of employees. The engineer testified that there was no such rule or custom, and Garner's testimony is not in conflict with that. He did not state, in so many words, that there was no such rule or custom, but he stated that the back-up signal was rarely ever given in the yards. In fact, he stated that he had no recollection of a single instance where it had been done. Now, since there was no rule or custom providing for the back-up signal, I fail to see how a charge of negligence can be based on failing to give such a signal, it being shown by undisputed testimony that the bell was ringing at the time the train moved backward. If there was no rule or custom to that effect, then appellant's intestate had no right to assume that the train would not be moved without giving the back-up signal.

Mr. Justice WOOD concurs.

BLACKBURN *v.* BLACKBURN.

Opinion delivered January 10, 1921.

1. LIMITATION OF ACTIONS—ACTION TO RECOVER CHARGE UPON DEVISE.—Where a will provided that partition between devisees could not be made for a period of ten years, and charged a certain sum against the share of land going to defendant, an action to recover the sum charged did not accrue until the actual partition.
2. WILLS—ELECTION TO TAKE DEVISE.—Where a will charged a devisee with payment of a specified sum of money, but provided that there should be no partition for the period of ten years after testator's death, the devisee was not put to an election to take or refuse the devise until the partition was made, since until then he would not know what land would be apportioned to him.
3. EXECUTORS AND ADMINISTRATORS—ACTION TO RECOVER CHARGE UPON DEVISE.—An action against a devisee to recover a sum charged upon land devised to him was properly brought by the administrator, the sum charged being a part of the assets of the estate.

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

*Daggett & Daggett* and *Fink & Dinning,* for appellant.

1. The action is barred by the three years' statute of limitation. 47 Ark. 301-14. The chancery court had full power to declare a lien upon the interest of appellant, and it was the duty of the devisees under the will to assert their lien before the action was barred. A judgment of a court of record is conclusive as to the parties on any issue which might have been adjudicated. 118 Ark. 533; 119 *Id.* 413; 96 *Id.* 540; 97 *Id.* 450. The action is barred.

2. The administrator of C. B. Blackburn is not the proper party to maintain this suit. 40 Cyc. 2057; 33 Pa. 47; 36 Pa. St. 1; 1 Appeal Cases (D. C.), 148; 118 Md. 242; 28 Wis. 659; 247 Pa. 196; 47 Ark. 254-265; 115 Ark. 577; 114 *Id.* 8. The circuit court had no jurisdiction, as the real parties in interest are not parties to the suit, and if it did the suit is barred.

*Moore & Vineyard* and *John I. Moore, Jr.*, for appellee.

1. The suit is not barred by the three years' statute of limitation. The statute does not run until a cause of action accrues. Until appellant elected to take his share of the land under the will no right of action existed. The acceptance of the land when allotted to him binds the appellant to performance of the terms of the will. 47 Ark. 317. The acceptance of land is a waiver of the other limitations. Appellant could not accept the benefits of the will without abiding by the judgment of the probate court that he should stand charged with the amount stipulated in the will. 50 Ark. 201; 53 *Id.* 514; 92 *Id.* 15; 96 *Id.* 251; 132 *Id.* 575; 111 *Id.* 1.

2. Appellant is estopped by his own conduct from pleading the statute of limitation. 134 Ark. 351. The cases cited by appellant do not apply. There is nothing in the record to indicate that the administrator was a party to this suit, and unless he was it could have no binding effect in this case.

3. The administrator of C. B. Blackburn was the proper party to maintain this suit. 46 Ark. 453 is not in point, but the question was settled in 18 Ark. 447; 15 *Id.* 436; 22 *Id.* 535; 15 *Id.* 438. It is the duty of the executor to collect all the assets of an estate and until the assets are collected, neither heirs nor legatees have the right to interfere. 111 Ark. 354.

SMITH, J. This suit was brought in the Phillips Circuit Court by George E. Blackburn, as administrator of the estate of C. B. Blackburn, deceased, for the purpose of recovering judgment against the defendant, E. M. Blackburn, in the sum of $3,000. The cause of action is predicated upon an implied agreement on the part of defendant, as one of the devisees under the will of his father, C. B. Blackburn, to pay off and discharge the said sum of $3,000 with which he was charged in the will, the defendant having taken the property devised to him under the terms of the will.

The defendant below filed a demurrer to the complaint, which was overruled by the court, and, electing to stand on his demurrer and refusing to plead further, judgment was rendered against him for the sum of $3,000. From this judgment he now prosecutes this appeal.

The will contained the following provisions in regard to the lands: "I wish to act justly by all, and wish that what property I may have to be divided between them (children) and my present wife as follows: Each child to share alike in the division of the property, or rents thereof, with an equal share during life for my wife Florence as if she was one of the children, besides the house and two lots now occupied as a home by me in Memphis, which is to be set apart, with the household fixtures, for her separate use and purpose for her and my younger children, in place of what benefits the older children have derived from me. I do not wish any of my property in Phillips County, Arkansas, to be sold for the term of ten years from the date of my death, but to be rented out or managed to the best advantage until that time for the interests of my heirs. At the end of the ten years the property to be divided equally between all my living children, and also one share as a child's part for my wife, if she is living. * * * I also wish the sum of $600 paid to my wife Florence each year out of the proceeds of rent on, or sale of timber from, lands for the term of ten years, for the purpose of any education for the younger children. This $600 to be first and separate of any other bequest, as I think it due the younger ones to receive a fair schooling, as I gave the older ones."

The deceased died November 17, 1908, and his will was duly probated February 15, 1909, and partition in kind of his lands was made ten years after his death; and this suit was filed October 17, 1919, a period of ten years and ten months having elapsed from the time the will was probated to the time of filing this suit. The executors named in the will refused to serve, whereupon George E. Blackburn, one of the sons, applied for and

obtained letters of administration with the will annexed. The probate court made an order directing the administrator to bring this suit, and the suit was brought by him for the benefit of the estate. There appears to have been no personal property.

Appellant concedes that there would have been liability had the suit been brought within the proper time, but insists that the cause of action was barred when the suit was brought; and further that the suit should have been brought by the heirs, and not by the administrator. These were the grounds of demurrer.

We think the cause of action was not barred when the suit was brought. The statute of limitation does not begin to run until the cause of action accrues, and the cause of action here sued upon arose out of an implied promise to pay the sum of money made a charge against the interest given the defendant.

In the case of *Williams* v. *Nichol,* 47 Ark. 263, Judge BATTLE quoted from the case of *Brown* v. *Knapp,* 79 N. Y. 143, the following language: "It is well settled that when a legacy is given and is directed to be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy. And the rule is the same when the legacy is directed to be paid by the executor who is the devisee of real estate. (Cases cited.) If the devisee, in such case, accepts the devise, he becomes personally bound to pay the legacy, and he becomes thus bound, even if the land devised to him proves to be less in value than the amount of the legacy. If he desires to escape responsibility, he must refuse to accept the devise. If he does accept, he becomes bound to pay the whole amount of the legacy which he is directed to pay."

In the case of *Millington* v. *Hill, Fontaine & Co.,* 47 Ark. 314, Judge COCKRILL, speaking for the court, said: "Seth Bolton accepted the devise, and in doing so he by implication agreed to pay the sum given to the other heirs."

The presumption is that when defendant accepted the land devised him he agreed to discharge the indebted-

ness with which it was charged, but when did this acceptance occur? There was no occasion for the defendant to announce in advance whether he would accept the property bequeathed to him under the will. In fact, he could have done nothing more than to announce what action he would take when the partition became permissible, and was made, but he could not actually accept and take possession of the land until the partition was made. By the express terms of the will, partition could not be made for a period of ten years, and defendant could not know until that time what lands he would receive, as they were divided in kind, and there were seven children and the widow, who received equal shares. He might, or might not, have been willing to assume the burden which went with the devise, and he was not put to an election to take or to refuse until he knew what land would be apportioned to him. We think a fair interpretation of the purpose of the testator was that his lands should be held intact for ten years and then divided, and when divided the share of the defendant should stand charged with the sum of $3,000 for the benefit of the estate.

We think the suit was properly brought by the administrator. As is pointed out in the brief of the appellee, this is not a suit to subject the lands which passed to the defendant to the payment of the legacy, but is a suit brought by the order of the probate court to collect a sum charged against the lands devised defendant. The liability fixed against defendant's land is a part of the assets of the estate, and as such it is the duty of the administrator to collect it. *Shane* v. *Dickson,* 111 Ark. 354.

Judgment affirmed.

DOROUGH-NEWALD COMPANY v. VALLEY FARMING COMPANY.

Opinion delivered January 10, 1921.

1. MORTGAGES—RIGHT TO REDEEM—FORMER ADJUDICATION.—Where the original decree of foreclosure of a mortgage provided that the mortgagor might secure the release of certain parcels of the mortgaged land, which the mortgagor had sold, upon payment within a designated time of the *pro rata* part per acre of the mortgage debt, but the mortgagor failed to comply with such provision, a subsequent petition by the mortgagor to be permitted to redeem the same parcels is concluded by the former adjudication.
2. MORTGAGES—RIGHT TO REDEEM.—Where a mortgagor's right to redeem was concluded by a former adjudication, a petition by a bank, to which notes of a purchaser from the mortgagor were negotiated, asking permission for the mortgagor to discharge the *pro rata* part of the mortgage debt as to such lands will be denied; the mortgagor having failed to exercise that right under the original decree of foreclosure.

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

*F. G. Taylor,* for appellant.

1. At the time of the commencement of the original suit appellee had no right to foreclose the mortgage except for the $5,000 note due at the time.

2. Appellees purposely and deliberately refused to comply with the release provisions of the mortgage, and the only remedy appellants had was a resort to a court of equity, and they did so at the first opportunity.

3. Appellants had a right to a release under the release provisions of the mortgage at any time before a decree of foreclosure. The only remedy appellant had was the one here pursued. 70 Ore. 142, 321. Appellants have the right to pay the *pro rata* per acre of the mortgage debt and have the lands claimed by them released. 127 Ark. 577; 27 Cyc. 1415-16; 20 A. & E. Enc. Law 1070 and notes; 57 N. J. Eq. 539; 41 Atl. 405.

The right to a release may be exercised at any time before final decree where the language of the release provision is unconditional and without limitation, as it is

here. 41 Atl. 405; 42 N. W. 483; 63 *Id.* 1012; 103 Iowa 301, 72 N. W. 531. This same question was presented in 133 Ark. 456. See, also, 27 Cyc. 1415-16; 20 A. & E. Enc. Law 1070 and notes. Appellants have pursued their only and proper remedy and in due time. 70 Ore. s. c. 142 Pac. 321.

*D. Hopson,* for appellee.

The rights of plaintiffs and defendants were settled on the former appeal. 133 Ark. 456. Appellant is estopped from asserting further claims. The finding is *res judicata* and conclusive as there was no appeal. 218 S. W. 189; 76 Ark. 473; 41 *Id.* 75.

SMITH, J. The present appeal is a continuation of the case of *Newald* v. *Valley Farming Co.,* 133 Ark. 456. The litigation began as a proceeding to foreclose a mortgage executed by Newald to the Valley Farming Company. The transaction covered something over eight thousand acres of land, and it was contemplated by the parties that Newald should resell the land in small tracts, and the mortgage given to secure the purchase money, provided for the release of any land so sold upon payment of the *pro rata* part of the purchase money due on said land.

A corporation styled Dorough-Newald Company was formed to take over Newald's contract, and the title to the lands; and that company made a number of sales. Among those purchasing from it were Aleks Copolish and Michal Guilas, Poles, who each bought an eighty-acre tract. These Poles made cash payments and gave notes for the balance of purchase money, and, to secure those notes, executed mortgages on the land they had bought.

The notes and mortgages executed by the Poles to the Dorough-Newald Company were dated September 3, 1914, and the notes were deposited with the Benton County National Bank on September 28, 1914, by the Dorough-Newald Company as collateral to a loan of $1,500 made on that date to that company.

Copolish and Guilas were made parties defendant in the foreclosure suit brought by the Valley Farming Company, and service against them was had by the publication of a warning order. The affidavit for the warning order was made on May 5, 1915. The Benton County National Bank was not made a party to the suit; and its cashier testified that the bank acquired the collateral notes before their maturity in the usual course of business, and that the bank had no knowledge of the foreclosure proceeding until September 20, 1915.

Neither Copolish nor Guilas has ever filed any answer or other pleading in the cause, and they have apparently abandoned the land.

The Benton County National Bank has never filed any pleadings in this cause, although it had actual notice of the pendency and purpose of the suit before the rendition of the first decree in this cause. This decree is referred to as the decree on the stipulations, and was entered October 8, 1915. By these stipulations—which formed the basis of that decree—the parties litigating the issues raised by the pleadings undertook to compromise and settle their differences; and that decree would have been a complete settlement of all matters in controversy between Newald and the Dorough-Newald Company and the Valley Farming Company, had its terms and requirements been complied with.

Before the entry of this decree, there was filed a pleading by the Dorough-Newald Company, in which the fact was recited that certain lands embraced in the mortgage sought to be foreclosed had been conveyed to Copolish and Guilas, and other parties, and the fact was further recited that the notes of Copolish and Guilas had been assigned to the Benton County National Bank. There was a prayer that the Dorough-Newald Company "be allowed to pay the *pro ratâ* per acre of the said mortgage debt, and that said mortgage, so far as it affects the lands embraced in said mortgage that have been assigned as herein stated, be canceled for the use and benefit of said assignees." The bank was not made a party

to the litigation by this motion, and did not then, nor has it since, offered to pay any sum of money to obtain the release of said lands.

As appears from the opinion on the former appeal, this decree dated October 8, 1915, recited the stipulation entered into between the Dorough-Newald Company and the Valley Farming Company, and provided a time and manner within which the Dorough-Newald Company should pay the purchase money on the lands and obtain their release from the mortgage. Had the terms of this decree been complied with by the Dorough-Newald Company, that company would, by its compliance, have had the relief which it prayed in its motion.

The decree of October 5, 1915, provided that, if its terms were not complied with within the time limited, the court should, in vacation, enter a general decree of foreclosure; and such a decree was entered on January 20, 1916.

A number of the purchasers from the Dorough-Newald Company had filed suits to cancel their contracts, on the ground of fraud, and for other reasons; and these suits were consolidated with the foreclosure suit. In the meantime, Taylor and Terry, the attorneys for the Dorough-Newald Company, had obtained deeds from the company for certain portions of the land; and it was expressly recited in the decree of January 20, 1916, that the rights of these last-named parties, including Copolish and Guilas and Taylor and Terry, were not adjudicated.

The recital of the decree of January 20, 1916, in regard to the reservation of the rights of Copolish and Guilas is as follows: "And it further appearing to the court that the defendants, * * * Aleks Copolish, Mary Copolish, Michal Guilas and Lizzie Guilas, * * * have purchased or contracted with the defendant, Dorough-Newald Company, for different parts or parcels of the above-described lands, and that the issues raised by them are not here adjudicated but reserved for future determination." In the same paragraph the rights of Taylor and Terry were also reserved for future adjudication.

The purpose of this reservation is shown in the former opinion, where we said (page 464): "The court also reserved from adjudication the rights of certain persons to a rescission of their contracts for the purchase of certain parcels of land from the mortgagors. The rights and interests of F. G. Taylor and C. W. Terry and the amount of ditch taxes claimed by the plaintiffs for the year 1915 were also reserved from the decree."

It also appears, from the recital of facts in the former opinion (page 465) that, under the decree of March 17, 1917, "The court further found that the sales to certain parcels of said land were procured by misrepresentation on the part of the mortgagors, and rescission as to these tracts was allowed in the decree."

This decree of March 17 was the decree which the former appeal sought to reverse, and the present litigation is predicated upon the hypothesis that the vacation decree of January 20, 1916, excluded or reserved the Copolish and Guilas lands from its provisions and order of sale, and that the decree of March 17 did not adjudicate the matters which had previously been reserved, and that there was, therefore, no authority to sell the Copolish and Guilas lands under the decree of March 17.

It appears that the decree of March 17 has been executed by a sale of the lands there ordered sold by the commissioner appointed for that purpose.

The present appeal arises out of the motion filed by the Dorough-Newald Company on March 3, 1919. This motion is styled "Motion for Hearing on Interplea." This motion recites the facts that, before the rendition of the final decree, it filed an intervention, asking that it be allowed to redeem the lands sold by it to Copolish and Guilas before the maturity of the mortgage which the original suit was brought to foreclose, alleging that it had sold the lands to Copolish and Guilas, and had taken notes for unpaid purchase money, which had been duly assigned by it to the Benton County National Bank. The motion concluded with the prayer, "That this cause be redocketed, and that said intervention be heard and

disposed of by the court." The court denied the prayer of the motion upon the ground that the matters there set out had been fully adjudged; and this appeal is from that order.

Accompanying the motion just referred to was a copy of the previous motion filed by the Dorough-Newald Company asking that it be allowed to redeem the Copolish and Guilas lands. In other words, the last motion was based upon the assumption that the court had not adjudicated the issues raised in the original motion. We think this assumption is not correct, for the reasons hereafter stated.

The reservation, in the decree of January 20, 1916, of the decision on the issues raised by the purchasers from Dorough-Newald Company, who had asked a rescission of their contracts, was for the benefit of those purchasers. A number of those purchasers obtained the relief prayed in the decree of March 17. Those purchasers, not only did not ask to be allowed to pay the *pro rata* part of the mortgage debts against their lands, but asked that their contracts be rescinded. Copolish and Guilas did not obtain that relief, as they did not ask it. As has been stated, Copolish and Guilas have filed no pleadings of any kind in this litigation, and have not appealed from any of the decrees; and we do not, therefore, have before us any question in regard to their rights.

The decree of March 17 described the land bought by Copolish and Guilas, and ordered its sale, and the land was sold pursuant to the directions of that decree.

In the first motion filed by Dorough-Newald Company the prayer was that it be allowed to redeem the land sold to Copolish and Guilas for the benefit of the bank to which it had sold the Copolish and Guilas notes. The Dorough-Newald Company, and not the Benton County National Bank, was the litigant which filed that motion; and it was the duty of that company to see that the motion was taken care of by the court, either in an interlocutory, or in a final, decree; and if it did not do so, it can not now complain.

But we think the court below correctly held that this motion had been adjudicated. The decree of October 8, 1915, undertook to settle all the matters in controversy between Newald and the Dorough-Newald Company with the Valley Farming Company. That decree expressly stipulated how Newald and the Dorough-Newald Company might redeem particular portions of the land; and the controlling question decided on the former appeal was that this decree of October 8, 1915, was a final decree, which settled the rights of Newald and the Dorough-Newald Company; and concerning that decree we said in the former opinion (p. 468): "All of the issues raised by the pleading between the plaintiffs and these defendants (Newald and the Dorough-Newald Company) were settled except as to whether or not the plaintiffs should be allowed the ditch taxes for 1915, which it had alleged that it had paid."

As we view the record now before us, the present appeal is an attempt to have reviewed a matter which was not only expressly raised by the pleadings filed by Dorough-Newald Company before the rendition of the original decree in the cause and therefore concluded by the decree, but one which was in fact adjudicated. The party presenting the matter to the court for adjudication was the Dorough-Newald Company, which company did not appeal from that decree, and it can not now, by using the name of the Benton County National Bank, reopen that case.

The Benton County National Bank prayed an appeal from the order of the court dismissing this last motion filed by the Dorough-Newald Company; and, if we treat that motion as having been filed by the bank itself, and not merely for its benefit, the status of the case is not changed, for the bank does not ask that it be allowed to discharge the *pro rata* part of the mortgage debt against the Copolish and Guilas lands, but only that the Dorough-Newald Company be allowed to do so; and, as we have shown herein, that company was awarded that right without availing itself of it. The decree of the court below will therefore be affirmed.

## SMITH v. STATE.

Opinion delivered January 10, 1921.

1. BILLS AND NOTES—POSTDATING OF CHECK.—A check which is postdated is a check in all essentials, though it relates to a future deposit or account in the bank upon which it is drawn, and not to a present account therein.
2. FALSE PRETENSES—DRAWING CHECK WITHOUT FUNDS.—Acts 1913, No. 258, §§ 1, 3, making it a misdemeanor for an individual, either resident or doing business in this State, to give a check in favor of any one on any bank when there shall not be sufficient funds therein to cover same, unless prior arrangements have been made with the bank to cover the same, *held* not applicable to the case of a postdated check, as there is nothing in the act which makes it unlawful to promise and fail to pay at a future date.

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

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

The errors committed by the court are patent. Appellant's plea of former jeopardy should have been granted. 135 Ark. 166; 42 *Id.* 35; 43 *Id.* 271; 71 *Id.* 349.

2. The instructions failed to instruct the jury at all with reference to the character of verdict they should bring in, nor as to the nature of the crime. The overdraft statute makes the offense a misdemeanor, and he was found guilty of a felony. 113 Ark. 454; 66 *Id.* 264.

2. The giving of a postdated check, whether a crime or not, is a debatable question, and we ask the court to pass on it. The general pinion is that it is only a promise to pay, and not a crime at all.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Pike Circuit Court for unlawfully and feloniously giving a check, in the sum of $103.40, on the Citizens' National Bank of Arkadelphia, in Clark County, to J. H. Wallace in Pike County, not having at said time sufficient funds on deposit in said bank with which to pay said check. From the judgment of conviction, an appeal has been duly prosecuted to this court.

Appellant was indicted under sections 1 and 3 of act 258, Acts 1913, making it a misdemeanor for an individual, either resident or doing business in this State, to give a check in favor of any one on any bank when there shall not be sufficient funds therein to cover same, unless prior arrangements had been made with said bank to pay the check.

The undisputed evidence showed that the check in question was drawn in favor of and given to J. H. Wallace by appellant, in November or the early part of December, 1918, and postdated January 21, 1919.

The question raised by the appeal is whether the act has any application to a postdated check. This court is committed to the doctrine that the postdating of a check does not convert it into any other form of commercial paper. It is still, notwithstanding the postdate it bears, a check in all essentials. A postdated check relates, however, to a future deposit on account in the bank upon which the check is drawn, and not to a present account therein. In the meantime, the drawer retains the full and free use of his entire account or deposit. *Merchants & Planters Bank of Camden* v. *New First National Bank of Columbus, Ohio,* 116 Ark. 1; *Champion* v. *Gordon,* 70 Penn. St. 474; *Allen* v. *Keeves,* 1 East 216. It is apparent from a careful reading of the statute under which appellant was convicted that it has relation to checks drawn upon a present, and not a future, deposit or account. The act makes it unlawful to give a check upon any account in any bank when there shall not be sufficient funds therein to cover the same, or unless arrangements had been previously made with the bank to pay same. The purpose and intent of the act was to prevent one from defrauding another by negotiating checks without funds in the bank upon which drawn to pay same. The giving of a postdated check implies a promise to deposit money in the bank at a future date to pay the check, and there is nothing in the act which makes it unlawful to promise and fail to pay at a future date.

The judgment of conviction is therefore reversed; and, as there can be no offense under the statute for giving a postdated check, the cause is dismissed.

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## BLEDSOE v. PIERCE-WILLIAMS COMPANY.

Opinion delivered January 10, 1921.

1. EXECUTION—PLACE OF MAKING RETURN.—Kirby's Dig., § 6381, specifying the manner of making return on an execution, does not require the sheriff to whom the writ has been directed from another county to bring it back in person to the office from which it issued; it being sufficient if he indorses a certificate of his proceedings under it and mails it back to the officer who issued it.
2. VENUE—ACTION AGAINST SHERIFF FOR FAILURE TO MAKE RETURN.—An action under Kirby's Dig., § 3286, against a sheriff for failure to make a return on an execution issued out of another county should be brought in the county in which the sheriff is an officer, and not in the county from which the execution issued.

Appeal from Sebastian Circuit Court, Fort Smith District; *John Brizzolara,* Judge; reversed.

*C. A. Starbird* and *E. L. Matlock,* for appellant.

The court had no jurisdiction. The venue was laid in Sebastian County instead of Crawford. Kirby's Digest, § 6061. The cause of action arose in Crawford County and no part of it in Sebastian County. 1 Bush (Ky.) 384. The cases in 51 S. W. Rep. 148 and 65 *Id.* 152 are not in point.

*Geo. W. Dodd,* for appellee.

1. The venue was properly laid. Kirby's Digest, §§ 3286, 6061; 60 Ark. 182; 40 Cyc. 82 to 84. The cases cited from Kentucky do not apply, as the Kentucky law is different from ours.

2. Under section 3525, Kirby's Dig., a sheriff is not required to execute process unless his fees are paid or tendered. 40 Ark. 377; 65 N. C. 48. Such words as "serving," "return" and "execute" in a statute regulating fees will be presumed to have been used in their technical sense. 47 Ark. 404. In the absence of a statute an

officer can not demand prepayment of fees before performing an official duty. 35 Cyc. 1601; 149 Ind. 149.

3. There is no error in the instructions. Kirby's Dig., § 3505; 40 Ark. 377.

HUMPHREYS, J. This is an appeal from a judgment rendered in the Sebastian Circuit Court, Fort Smith District, against appellant, for failure to make a return, as sheriff, upon an execution issued out of said court on a judgment obtained by appellee against Alma Cash Store, an Arkansas corporation. The execution was issued by the circuit clerk of Sebastian County, directed to appellant, sheriff of Crawford County, mailed to and received by him. He failed to return the execution in the manner and within the time required by law. Thereupon suit was instituted against him in the Fort Smith District of Sebastian County, under section 3286 of Kirby's Digest, which is, in part, as follows: "If any officer to whom any execution shall be delivered * * * shall not return any such execution on or before the return day therein specified, * * * such officer shall be liable and bound to pay the whole amount of money in such execution specified * * *." Service was procured upon appellant in Crawford County.

A plea to the jurisdiction of the court was interposed and maintained throughout the progress of the trial.

The chief insistence of appellant on appeal is that the venue of the action was laid in Sebastian, instead of Crawford, County. If neither the cause of action, nor any part thereof, arose in the Fort Smith District of Sebastian County, appellant's contention is correct, for it is provided by section 6061 of Kirby's Digest that an action against a public officer for a neglect of official duty must be brought in the county where the cause, or some part thereof, arose. Under the system of government in vogue in Arkansas, each county has a sheriff, and he is confined in the exercise of official duties to the limits of his county, unless authorized specifically, or by necessary implication, to function elsewhere in the State. There

is no specific direction, or direction by necessary implication, in the law requiring an officer outside of the county, to whom an execution has been directed, to bring it back in person to the office from which it issued and file it. The manner of making returns is prescribed by section 6381 of Kirby's Digest, which is as follows: "Every officer to whom any writ shall be delivered to be executed shall indorse thereon the time when such writ came to his hands, and shall make return thereof in writing, and shall sign his name to such return, and set out how and in what manner he executed the same." An indorsement on the execution of a certificate of his proceedings under it and mailing the same back to the officer issuing it, or adopting any other usual and safe method of conveying it to its destination, would meet the requirements of the statute. Any other construction would necessitate long and expensive trips from one part of the State to another to return executions, at great loss of time, and without remuneration to the officers making them. Under this construction, appellant could have made the return on the execution in Crawford County, and his failure to do so was a delinquency or neglect of duty in Crawford County. The cause of action, therefore, necessarily arose where the delinquency occurred; that was in Crawford County. *Bank of Kentucky* v. *Harrison*, 1 Bush 384. The venue of the case was laid in the wrong county, and, for that reason, the judgment is reversed and the cause dismissed.

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## MARSH v. ARKANSAS NATIONAL BANK.

Opinion delivered January 10, 1921.

1. BILLS AND NOTES—ACCOMMODATION INDORSEMENT.—In an action by the holder of notes against indorsers thereon, in which the defense was that defendants indorsed the notes for the benefit of the payee, and not for the maker, that the payee had paid the notes at maturity and that plaintiff had acquired the notes after maturity, and held them subject to equities between the payee and the indorsers, evidence *held* to sustain a finding that the notes were indorsed for the payee's accommodation.

2. BILLS AND NOTES—TRANSFER AFTER MATURITY.—One acquiring notes after maturity takes them subject to equities between payee and indorsers, who had indorsed for the payee's accommodation.

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

*R. G. Davies* and *L. E. Sawyer,* for appellant.

The finding of the chancellor is contrary to the clear preponderance of the evidence. The only question is whether or not Jones and Joplin endorsed the notes for the accommodation of Moss & Co. or P. C. DeMoss. The evidence shows they did not. The burden of proof was on appellees, and they have failed. The weight of the testimony is clearly with appellant.

*Martin, Wootton & Martin* and *George P. Whittington,* for appellees.

The opinion of the chancellor is the best argument we can make, and shows conclusively that the proper decision was made in this case.

HUMPHREYS, J. On May 29, 1918, appellant, Ludie Marsh, instituted suit against appellees P. C. DeMoss, J. F. Joplin and R. A. Jones, in the Garland Circuit Court, on three notes of $100 each, dated August 3, 1914, and due, respectively, in thirty, sixty and ninety days after date; three notes of $100 each, dated November 2, 1914, and due, respectively, in thirty, sixty and ninety days after date; and one note for $1,470, dated November 2, 1914, and due ninety days after date. The Arkansas National Bank, also an appellee, was made a party defendant in the suit on the ground that it was the holder of the notes as collateral to secure an indebtedness of $3,000 which Ludie Marsh, the appellant, owed it, and that, although notified to do so, it had refused to institute suit upon the notes so held as collateral.

It is alleged in the complaint that P. C. DeMoss was the maker of the notes, T. T. Marsh & Company, the payee therein, J. F. Joplin and R. A. Jones indorsers thereon, and Ludie Marsh owner thereof by transfer,

indorsement and delivery of said notes to her by T. T. Marsh & Company for a valuable consideration.

The Arkansas National Bank filed answer, admitting that it held the notes as collateral to secure a note of $3,000 executed by appellant to it and prayed that, in the event appellant should recover upon the notes, the amount, or so much thereof as might be necessary, be paid to it upon the $3,000 note aforesaid.

P. C. DeMoss filed answer, pleading acquittance under a bankrupt adjudication of date the 28th day of February, 1915.

Appellees J. F. Joplin and R. A. Jones filed answer, interposing the defense that they had indorsed the notes for T. T. Marsh & Company, the payee therein, and not for the maker, P. C. DeMoss, and that when the notes became due, T. T. Marsh & Company paid the notes, thereby releasing them on their indorsement; that whatever interest Ludie Marsh and the bank acquired in the notes was subsequent to maturity and subject to any equities existing between T. T. Marsh & Company and appellees, J. F. Joplin and R. A. Jones.

The cause was transferred to the chancery court and submitted upon the pleadings, exhibits thereto and the depositions of the witnesses, which resulted in a decree on June 17, 1920, dismissing the complaint of appellant for the want of equity. From the decree of dismissal, an appeal has been prosecuted to this court, and the cause is before us for trial *de novo*.

The record is voluminous, and a summary of the evidence of each witness would extend an opinion to unusual length. We shall, therefore, only attempt a short statement of the case and record the result reached after very careful investigation and consideration of the case. T. T. Marsh transacted business in the name of several companies, among them, T. T. Marsh & Company. This company was incorporated. Appellant owned most of its capital stock. It was engaged in the feed business. P. C. DeMoss, the maker of the notes, was engaged in the dairy business, and R. A. Jones, with H. M. Steel,

indorsers on the notes, was engaged in the pasteurized milk business. DeMoss purchased feed from T. T. Marsh & Company on credit, and, in payment therefor, executed notes to it, which were discounted by the Arkansas National Bank and the proceeds credited to T. T. Marsh & Company, and these notes were renewed from time to time in the same form. P. C. DeMoss furnished Jones and Steel a large part of the output of his dairy for use in their pasteurized milk business. In addition to paying DeMoss cash for his milk, both R. M. Jones and H. M. Steel frequently indorsed his notes during their business relationship to enable DeMoss to continue the dairy business and furnish them milk. J. F. Joplin was a brother-in-law to Mrs. Files, with whom DeMoss had transacted a great deal of business, and he had indorsed DeMoss' note on several occasions at the request of Mrs. Files. The notes forming the basis of the suit were given to retire seven notes, ranging in amounts from $100 to $1,000, which had theretofore been executed by DeMoss to T. T. Marsh & Company and by it indorsed to said bank. Two of said notes had been indorsed by R. A. Jones, and four by J. F. Joplin. When the notes sued upon became due, they were paid by T. T. Marsh & Company, without request or demand on J. F. Joplin and R. A. Jones to pay any part thereof, and either returned to it or placed in an envelope and left in the bank. In fact, no demand was made by T. T. Marsh & Company on Jones and Joplin for payment at any time, nor was any demand made by Ludie Marsh on them for payment of the notes until the institution of this suit, on or about May 29, 1918. Subsequent to the maturity of the notes and payment of them by T. T. Marsh & Company, Ludie Marsh paid the existing indebtedness against T. T. Marsh & Company and took over its assets—among them, the notes sued upon. Appellant then borrowed $3,000 from the bank upon these notes and other collateral. R. A. Jones and J. F. Joplin testified that they were accommodation indorsers for T. T. Marsh & Company; that they indorsed the notes at the instance and request and

for the benefit of T. T. Marsh & Company, and not at the instance and request of P. C. DeMoss and for his benefit. T. T. Marsh and P. C. DeMoss testified that J. F. Joplin and R. A. Jones indorsed the notes at the instance and request and for the benefit of P. C. DeMoss.

Appellant insists that the finding of the chancellor, to the effect that R. A. Jones and J. F. Joplin indorsed the notes at the instance and for the benefit of T. T. Marsh & Company, was contrary to the weight of the evidence. The positive evidence, responsive to this issue, is in direct conflict. Two of them swear to one state of facts and circumstances, and two to another. We are unable to say that the other facts and circumstances in the case more strongly corroborate the evidence of appellant's witnesses than the evidence of appellees'. The outstanding fact that T. T. Marsh & Company paid the notes to the bank at maturity, without demanding or insisting upon payment by R. A. Jones and J. F. Joplin, then or afterward, is most convincing that they had indorsed the notes for the benefit of T. T. Marsh & Company, and not P. C. DeMoss. The fact that appellant, who was the principal stockholder of T. T. Marsh & Company and succeeded to its rights, made no demand on R. A. Jones and J. F. Joplin for the payment of the notes for about four years after maturity is alike convincing that Jones and Joplin were accommodation indorsers for T. T. Marsh & Company, and not for P. C. DeMoss. There are no circumstances in the record as convincing as the ones just mentioned corroborating the evidence of appellant's witnesses. The circumstances most strongly corroborating appellant's witnesses is that on other occasions both Jones and Joplin had indorsed notes for DeMoss in order to aid him in his business. This circumstance establishes a probability only, and does not lead to a definite conclusion. The probability is that, having indorsed for DeMoss on former occasions, they would have accommodated him in like manner again if requested to do so. After carefully weighing all the evidence, we are unable to say that the finding of the chan-

cellor, to the effect that Jones and Joplin were accommodation indorsers for T. T. Marsh & Company, was contrary to the preponderance of the testimony. Ludie Marsh and the Arkansas National Bank, having acquired the notes after maturity, took them subject to existing equities between T. T. Marsh & Company and Jones and Joplin.

The decree of the chancellor is therefore affirmed.

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## SCOTT-MAYER COMMISSION COMPANY v. MERCHANTS' GROCER COMPANY.

Opinion delivered January 17, 1921.

1. BAILMENT—PLACE OF STORAGE.—Where a bailee expressly contracts to keep property in a particular place, he will be liable for his failure to do so, although at the time the property was received the bailee, by force of circumstances, was compelled to store the property in another place, and in doing so was not guilty of any negligence.
2. BAILMENT—CONTRACT TO STORE GOODS.—Where a bailee agreed simply to store a carload of potatoes, without special or express contract to keep the same in any particular plant or building, he is bound only to exercise reasonable care and diligence to preserve the property intrusted to him, and is not an insurer nor liable for conversion in case the potatoes are lost without negligence on his part.
3. BAILMENT—QUESTION FOR THE JURY.—In an action against a bailee for goods stored by him in a different cold storage plant from the one intended, evidence *held* to require the submission to the jury of the issue whether the bailee specially contracted to store the goods in a particular cold storage plant.
4. BAILMENT—QUESTION FOR THE JURY.—In an action against a bailee for loss of goods, evidence *held* to require submission to the jury of the issue whether the bailor had ratified a change in the place of storage if the jury found a special contract to store in a particular cold storage plant.

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

*Owens & Ehrman,* for appellants.

1. The court erred in directing a verdict for appellee, as there is a direct conflict in the evidence on two ma-

terial points and a case was made for a jury. 83 Ark. 631; 97 *Id.* 643; 107 *Id.* 158; 120 *Id.* 446; 128 *Id.* 347.

Appellate courts, where a verdict has been instructed, view the evidence in the most favorable light to the party against whom the instruction is given, and if there is any evidence justifying a verdict in his favor, they will remand for a new trial. 73 Ark. 561; 89 *Id.* 368; 92 *Id.* 618; 96 *Id.* 394; 105 *Id.* 136; 115 *Id.* 166; 124 *Id.* 460; 136 *Id.* 128. The trial court adopted the view of the rule stated in 3 C. L. 118, which was error. The theory of appellee that appellants were bailees of the potatoes, but there is a direct conflict in the evidence as to the intention of the parties.

Before a bailee can be held guilty of conversion, the bailor must prove the exercise by the bailee of control over the property inconsistent with his title. 2 Cooley on Torts 872; 163 S. W. 381; 103 S. E. 36. The uncontroverted evidence is that the potatoes were stored at the National Company in the name of the Merchants' Grocer Company, the appellee, and the warehouse receipt introduced in evidence and identified by appellee's manager as the one received from the National Company states on its face that the goods were received in storage for the Merchants' Grocer Company.

There is no distinction between the liability of a warehouseman and a bailee for hire. A warehouseman is bound only to exercise an ordinary care in the preservation of goods entrusted to him. He is not an insurer and is not responsible for loss unless occasioned by his fault or negligence. Mohun on Warehousemen 51; 42 Ark. 200; 63 *Id.* 344.

2. Appellants were not guilty of any negligence in sending the potatoes to the National Warehouse. The potatoes were perishable, and O'Leary acted in good faith and handled the potatoes as he would have handled similar commodities belonging to himself. All this occurred during March, 1918, when war was on, and the utmost efforts were being made to conserve food supplies. The

courts should take judicial knowledge of the rules and regulations of the United States Food Administration, and dealers were required to handle and preserve all perishable foodstuffs. 258 Fed. 307; 152 U. S. 211; act August 10, 1917, §§ 1, 5, etc. General License Regulations. 1 A, rule 11.

Appellants were duly licensed and acting under a license from the United States Food Administration, and the court should take judicial notice that O'Leary was compelled to place the potatoes in cold storage, and, there being no room in the Arkansas warehouse, the compulsion on him to place them elsewhere was absolute, and, doing so, was a valid defense to this action.

Under the evidence and facts the trial court would have been justified in directing a verdict for appellants. 180 S. W. 1000. It is always competent for a bailee or warehouseman to prove that the bailed property was taken from him under valid, legal process, and that is a complete defense to an action by a bailor for conversion. Appellee had full and complete notice, and by silence and acquiescence has ratified the action of O'Leary and is estopped. This case differs from the Massachusetts case and those in 123 Mo. App. 582, 100 S. W. 538 and 52 Mo. App. 323. See 162 N. Y. 900.

3. In a suit against a bailee for conversion the burden of proof is on the bailor to prove negligence. The bailee by proving delivery of the bailed property and the failure to redeliver on demand makes out a *prima facie* case and casts the burden of going forward with the evidence on the bailee, but, when the bailee shows that the goods have been lost, stolen or destroyed, the bailor must affirmatively prove that the bailee has been guilty of some fault or negligence in the preservation of the bailed property. Story on Bailments, § 410; 68 Ark. 284. It was error to direct a verdict.

The cases in 74 Ark. 557 and 55 *Id.* 240, are not similar to this, and not in point.

*Brundidge & Neelly* and *W. H. Rector,* for appellee.

1. Upon the undisputed facts the lower court held properly as matter of law that the act of defendant in sending the potatoes to the National Company, when they had contracted to store them with the Arkansas Company was a breach of their contract and rendered them liable. A bailee who makes a contract to store a chattel at a special place is liable for any loss or damage accruing by reason of his storing the chattel at some other place. 68 S. W. 496; 24 L. R. A. (N. S.) 1117; 94 Minn. 326; 3 A. & E. Ann. Cas. 468. See, also, 97 Mo. App. 253. The rule stated in 3 R. C. L. 118 is well supported. See L. R. Q. B. Div. 510; 109 Am. St. 679; 98 Am. Dec. 516; 6 Cal. 643; 13 Ala. 587; 99 N. E. 181; 38 Wis. 603; Schouler on Bailments, § 106; Piggott on Torts, § 353; 30 A. & E. Enc. Law 53.

2. There is no evidence from which a jury could infer ratification. Elliott on Cont., § 455. Defendants are liable under a contract which they breached, and no ratification is proved or even knowledge of the material facts. Plaintiff had no knowledge of the material facts, and hence there could be no ratification, and plaintiff is not bound. 55 Ark. 240; 74 *Id.* 557; 64 *Id.* 217; 76 *Id.* 563; 124 *Id.* 360. There being no evidence whatever to show a ratification of the unauthorized change in the place of storage or to show that plaintiff had released defendants from the contract, and all the facts tending to show the contrary, the court properly directed a verdict for plaintiff. The court's instruction was proper, and the verdict is in accordance with the undisputed facts.

WOOD, J. The Merchants' Grocer Company, the appellee, was a corporation in the wholesale grocery business at Searcy, White County, Arkansas. Henry Patterson was its secretary and manager. The Arkansas Cold Storage Company was engaged in the cold storage business in Little Rock, Arkansas, under the management of W. A. O'Leary.

Patterson testified that on March 19, 1918, he called up O'Leary over the telephone and asked him if he had space in the Arkansas Cold Storage Company (hereafter called Arkansas) for a car load of potatoes. O'Leary said that he did. Witness asked what he would charge, and O'Leary replied, "35 cents a sack." Witness told him that he had a car on the track and would ship them right away, and O'Leary replied, "All right." The same day witness took out the bill of lading and shipped the car to the Arkansas. Witness had previously at different times done business with the Arkansas, and for that reason wanted to store the potatoes with that company. O'Leary told witness that he was the manager of the Arkansas, and would store the potatoes and to send them on. The appellee never authorized O'Leary, or any one else, to deliver the car of potatoes to the National Ice and Cold Storage Company (hereafter called the National), or to any one else. Witness afterward demanded the potatoes of O'Leary, and he informed witness that he had sent them to the National. Witness, upon inquiry, found that the potatoes had been dumped. He thereupon asked O'Leary if he didn't think he ought to have notified witness concerning them, and O'Leary replied, "No, he did the very best he could;" that the Food Administrator took them; that was the first that witness knew that the Arkansas did not have the potatoes. O'Leary did not at any time claim to witness that witness had authorized him (O'Leary) to divert the potatoes from the Arkansas to the National. Witness received a bill of 50 cents a sack from the National for storage. There were 200 sacks and the amount was for $100. Witness called up O'Leary, and said to him that he had made a contract with witness for 35 cents a sack, whereupon O'Leary told witness to remit for 35 cents a sack. The market price of potatoes on the day witness made demand upon O'Leary for them was $3.20 a hundred pounds. There were 30,000 pounds, and the total amount of appellee's damage was $960. The National sent its receipt to appellee for the potatoes, dated

March 30, 1918. This receipt showed that the potatoes were received in storage by the National for the account of the appellee. Witness did not know at the time that the National was a separate cold storage company; he found that out later when he went to see them. If witness had taken the time to read the receipt, he would have known that the potatoes were in the other warehouse, but he didn't pay any attention to it. Witness' company was well stocked with potatoes. Planting time was over then. Witness thought that about the time the potatoes were shipped a copy of the bill of lading was sent to O'Leary.

O'Leary testified that in the spring of 1918 Patterson called witness up and asked witness if he could take care of the potatoes in controversy. Witness told him that he couldn't take care of them himself, but that the Arkansas could. Patterson asked what the charges would be and witness replied, "Thirty-five cents." Patterson then said, "I have a car load on track, and if I can't get rid of them I might ship them down." Witness inquired of Patterson, "When are you going to let them come," and he said, "I don't know—I will let you know when I do ship right away." That was the last witness heard of it until the warehouseman called witness up and said there was a car load of seed potatoes there and wanted to know what to do with them. Witness asked where they were from, and the warehouseman answered that he didn't know. Witness told him to call up the railroad company and find out. Later the warehouseman called witness and said that the potatoes were from Searcy. Witness then told the warehouseman to go ahead and unload them, and he said he couldn't; that the house had been filled three or four days prior to that. The Food Administrator got on to it in some way and called witness up. Witness told the Food Administrator that he would take care of it, but witness couldn't take care of it at the Arkansas. Witness was storing some of his own goods at the National. The warehouseman said he could not take care of the car, and witness felt that it

was his duty to place them somewhere to be taken care of, so he ordered it to the National, and the warehouse receipt was issued and sent to Patterson. They charged the regular rate of 50 cents a sack, and Patterson called witness up and said, "You made me a rate of 35 cents." Witness replied, "I did, but that was at the Arkansas." Witness then told Patterson that he would see the National and ask it to meet that rate for him. Witness called up the National and explained that Patterson was a friend of his and wanted it to take care of him at the rate witness had made. The National agreed to do so, and Patterson sent it the storage charges of $70, that is, 35 cents a sack. In the first conversation in regard to witness storing the potatoes, Patterson said that he was long on Triumphs. Witness said, "You are in the same boat as everybody else." Patterson then said: "If I can't dispose of them for eating potatoes, I will ship them down to you." Witness replied, "All right, let me know." Witness heard nothing further after that until eight or nine days when the warehouseman called witness up. If Patterson had notified witness definitely that he was shipping the potatoes on the day he called witness up, witness would have taken care of it. If witness had known that the car was coming, he could have cut out a car of near beer that came in just at the last minute and taken care of appellee's car instead. Witness didn't expect the car at the time same arrived. When witness informed Patterson that he had sent the car to the National, Patterson raised no objection. He remarked that he had the National receipt calling for $100 and reminded witness that the arrangement was that he was to pay $70, whereupon witness promised, and did arrange with the National for that rate. At the time witness had the conversation with Patterson in regard to storing the potatoes, witness was one of the lessees of the Arkansas and Scott-Mayer was the other. The plant was being operated under the name of the Arkansas Cold Storage Company. Patterson did not ask witness about storing the potatoes with the

Arkansas, but simply asked witness if he could take care of a car load of potatoes, and witness told him that he could not at his individual plant, but thought he could at the Arkansas. Witness had no authority or permission from Patterson to store the potatoes at the National, but did it on his own initiative. Witness did not tell Patterson at the time they had the conversation in regard to the rate charged by the National that the National was a separate and distinct concern from the Arkansas. Witness told Patterson that he would take it up with the National and explain the circumstances and ask if the National would not reduce the price. At that time witness didn't know whether Paterson knew it was a different concern or not. Patterson had the warehouse receipt showing it.

A letter, dated April 11, 1918, from the National to the appellee, enclosing to the latter the warehouse receipt covering the potatoes in controversy and storage charges for $100, was introduced in evidence. In this letter nothing was said about O'Leary or the Arkansas. Another letter from the National to the appellee dated April 13, 1918, reads as follows: "We are in receipt of your notation on our invoice of the 1st, relative to our storage charge of 50 cents per sack per season, and stating that Mr. O'Leary quoted you a price of 35 cents. In this connection we beg to advise you that while 50 cents is our regular rate, inasmuch as Mr. O'Leary quoted you 35 cents, we are crediting your account with the difference of $30, but wish to state that we can not handle any more at this rate."

Witness Sullivan testified that he was foreman at the warehouse of the Arkansas; that the car of potatoes arrived on March 25, 1918, and that the Arkansas did not have room for it and did not know that the car was coming on that day until it got there; that the car was ordered out by O'Leary to the National. Patterson wrote to the Arkansas, enclosing an invoice for the car of potatoes in controversy. In answer to this a letter dated August 12, 1918, from O'Leary

to the appellee was introduced, in which he stated in explanation of the disposition of the car that his company had sent the car on with some of its own and others to the National; that the Arkansas had done the best it could to have the potatoes taken care of and put under refrigeration as quickly as they arrived. The letter then explains the reason why they were lost, and disclaimed liability, and returned to the appellee its invoice.

This action was instituted by the appellee against the appellants, Arkansas Cold Storage Company and others, to recover damages for the loss of the potatoes, alleging that the same were lost through the negligence of the Arkansas Cold Storage Company and the other appellants, its lessees, in diverting the potatoes to the National. The appellants denied all material allegations of the complaint.

The above are the issues and the facts developed by the testimony, upon which the trial court, over the objection of appellants, directed the jury to return a verdict in favor of the appellee, to which ruling of the court appellants duly excepted. The appellants then presented prayers for instructions directing the jury to return a verdict in their favor, asking the court to submit the issue of the alleged negligence of the appellant to the jury, and also as to whether or not the appellee by its conduct had not ratified the acts of the Arkansas in storing the car of potatoes with the National. The court refused these prayers, to which appellee duly excepted. The jury returned a verdict in favor of the appellee in the sum of $960. Judgment was rendered for appellee in that amount, from which is this appeal.

Two questions are presented:

1. Does the undisputed testimony show that the appellant, the Arkansas, as bailee for hire of the car of potatoes in controversy, violated its contract with the appellee, the bailor, for storage? It is undoubtedly the law that where a bailee expressly contracts to keep property in a particular place he will be liable for his fail-

ure to do so, although at the time the property was received the bailee, by force of the circumstances, was compelled to store the same in another place, and in doing so was not guilty of any negligence. For the bailor and bailee would be bound by the terms of any special contract of that sort made between them. If, therefore, the undisputed testimony shows that the Arkansas undertook for hire to store the car of potatoes in its own building and nowhere else, then it could not escape liability on the ground that at the time the car of potatoes was received its own storage plant was full, and that, in order to preserve the potatoes, it was compelled to store the same with another storage plant without the knowledge or consent of the appellee. This is the law as shown by *McCurdy* v. *Wallblom Furniture & Carpet Co.*, 94 Minn. 326, 3 A. & E. Ann. Cas. 468, and cases cited in note; *Locke* v. *Wiley,* 24 L. R. A. (N. S.) 1117; *Butler* v. *Greene*, 49 Neb. 280, 68 S. W. 496; *Hudson* v. *Columbian Transfer Co.,* 137 Mich. 255, 109 Am. St. Rep. 679; *Mortimer* v. *Otto,* 126 N. Y. Sup. 866; *Kennedy* v. *Portman,* 97 Mo. App. 253; Schouler on Bailments, § 106; 2 Cooley on Torts, 1332; 30 Am. & Eng. Enc. of Law 53, and other authorities cited in appellee's brief.

On the other hand, if the contract between the Arkansas and the appellee was that of bailment for hire, and the contract contemplated that the Arkansas as the bailee should keep the car of potatoes for the appellee in cold storage, but without any special or express contract to keep the same in any particular plant or building, then the liability of the Arkansas to the appellee was that of a warehouseman engaged in, and equipped for, the storage of goods of that character. If, under the contract, such was the relation between the Arkansas and the appellee, then the duty of the former was to exercise reasonable care and diligence to preserve the property intrusted to it, that is such care as an ordinarily prudent person engaged in that particular business would or should have exercised for the preservation of the po-

tatoes. If such were the relation, the Arkansas was not an insurer and thereby liable absolutely for the loss of the potatoes, but was only responsible for loss caused by its negligence. Nor was it liable as for conversion, which always implies that the bailee has dealt with the property wholly inconsistent with the contract under which he holds same. *Burr & Co.* v. *Dougherty,* 21 Ark. 559-566; *Murphy* v. *LeMay,* 32 Ark. 223, 225; *L. R. & Fort Smith R. Co.* v. *Hunter,* 42 Ark. 200. See, also, *Union Compress Co.* v. *Nunnelly,* 67 Ark. 284; Mohun on Warehousemen, 51; 3 R. C. L., § 39; 30 A. & E. Enc. Law, 46; Schouler on Bailment and Carriers, 101; *Locke* v. *Wiley, supra,* case note; *Bradley* v. *Cunningham,* 61 Conn. 485.

Under the above principles of law, the court should have submitted to the jury the issue, first, as to whether or not the relation of bailor and bailee existed between the appellee and the Arkansas, and, second, if they found that such was the case, then the court should have submitted the issue as to whether or not the contract of bailment contemplated that the car of potatoes should be stored by the Arkansas in its own particular plant or building. Without going into detail in discussing the testimony, it suffices to say that these were issues of fact under the evidence for the jury to determine, guided by the principles above announced.

2. Does the undisputed testimony show ratification by the appellee of the act of the Arkansas in storing the potatoes with the National? It occurs to us also that, if a contract of bailment existed between the Arkansas and the appellee, and if the Arkansas violated that contract by storing the goods with the National, then it was a question for the jury to determine, under all the evidence, as to whether or not the appellee had knowledge of the fact that the potatoes had been so stored, and, if it had such knowledge, whether or not it had by its conduct ratified the act of the Arkansas in storing the potatoes with the National. In directing the verdict in

favor of the appellee, the court took these issues from the jury. This was error for which the judgment must be reversed and the cause remanded for a new trial.

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## EVANS v. STATE.

Opinion delivered January 17, 1921.

1. HOMICIDE—EVIDENCE.—In a prosecution for assault with intent to kill, evidence *held* sufficient to sustain a conviction.
2. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE.—A charge of assault with intent to kill can not be sustained unless the evidence would have warranted a conviction for murder if death had resulted from the assault, but the proof is sufficient where, if death had resulted, it would have been murder in the second degree, coupled with the specific intent to take the life of the person assaulted.
3. HOMICIDE—INTENT TO KILL.—The intent to kill, constituting an element of the crime of assault with intent to kill, need not have existed for any appreciable length of time.
4. CRIMINAL LAW—REQUEST FOR INSTRUCTION.—Where the defendant in a prosecution for assault with intent to kill requested the court to charge the jury upon the offense of aggravated assault, but did not present a correct instruction on this phase of the case, he can not complain of the court's failure to give a charge on that phase of the case.

Appeal from Prairie Circuit Court, Southern District; *George W. Clark*, Judge; affirmed.

*Gregory & Holtzendorff*, for appellant.

1. The court erred in its refusal to instruct the jury on aggravated assault as requested by defendant. 72 Ark. 571; 96 *Id.* 52; 131 S. W. 46; 103 Ark. 28; 21 Cyc. 785.

2. The verdict is not supported by the evidence. Before defendant could be convicted of assault with intent to kill, the evidence must be of such weight and sufficiency as to make it appear beyond reasonable doubt that, had death ensued, the defendant would have been guilty of murder in the first or second degree. 21 Cyc., pp. 789-90; 110 Ark. 209. The evidence here only showed

an aggravated assault or simple assault, and the court should have by proper instruction submitted only that issue to the jury. 21 Cyc. 746-7; 110 Ark. 209; 72 *Id.* 571. The court by its instructions prevented the jury from passing at all upon the question of aggravated assault. The court should have instructed the jury on aggravated assault and left it to the jury to say upon the whole case whether defendant was guilty or not of assault with intent to kill, etc.

*John D. Arbuckle,* Attorney General, and *Silas W. Rogers,* Assistant, for appellee; *Elbert Godwin,* of counsel.

1. Appellant can not complain of the refusal of the court to submit an issue, until he asked for instructions on the issue, which were correct. 110 Ark. 567. The exceptions were too general. 47 L. R. A. (N. S.) 717; 88 Atl. 523; 87 Vt. 115. Appellant can not complain, as he did not ask a suitable instruction. 16 L. R. A. 963; 116 N. W. 281; 81 Neb. 546. Mere failure to instruct a jury on a particular issue is not reversible error, unless a specific instruction covering the issue is asked. 20 L. R. A. 340; 98 Pac. 634; 44 Col. 472.

2. The evidence was legally sufficient to sustain the verdict. 60 Ark. 76; 119 *Id.* 6.

HART, J. W. T. Evans prosecutes this appeal to reverse a judgment of conviction against himself for the crime of assault with intent to kill.

A. J. Screeton was the prosecuting witness. According to his testimony, he was 63 years of age and had known the defendant, W. T. Evans, for twenty-five years at the time the alleged assault was committed. On the 24th day of March, 1920, Screeton went to the back side of Simms's store in the town of Hazen, in Prairie County, Arkansas, and saw the defendant, Evans, standing in the door. Screeton told Evans that he wanted to talk to him about their land matter, and Evans replied that he did not want to talk with Screeton and admonished him not to

come into the store. Screeton walked into the store and again told Evans that he wanted to talk with him about their land matter. Evans walked on about forty feet toward the other end of the store and Screeton followed him. Finally Evans turned around, and Screeton stopped and again told Evans that he had come there to talk business with him. At that time Screeton was about fifteen or twenty feet away from Evans. Evans again told Screeton that he had better go out of the store. Screeton said that Evans owed him about $648, and that he wanted a settlement with him, as he knew that Evans was going home in a few days. Screeton then turned around and started out of the door of the store when the defendant, Evans, shot him. Screeton did not see Evans shoot at him, but saw the blaze come out of the pistol and felt the sting of a bullet. Screeton continued to walk away from the defendant, and the defendant again fired a second shot which struck Screeton in the back. The first shot entered the back part of the witness' arm and came out of the front part of it. The second shot hit Screeton in small of the back. Both shots struck Screeton in the back, and he was walking away from Evans at the time the latter shot at him.

On cross-examination Screeton denied that he cursed or abused the defendant just before he was shot.

Other witnesses who were present corroborated the testimony of Screeton in the main, but said that Screeton cursed Evans just before the latter shot him.

The defendant, Evans, was a witness for himself. According to his testimony, Screeton followed him into the store and cursed and abused him about the land matter. Evans continued to walk away from Screeton until he reached the front end of the store, and then Screeton approached him with his fist shut up as if he was going to strike him. When Screeton got within five or six feet of Evans, he slipped his hand down on the inside of his coat, and Evans said, "Don't do that!" and immediately fired. The pistol used was an automatic one, and Evans fired the second shot without intending to do so. Evans

fired at Screeton because he thought the latter was going to shoot or cut him when he reached his hand down inside of his coat.

Other witnesses corroborated the testimony of the defendant.

It is earnestly insisted by counsel for the defendant that the evidence is not sufficient to support the verdict. We can not agree with counsel in this contention. The law is that a charge of assault with intent to kill can not be sustained unless the evidence would have warranted a conviction for murder if death had resulted from the assault; but the proof will be sufficient to sustain the charge where, if death had resulted from the assault, it would have been murder in the second degree, coupled with the specific intent to take the life of the person assaulted. *Allen* v. *State,* 117 Ark. 432 and cases cited, and *Slaytor* v. *State,* 141 Ark. 11.

Tested by this rule, the evidence was sufficient to warrant the jury in convicting the defendant of the crime of assault with intent to kill. Under the authorities above cited, while there must have been a specific intent to kill, it need not have existed for any appreciable length of time, and malice could be inferred from the fact that the assault was committed with a deadly weapon, in connection with the surrounding circumstances.

According to Screeton's testimony, he did not even curse or abuse Evans or do anything to provoke the assault. He was an elderly man and only insisted on talking with Evans about a land matter. He was unarmed and made no threats or demonstrations of any kind toward Evans. Evans drew his pistol and fired two shots at Screeton at a time when Screeton's back was to him and when Screeton was walking out of the building.

The jury believed the testimony of Screeton and the other witnesses for the State and disregarded the testimony of the defendant and his witnesses. This it had the right to do.

Counsel also contend that the judgment should be reversed because the court refused to give an instruction on aggravated assault. Counsel for the defendant did not present to the court any instruction on aggravated assault. He simply asked the court to instruct the jury on that phase of the case, without presenting any instructions whatever. Under our practice this was not sufficient. The defendant or his counsel should have presented to the court a correct instruction on this phase of the case, and, not having done so, he can not now complain of the ruling of the court. The court was not required to prepare and give the instruction on its own motion. *Bradshaw* v. *State,* 95 Ark. 409; *Hankins* v. *State,* 103 Ark. 28, and *Johnson* v. *State,* 132 Ark. 128.

No other assignments of error are presented, and the judgment will be affirmed.

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## HALLMAN *v.* COKER.

Opinion delivered January 17, 1921.

BRIDGES—BRIDGE DISTRICT ACT VOID FOR INDEFINITENESS.—Acts 1920, No. 263, § 1, creating a bridge district "for the purpose of building, repairing, relocating or constructing highway bridges across the Caddo River and Little Missouri River and such other streams as in the opinion of the commissioners need bridging, at such points across said streams as the commissioners hereinafter may select," *held* void for failure to describe the character and extent of the improvement.

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

*Rose, Hemingway, Cantrell & Loughborough,* for appellants.

The court below held that the district was void because it provided for the building of several bridges on different roads and therefore lacked unity. This court has not held a district void for lack of unity. No provision of the Constitution is violated here by the act, and the court erred in sustaining the demurrer. Act 263,

Acts 1920; 95 Ark. 496; 102 *Id.* 306; 100 *Id.* 366; 107 *Id.* 290, 413; 224 S. W. 622; 125 Ark. 325; 139 *Id.* 595; 109 *Id.* 568. While the rule of unity suggested in various dicta of this court is a mistake, even if the rule is enforced, it will not justify the ruling below.

*Otis Gilleylen,* for appellee.

There are two questions involved here: (1) Whether or not the act is void because it confers upon the commissioners a "roving" commission, and (2) whether or not the improvements contemplated in the act render it void for want of unity. The act is too vague and indefinite to be capable of enforcement. 118 Ark. 111. It is a hasty piece of legislation, full of uncertainties and indefiniteness and violates our law. 118 Ark. 119; 120 *Id.* 510; 118 *Id.* 294; 125 *Id.* 325.

HART, J. Appellee, an owner of real property in Pike County, brought this suit in equity against appellants to enjoin them from further proceeding as commissioners in constructing bridges under act 263 of the extra session of 1920, of the Arkansas Legislature.

The defendants interposed a demurrer to the complaint. The chancellor overruled the demurrer, and, the defendants declining to plead further, it was decreed that they should be restrained from proceeding further as commissioners of Pike County Bridge District, and the issuing of bonds or levying of taxes under the provisions of said act. The defendants have appealed.

Act 263 was passed at the extra session of the Arkansas Legislature held in 1920. Section 1 of the act reads as follows:

"That all of townships 5 and 6 south in Pike County and all incorporated towns situated on any part of said land, all railroads and tramroads located on any part of said land above described, are hereby formed into an improvement district, to be known as Pike County Bridge District No. 1, for the purpose of building, repairing, relocating or constructing highway bridges across the Caddo River and Little Missouri River and such other

streams as in the opinion of the commissioners need bridging, at such points across said streams as the comsioners hereinafter may select."

Other sections provide for the issuance of bonds, the assessment of benefits and the collection of special assessments on the real property situated within the boundaries of the district.

It is difficult to state an exact rule as to what extent a statute must go in describing an improvement, and we do not attempt to do so in this case. We deem it sufficient to say that section 1, which attempts to describe the improvement, is too vague and indefinite to be capable of enforcement. No intelligent idea of the character and extent of the improvement can be obtained from the statute. Therefore it can not be upheld, and the decree will be affirmed.

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WISCONSIN & ARKANSAS LUMBER COMPANY *v.* GARRETT.

Opinion delivered January 17, 1921.

1. MASTER AND SERVANT—NEGLIGENCE—JURY QUESTION.—In an action for injuries to an employee in lowering a jack under a car, whether the jack was defective and whether defendant had knowledge of that fact *held* questions for the jury.
2. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION.—In such case, whether the defect in the jack was so open and obvious that the employee assumed the risk therefrom, *held* a question for the jury.
3. MASTER AND SERVANT—DUTY TO INSPECT TOOLS.—An employee in a car repair shop who is ordered to lower a jack under a car is not required to inspect the jack for defects, but has the right to assume that the implement is in good condition.
4. DAMAGES—WHEN NOT EXCESSIVE.—Where plaintiff suffered a complete fracture of the jaw which permanently interfered with the mastication of food, a verdict of $6,000 was not excessive.

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

*T. D. Wynne,* for appellant.

1. It was error to refuse to direct a verdict for defendant as requested. There was a total failure of evi-

dence to show that the jack with which plaintiff was injured was defective or that defendant knew of the defect. The verdict is based upon speculation, inference and surmise and can not be sustained. 26 So. Rep. 86; 51 La. Ann. 1247; 88 Fed. 462. See, also, 59 Ark. 106; 58 *Id.* 454; 106 S. W. 817; 212 *Id.* 463.

2. Plaintiff assumed the risk. 57 Ark. 160; 54 *Id.* 389; 56 *Id.* 232; 43 *Id.* 333; 88 *Id.* 548; 96 *Id.* 387.

3. It was error to give plaintiff's instruction No. 5. It is abstract. 88 Ark. 548, 243; 101 *Id.* 197; 104 *Id.* 489; 98 *Id.* 202; Labatt on M. & S. (2 ed.), vol. 3, par. 1174, 1179, 1183.

4. The verdict is excessive and at least a remittitur should be entered.

*D. D. Glover* and *Luke Monroe,* for appellee.

1. The verdict is sustained by the evidence. The evidence does show that the jack was defective and that defendant knew it or might have known it if due care had been used. 4 Labatt on M. & S., pp. 4185, 4819. The cases cited by appellant, 26 So. 86, and 212 S. W. 463, are not in point.

2. The risk was not assumed. 92 Ark. 355; 4 Thompson on Neg., § 3803; 1 Labatt on M. & S., §§ 155-7; 101 Ark. 201; 123 *Id.* 119; 107 *Id.* 512; 122 *Id.* 227.

3. The verdict is not excessive. Plaintiff was a young man with an expectancy of thirty-six years of life. The questions of fact were submitted to a jury, and there were no errors of law, and under the law and evidence the verdict is conclusive.

SMITH, J. Appellee, who was the plaintiff below, recovered judgment for $6,000, to compensate an injury which, according to his testimony, was sustained in the following manner. He was injured on November 10, 1919, while working in appellant's car repair shop, where he had worked only five days before his injury. A car, weighing about eight or nine thousand pounds, was jacked up with jacks—two on each side. Plaintiff did not assist in jacking the car up, but was directed by his

foreman to let the jack down. The jack was hard to start, but plaintiff was assured that there was nothing wrong with the jack, that it just needed working, and for him to go ahead and let it down. In lowering the jack he used a canthook handle as a lever, which was about five or six feet long. He had lowered the jack a notch or two in the usual and ordinary way, when the handle flew up unexpectedly and struck him on the jaw, knocking him down and rendering him unconscious for a few moments. After regaining consciousness he looked at the jack closely and saw that it was in a defective condition. His jaw was broken, and pus formed in it, which ran for about three months, during which time pieces of bone sloughed off, and his jaw was kept bandaged, and he saw a doctor nearly every day. His jaw became ankylosed, and an operation was performed which left a hole in his jaw, since which time he has been unable to chew his food, and has been unable to talk except through his teeth, and his jaw feels dead and stiff and pains him at times, so that he can not take bites of food as an ordinary man does, and he sustained a loss of twenty pounds in weight. There were four jacks in the shop, all of the same size and make, and one could not be told from another by casual observation.

John Bailey, who had been foreman in the repair shops until about two months before plaintiff's injury, testified that an engine fell on one of the jacks and bent the step or stempiece which comes up out of the jack, which is housed in and which has notches on it, and this occurrence tore the step loose and damaged the screw so that it would not hold after that. Witness regarded the jack as unfit for use, put it in the scrap heap, and asked for a new one in its stead. The master mechanic took the jack to the shop and attempted to repair it, and put it back in use. The jack was repaired more than once, but on account of the stem being bent the dog, which catches in the notches, worked to the side, instead of the center of the stem, and would cause it to slip out of the notches and fall.

There was testimony that the jack fell once while the general foreman was present, the lever going near his head, and that the master mechanic, whose duty it was to keep the tools safe, knew of its defects, and put it back into use over the foreman's objection.

The witness, Bailey, who testified about the defective condition of the jack, did not know that plaintiff was injured while employed with that jack or that the jack was in use when plaintiff was injured, and objections were made to the admission of the testimony on that account. But there were only four jacks in use, and the testimony was to the effect that only one of them was defective, and plaintiff testified that he observed some of the defects in the jack with which he was at work which the witness Bailey described. The testimony of Bailey was competent, as it, taken in connection with that of plaintiff, warranted the inference that plaintiff was hurt while using the defective jack which Bailey had described.

Upon the part of defendant the testimony was to the effect that the jacks were all exactly alike, and none of them was defective. That in raising or lowering the jack the operator should hold the handle firmly, and that if this had been done by plaintiff no injury would have occurred, and that plaintiff's injury was due to this failure on his part, and not to the defective condition of the jack. That as soon as plaintiff was injured another employee was directed to lower the jack, and that he did so in the usual and ordinary way without difficulty or injury, and that the jack was continued in use without repair of any kind from the date of plaintiff's injury to the date of trial, during all of which time no defect in it had been observed, and that none existed. One of the jacks was exhibited to the jury, and, while the witnesses did not testify that it was the jack at which plaintiff was employed, they did testify that it was exactly like the other three jacks, and had been picked up from among the others, and that there was nothing to distinguish any one from the others. Plaintiff testified, how-

ever, that the jack exhibited was not the one with which he was hurt.

The court gave all the instructions requested by defendant except one numbered 9. But this instruction appears to have been fully covered by others which were given.

It is insisted that there is a total failure of evidence to show that the jack with which plaintiff was injured was defective, or that defendant had knowledge of that fact. But we think the testimony set out above was sufficient to carry that question of fact to the jury.

It is also insisted that plaintiff assumed the risk; this insistence being based upon the theory that, if there was a defect such as plaintiff and Bailey testified existed, the defect was so open and obvious that it would have been discovered by any ordinary use of the jack. But this question was submitted to the jury, and we think properly so. Plaintiff had the right to assume that the jack was in good condition, and he was not required to inspect it for defects, and he testified that he did not observe the existing defect until after his injury. It is true that he did admit that after his injury he observed the defect; but the discovery then made was the result of curiosity, and not a belated discharge of a duty to inspect or to observe obvious defects.

It is finally insisted that the verdict was excessive. Upon this proposition, in addition to the testimony set out above, plaintiff's physician testified that there was a complete fracture of the jaw; that the jaw was stiff and the injury was permanent; that, while there was an operation which might be beneficial, he did not advise the operation in plaintiff's case, as he thought there was no promise of good results. The surgeon representing the defendant testified that it was impossible to open plaintiff's mouth to get an x-ray picture of it, and that the injury was a permanent one, which would always interfere with the mastication of food, essential to good digestion.

Under these circumstances we can not say the testimony was not sufficient to support the verdict.

No error appearing the judgment is affirmed.

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## AMERICAN BUILDING & LOAN ASSOCIATION v. STATE.

Opinion delivered January 17, 1921.

1. NEGLIGENCE—DAMAGES FOR PERMITTING WELL TO REMAIN UNCOVERED.—In a criminal prosecution for permitting a well to remain uncovered on an uninclosed lot, in violation of Kirby's Digest, § 7905, as amended by Acts 1905, No. 119, it is error to assess damages against defendant for injuring livestock; the statute not authorizing it and the owner not being concluded by the proceeding.
2. NEGLIGENCE—STATUTE AS TO OPEN SHAFTS OR WELLS—CONSTRUCTION.—Under Kirby's Digest, § 7905, as amended by Acts 1905, page 312, making it unlawful to leave "any shaft, well or other opening uncovered on any unenclosed land, and requiring every corporation, company, individual, person or asscoiation, of persons who shall dig any such shaft, well or other opening, whether for the purpose of mining or other purpose," to keep same either enclosed or sufficiently covered, *held* that it is unlawful to leave a well uncovered and uninclosed, though it was not dug for mining purposes.
3. STATUTES—EJUSDEM GENERIS.—The rule of *ejusdem generis* is invoked in the construction of statutes to aid, and not to control, the construction, and it must yield to another rule, viz., that every part of a statute should, if possible, be upheld and given its appropriate force.
4. NEGLIGENCE—OPEN SHAFTS OR WELLS.—The statute making it unlawful to leave uncovered openings on uninclosed land applies to a well or opening on a lot in a city or town occupied as a residence.
5. NEGLIGENCE—OPEN SHAFTS OR WELLS.—An owner of land may be convicted of a violation of the act prohibiting leaving uninclosed and uncovered shafts or wells, though he did not dig the same.
6. NEGLIGENCE—LIABILITY OF LANDLORD FOR TENANT'S OMISSION.—A landlord who delivers land to his tenant with a well properly covered is not guilty of violating the act against leaving uninclosed or uncovered shafts or wells, though the well became insufficiently covered while the land was in the tenant's possession.

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

*W. G. Riddick, W. A. Utley* and *J. W. House,* for appellant.

1. The appellant is not guilty under the statute. Kirby's Digest, §§ 9843-4. The statute is in derogation of the common law and must be strictly construed. 79 Ark. 517. Before a conviction can be sustained under the statute the following facts must appear: (1) The person charged must have dug the well; (2) the person charged must have left or abandoned the well; (3) the well must have been dug or abandoned upon unenclosed property. These are the plain words of the statute without addition or interpretation. There is absolutely no proof nor any contention that defendant dug the well, and there is nothing in the record to show that defendant ever left the well upon uninclosed property. The right to control and use the property was in the tenant during the time of his rent and lease. The word "leave" as used means "to desert or to abandon." 48 So. Rep. 357; 108 Pac. 895. The evidence shows that the well was within three feet of a dwelling house on a lot within the city of Benton and inclosed and the house was occupied; it was not uninclosed, within the meaning of the statute. 95 Ark. 6; 104 *Id.* 624; 45 N. E. 612. It is clear that the statute was never intended to apply to the circumstances of this case. The statute says nothing about the owner of the land. Liability does not depend upon ownership of the land. The person who digs the well and leave it on uninclosed land is liable under the statute, regardless of whether or not he owns the property. Appellant never dug the well, never left it, and the premises were not uninclosed, and the demurrer to the indictment should have been sustained.

2. It was error to assess and award damages in the trial of a criminal case. It was not the intention of the Legislature to reach by this act wells in the yards of private residences. The doctrine of *ejusdem generis* ap-

plies. The intent was to reach shafts, wells and openings upon uninclosed lands for *mining* purposes, and the statute was never intended to apply to wells on private property.

3. It was improper to award damages in a criminal case. The owner was not a party to the suit. Damages are only recoverable in a civil suit. 138 Ark. 425; 54 *Id.* 364.

4. The court erred in its instructions given and refused, and it was error to admit testimony to prove the value of the mules. It was also error to refuse to permit defendant to introduce testimony to show an ordinance of the city of Benton prohibiting the running at large of stock within the city limits of the city of Benton. The evidence was material, and it was error to exclude it.

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

Confesses error, as the statute contains no provision for the assessment of damages in a criminal case. The stock must be appraised, which was not done.

SMITH, J. At the trial from which this appeal comes the appellant was found guilty under an indictment charging it with permitting a well to remain uncovered on an uninclosed lot owned by it in the city of Benton. The indictment also alleged that two mules, of the value of $500, the property of S. McLehaney, had fallen into the well and been killed. The verdict of the jury fixed the value of the mules at $500, and judgment for twice that amount was rendered against appellant.

The appellant company had a loan secured by mortgage on the lot in question and acquired title to the lot under a foreclosure proceeding in 1915. Appellant immediately thereafter rented the lot and the house standing thereon to one Witham, who thereafter remained continuously in possession until September 5, 1919, on which date the mules fell into the well.

The well was dug prior to the foreclosure proceeding, and according to appellant was securely covered at the time the property was delivered to Witham.

McLehaney testified that he had been employed to plow the garden, and that he did not know the well was on the premises, that he saw a pile of rubbish on some planks, but Bermuda grass and weeds had grown over the well; that as he drove by the well one mule set her hind foot close to the well and the dirt caved in and that caused the mule to slip and she fell into the well and pulled the other mule in on top of her. The well was within a few feet of the house, and that portion of the premises was uninclosed.

Numerous errors are assigned, and the Attorney General has confessed error on several of the assignments; and, as there is error, the cause must be reversed. We proceed, therefore, to declare the law of the case to the end that it may be properly tried on its remand.

The first error assigned is that it was improper to assess and award damages in the trial of the criminal case. This was error, because the statute does not authorize that procedure. There are certain proceedings in which a fine may be imposed by the jury for a violation of a statute by killing or injuring live stock or damaging property and an assessment of such damages made by the same jury which tries the criminal branch of the case; but there is in those cases a statutory authorization for the proceeding. But here there is an absence of such authority in the statute under which this proceeding was had.

The owner of the mules was not a party to this proceeding, and unquestionably would not have been concluded by the judgment, had appellant been acquitted. The case of *Johns* v. *Patterson,* 138 Ark. 420, was a suit under a statute which made it unlawful to entice away a laborer, and provided for both a fine and for damages. The contention was there made that the suit for damages could not be maintained prior to a conviction for the misdemeanor. We held against that contention, and

in doing so said the injured person was not a party to the prosecution and could not control it; that the charge might be dismissed without his consent, and he could not prosecute an appeal from that judgment; and that the doctrine of reasonable doubt prevails on the trial of a criminal case, whereas in a civil action for a tort a preponderance of the evidence in favor of the plaintiff would entitle him to a verdict. It was not proper, therefore, to assess damages upon the trial of the misdemeanor.

The proceeding was had under the authority of section 7905 of Kirby's Digest, as amended by act 119 of the Acts of 1905 (page 312), which reads as follows:

"It shall be unlawful for any corporation, company, individual, person, or association of persons, to leave any shaft, well or other opening uncovered on any uninclosed land. Every corporation, company, individual, person, or association of persons, who shall dig any such shaft, well or other opening, whether for the purpose of mining or other purpose, shall be required to securely inclose the same or cover and keep covered with strong and sufficient coverings."

The statute, as found in Kirby's Digest, made it unlawful "to leave any shaft or opening uncovered on any uninclosed land." As amended, it was made unlawful "to leave any shaft, well or other opening uncovered on any uninclosed land." The addition of the word "well" after the word "shaft" and of the adjective "other" before the noun "opening," in the first sentence, and the addition of the words "well or other opening" after the word "shaft," in the second sentence, and the substitution of the words "other purpose" for the word "otherwise," would appear to refute appellant's insistence that the penalty of the act is only directed against excavations for the purpose of mining or purposes similar to mining.

Appellant says that the rule *ejusdem generis* is applicable here in the construction of the statute, and that only excavations made in mining, or for similar purposes,

are unlawful. The original statute made it unlawful to dig any such shaft, "whether for the purpose of mining or otherwise." The word "whether" is defined in Webster's New International Dictionary as "A particle used to indicate that what follows is an alternative. * * *"

This court has often recognized and applied the ancient maxim *ejusdem generis* in the construction of statutes. But, like all rules of construction, it is invoked to aid, and not to control, the construction. In the case of *Crabtree* v. *State,* 123 Ark. 68, in speaking of the maxim, we said:

" 'It has never been supposed,' says the Supreme Court of Illinois, 'that the rule required the rejection of the general terms entirely, but only that they should be restricted to cases of the same kind as those expressly enumerated. On the contrary, it must yield to another equally salutary rule of construction, viz., that every part of a statute should, if possible, be upheld and given its appropriate force.' *Misch* v. *Russell,* 136 Ill. 22, 25."

So, here, when section 7909 of Kirby's Digest is read in connection with the amendatory act of 1905, it appears clear that the legislative purpose was to make it unlawful to leave uncovered, on uninclosed lands, any shaft, well or other opening, whether they had been dug for mining purposes or for purposes other than mining.

We conclude, therefore, that the court below was correct in instructing the jury that leaving an uncovered well was unlawful, although the well had not been dug for mining or a similar purpose.

It is next insisted that the act was never intended to apply to a lot in a town or city occupied as a residence. But we find nothing in the act to support that contention. Certainly, the danger which the act seeks to avert is as great in a city or town as elsewhere.

It is next insisted that appellant can not be guilty because it affirmatively appears that it did not dig the well, nor have it dug. The statute does not require this showing. Upon the contrary, it is made unlawful to leave a well uncovered on any uninclosed land; and to

leave uncovered means to permit the well to remain uncovered; and, if this is done, it is not material to inquire who dug the well. The gist of the offense is leaving the well, shaft, or other opening uncovered or unprotected, and that person violates the law who is guilty of that omission.

Appellant insists that under no view can it be guilty because the undisputed testimony shows that the well was securely covered when it turned the premises over to its tenant. This point was not fully developed at the trial, however, as the court had the view—as reflected in the instructions—that the owner was responsible for the safety of the premises, under all circumstances.

In the case of *Clay* v. *El Dorado Hotel Co.*, 121 Ark. 253, we had occasion to consider the liability of the owner of the land to a pedestrian who had fallen into a coal-hole at a time when the premises were in the possession of a tenant to whom they had been leased. The landowner there had covenanted to make the necessary repairs. In that case we approved an instruction which told the jury that, if there was no structural defect in the covering of the coal-hole, the duty of keeping it covered would devolve on the tenant.

So here the duty of keeping the well properly covered rested upon the tenant, provided the well was properly covered when the tenant took possession. The offense is not committed by digging a well, but is committed by leaving a well uncovered. It was the landowner's duty to have had the well properly covered when the premises were turned over to the tenant; and if he was remiss in this, he is subject to the penalty of the statute. If the landowner had complied with his duty in this respect, then he was not responsible for the tenant's failure to keep the property in proper repair. For such failure the tenant is himself liable. 16 R. C. L., page 1063, section 584, of the article on Landlord and Tenant, and authorities there cited.

Other questions are raised in the briefs which can only properly be considered in a suit by the owner of the mules for his damages.

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

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PITTMAN v. ROAD IMPROVEMENT DISTRICT NO. 1 OF NEVADA COUNTY.

Opinion delivered January 17, 1921.

1. HIGHWAYS—RIGHT TO APPEAL FROM ORDER REFUSING TO TERMINATE DISTRICT.—Under 1 Road Laws 1919, No. 130, § 22, creating Road Improvement District of Nevada County No. 2, and authorizing the county court to terminate the existence of Road Improvement District No. 1 of Nevada County, and providing for an appeal from that court's order within a specified period, the secretary of district No. 1 had no right to appeal from an order refusing to terminate the district; the right of appeal existing in the board itself or in the taxpayers of the district.
2. HIGHWAYS—AUTHORITY TO TERMINATE DISTRICT NOT MANDATORY.—Under 1 Road Laws 1919, No. 130, § 22, creating Road Improvement District No. 2 of Nevada County, providing that the county court is "authorized" to terminate the existence of Road Improvement District No. 1, created by Acts 1915, No. 338, but that, on the court's failure to terminate its existence, such district should continue to exist, and the proceedings of its commissioners and assessors shall not be affected by the act creating district No. 2, *held* the power vested in the county court was a sound discretionary one, and, in the absence of abuse, its exercise will not be disturbed on appeal.

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

*H. B. McKenzie,* for appellants.

1. It was mandatory upon the county court under § 22, act 130, Acts 1919, to terminate Road Improvement District No. 1 when the commissioners of district No. 2 filed a statement with the county court in accordance with § 22, act No. 130, Acts 1919.

2. The court erred in dismissing the appeals from the judgment of the county court. 88 Ark. 118; 73 *Id.*

523 and 246; 215 S. W. 600. The right of appeal is thoroughly established by the decisions of our court. 33 Ark. 568; 43 *Id.* 324; 54 *Id.* 321. As to whether a statute is mandatory or not, the legislative intent governs. A. & E. Ann. Cases 1916 C, page 391. It was never intended by the Legislature that the commissioners should go to the trouble and expense of organizing the district, hiring an engineer and assistants, preparing plans and specifications, filing same and assessing benefits and complying with other provisions of the act, and that after all this that the county court should make an order refusing to terminate district No. 1. 42 Ark. 46.

The word "authorized" in a statute is mandatory and imperative and not permissive. 51 N. Y. 401; 194 Fed. 775-81; 137 N. C. 579; 50 S. E. 291, 295; 134 Ga. 758; 68 S. E. 716, 723; 95 Md. 62; 93 Am. St. 317-323; 98 Ark. 505. Applying these principles, it was the purpose of the act to build a highway, and the act is valid. 218 S. W. 381. See, also, 50 S. W. 291; 98 Ark. 505; 4 Wall. (U. S.) 435; 5 *Id.* 705; 3 Hill 612; 46 N. Y. 401; 51 *Id.* 401; 130 Ill. 482; 36 S. W. 681; 38 *Id.* 80.

*J. O. A. Bush*, for appellee.

1. A bill of exceptions can not be signed on Sunday. It is a judicial act and can not be done on Sunday without statute authority. Kirby's Digest, § 1487; 88 Ark. 118; 90 *Id.* 316; 85 *Id.* 304.

2. The appeal of district No. 1 was properly dismissed. Tompkins could not appeal, as he was not a party to the suit. 52 Ark. 99; 71 *Id.* 84.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Nevada County, refusing to terminate Road Improvement District No. 1 of said county, which had been organized under act 338, Acts of the Legislature of 1915. The proceeding for the termination of said road improvement district was begun on the 30th day of January, 1920, in the county court of said county, by statement filed by Road Improvement District No. 2 of Nevada County, conforming to the requirements

of section 22, act 130 of the Acts of the General Assembly of 1919, which is as follows:

"If the commissioners and the county court find that it is feasible, practicable and desirable to construct sections 1 and 3 of the roads, as provided for in this act, and shall file the plans therefor with the county clerk, as provided in this act, or shall make the assessment of benefits in said sections 1 and 3, and said assessment of benefits in each of these sections shall be sufficient to complete the improvement in each, and this act and the said assessment of benefits shall not be held invalid, and the commissioners are ready to let the contract for the construction of the improvements in each of sections 1 and 3, they shall file a statement to this effect with the county court, and the county court is thereupon authorized to enter an order terminating the existence of Road Improvement District No. 1 of Nevada County. Appeals from such order shall be taken within thirty days after its entry, and not thereafter. If the county court does not enter an order terminating the existence of said Road Improvement District No. 1, as herein provided, then its existence and the proceedings of its commissioners and assessors shall not be affected by this act, but they may proceed to make the improvements in their district, under the provisions of the law under which said Road Improvement District No. 1 was created.

"It is found and hereby declared that the surveys, plans and other expenses incurred by said Road Improvement District No. 1 produced results that will inure to the benefit of sections 1 and 3 of the respective roads and the respective territory set forth in this act, and, in the event the existence of Road Improvement District No. 1 shall be terminated, as herein provided, the said sections 1 and 3, created under this act, shall assume and pay each one-half of such expenses and other indebtedness."

On the 19th day of February, 1920, a remonstrance was filed by appellee, who owned lands and were taxpayers in both road improvement districts, against the termination of said Road District No. 1 under the statement

filed by the president and secretary of said Road Improvement District No. 2. The remonstrance controverted the facts set forth in said statement. On the 27th day of March, 1920, the county court entered an order refusing to terminate said Road Improvement District No. 1, from which judgment Dan Pittman, for said Road Improvement District No. 2, and W. V. Tompkins, as secretary for Road Improvement District No. 1, prosecuted an appeal to the circuit court of said county within the time prescribed by law. In the circuit court, motions were filed to dismiss each appeal. The circuit court dismissed the appeal of W. V. Tompkins for Road Improvement District No. 1, and refused to dismiss the appeal for Road Improvement District No. 2. The cause was then submitted to the court, which resulted in the judgment from which this appeal was prosecuted by said Road Improvement District No. 2. As we understand the record, no appeal from the judgment of the circuit court, dismissing the appeal taken by W. V. Tompkins from the county court, for said Road Improvement District No. 1, has been prosecuted to this court; the only appeal pending here being that prosecuted by said Road Improvement District No. 2. This is really immaterial, however, for we are of opinion that W. V. Tompkins, as secretary of said Road Improvement District No. 1, was without power to appeal from the order of the county court. The right of appeal existed either in the board itself or in the taxpayers of the district.

It is insisted by appellant that it was mandatory upon the county court, under the provisions of section 22, act 130, Acts of the General Assembly of 1919, to terminate Road Improvement District No. 1 when the commissioners of said Road Improvement District No. 2 filed a statement with the county court in accordance with the requirements of section 22 of said act No. 130. We can not agree with this contention. The word "authorize," as used in this section, was clearly directory, because the section itself provided that, in the event the county court did not enter an order terminating the existence of said

Road Improvement District No. 1, then its existence and the proceedings by its commissioners and assessors should in no wise be affected by the act. The power vested in the county court under the act was a sound discretionary power.

It is next insisted that the circuit court erred in dismissing the appeals from the judgment of the county court refusing to terminate the district without a hearing upon the merits. As stated heretofore, the appeal by W. V. Tompkins, as secretary for said Road Improvement District No. 1, was properly dismissed, because the authority to appeal was in the board, and not its secretary. In addition, as we understand the record, no appeal has been prosecuted to this court by W. V. Tompkins, as secretary of the Board of Road Improvement District No. 1, from the judgment of the circuit court. According to the record, appellant is also in error in suggesting that the appeal of Road Improvement District No. 2, from the county court, was dismissed by the circuit court. On the contrary, the circuit court overruled the motion to dismiss the appeal of said Road Improvement District No. 2 and heard the case upon the merits, and rendered a judgment thereon, refusing to terminate said Road Improvement District No. 1. Nothing appears in the record to justify us in finding that the court abused its discretion in the rendition of the judgment.

No error appearing, the judgment is affirmed.

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BOARD OF DIRECTORS OF ROSS DRAINAGE DISTRICT *v.* STATE.

Opinion delivered January 17, 1921.

1. DRAINS—EXEMPTIONS AND LIABILITIES.—The exemptions and liabilities embodied in the general law relating to the establishment of drainage systems can not attach to a district established by special act.

2. DRAINS—LIABILITY OF SPECIAL DISTRICT TO CONSTRUCT BRIDGES.—Inasmuch as a drainage district, being a *quasi*-public corporation, is subject to such liabilities only as the statute creating it prescribes, the Ross Drainage District, created by Acts 1917, No. 92, as

amended by Special Acts 1919, No. 3, was not required to construct bridges where highways cross the ditches; no such liability being imposed on it by the statute.

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

*J. E. Callaway,* for appellant.

Under the statutes of this State we have two methods or systems of drainage procedure. Each system authorizes the assessment of public and corporate roads and railroads. Appellant is operating under neither of these systems, but is a body corporate under special act 92, 1917, which does not authorize the assessment of public roads or highways. Where a statute does not require a drainage district to construct bridges at its own expense, the district is under no legal duty to construct them. 190 Ill. 549; 60 N. E. 898; 15 N. E. 594; 97 Kan. 302. A drainage district has only such powers and liabilities as are prescribed by statute. 110 Ark. 416. The special act does not authorize the assessment of public roads or highways, nor does it require the commissioners to construct or repair culverts or bridges, nor the assessment of lands within the district for any purpose except that stated in the act. Where there is a special act on a particular subject or case, it only applies, and not the general law. 84 Ark. 329; 68 *Id.* 130; 50 *Id.* 132; 60 *Id.* 59.

Unless required by statute, no legal duty rests upon a drainage district to construct or maintain bridges over ditches crossing highways. 199 S. W. 716; 196 S. W. 1115; 190 *Id.* 897; 252 Mo. 345; 158 S. W. 633. The reasoning of the court in 196 S. W. 1115 is conclusive of this case. In this case the county pays nothing for benefits derived by the public highways, yet asks to be relieved of any expense in constructing bridges over which the public travels.

*L. F. Monroe,* Prosecuting Attorney, *Hardage & Wilson, John H. Crawford* and *Dwight H. Crawford,* for appellee.

1. Under our statutes the drainage district is liable for the cost of the extra bridges. Act 177, Acts 1913, p. 739, § 16.

2. The contention of appellant that where there is a special act on a particular case it only applies, and the general law, can not be applied here. 50 Ark. 137; 48 N. J. L. 370, 5 Atl. 178.

3. At common law and in a majority of States, in the absence of legislation, the drainage district is liable. 92 Neb. 776; 43 L. R. A. (N. S.) 695; Ann. Cases 1914 A, 546; 14 East 317; 9 R. C. L. 628; 19 C. J. 696. The Missouri cases cited by appellant do not sustain its contention made here. 224 S. W. 343-5. See, also, 87 Neb. 132; 70 Am. Dec. 134; 35 Am. Dec. 575; 59 Wis. 69; 17 N. W. 972; 49 Md. 257; 23 Am. Rep. 247; 40 *Id.* 430.

There is no evidence or admission that the county would derive benefit from the digging of the drainage ditches. The burden of building these bridges should fall on those landowners in the valley composing the Ross Drainage District who were benefited. 224 S. W. 343.

HUMPHREYS, J. This suit was instituted by appellee against appellant in the Clark Chancery Court for a mandatory injunction, requiring appellant to build suitable and proper bridges over the drainage ditches being dug by it wherever they crossed the public highways of the county. The cause was submitted to the court upon the pleadings and the following agreed statement of facts:

"The Board of Directors of Ross Drainage District of Clark County, the defendant herein, constitutes a body politic and corporate, organized and operating in compliance with and under the power and authority conferred upon them by special act No. 92 of the General

Assembly of the State of Arkansas of 1917, and as amended by special act No. 3 of the year 1919.

"The lands lying within and embracing Ross Drainage District are fertile agricultural lands, but subject to overflows of Terre Noir Creek. For the purpose of reclaiming same from such overflows, the defendants, acting within the scope of their authority under said act No. 92, are engaged in constructing two ditches down the valley of said creek within said district, one on either side of the channel of said creek near the foothills of said valley, said ditches each being about forty to sixty feet wide and from ten to fifteen feet deep. The length of the ditches on either side of the valley will be twelve or fifteen miles, said ditches traversing the valley of said creek for that distance. The said ditches will cross five or six public county highways which were established and being maintained by the county before the passage of said act No. 92. The said ditches have crossed said county highways in two or three places, and will soon cross them in other places. The county has heretofore constructed and maintained bridges on each of said highways where same cross said creek, which bridges will be necessary for the county to continue to maintain after said ditches are completed. At the places where said drainage ditches cross said county highways no bridges were necessary prior to the construction of said ditches, and it will be necessary, in order for the public to properly use said county highways, that said drainage ditches should have bridges over them where they cross said public highways."

The court decreed that appellant should construct good and substantial bridges, at its own expense, over drainage ditches then or thereafter constructed across any public road in Clark County, and enjoined it from cutting public roads without constructing bridges across its ditches where they intersected said roads. An appeal from the decree has been duly prosecuted to this court.

The general laws of the State make provision for two drainage systems. One system requires the county and

the other the drainage district to construct bridges over the ditches crossing highways. The exemptions and liabilities embodied in the general law estabishing either system can not attach to appellant district, because it was established by authority of special act No. 92 of the Acts of the General Assembly of 1917. This court announced the doctrine in *Wood* v. *Drainage District No.* 2, *Conway County,* 110 Ark. 416, that a drainage district, being a *quasi*-public corporation, was subject to only such liabilities as the statute creating it prescribes. By reference to said special act No. 92, creating appellant district, it will be observed that no liability was prescribed against it on account of intersecting public highways with its ditches. The highways within the district necessarily received a benefit from the drainage afforded by the construction of the drainage ditches, and this was perhaps the reason the Legislature imposed no liabiity upon it for crossing the highways with its ditches. The additional burden entailed upon the county to construct and maintain bridges over the ditches crossing the highways was compensated by the drainage afforded the highways. The rule seems to be well established that, unless required by statute, no legal duty rests upon a drainage district to construct and maintain bridges over its ditches crossing highways. *McCaleb* v. *Coon Run Drainage & Levee District,* 190 Ill. 549 (60 N. E. 898): *Rigney* v. *Fischer,* 113 Ind. 313 (15 N. E. 594); *Board of County Commissioners of the County of Jefferson* v. *Delaware River Drainage Dist. of Jefferson County,* 97 Kan. 302 (155 Pac. 54).

For the error indicated, the decree is reversed and appellee's bill for mandatory injunction is dismissed.

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## HUNT *v.* DELL.

Opinion delivered January 17, 1921.

1. MASTER AND SERVANT—DUTY TO GIVE WARNING.—A master is not liable for failure to warn an intelligent and experienced servant of dangers incident to the use of machinery which he has been accustomed to use.

2. MASTER AND SERVANT—ASSUMED RISK.—An employee of intelligence and experience assumes the risk of starting a gasoline engine by turning the flywheels and of going between two flywheels for that purpose; such risk being obvious.

Appeal from Clay Circuit Court, Western District; *R. H. Dudley,* Judge; reversed.

*F. G. Taylor*, for appellant.

The court should have directed a verdict for defendant, as plaintiff's injury was the result of an assumed risk of his own negligence, as shown by the undisputed evidence. There was no negligence of the master in failing to warn a man of ordinary intelligence and experience in the operation of machinery as to its condition and danger, which were obvious and not concealed. Plaintiff assumed the risk. 180 S. W. 984; 95 Ark. 560; 82 *Id.* 534; 93 *Id.* 153; 107 *Id.* 341. By his own negligent act he went into a dangerous place and was injured, and no one was responsible for his injury. 66 Ark. 237; 125 *Id.* 480. The defect was obvious, and so was the danger, and plaintiff assumed the risk. 135 Ark. 503 and cases cited. The case should be reversed and dismissed, as the case is fully developed. A verdict should have been directed on the defenses of assumed risk and contributory negligence.

*Oliver & Oliver,* for appellee.

Where a young and experienced servant is employed to operate a dangerous machine, it is the duty of the master to inform him how to operate it safely, and for an injury caused by a breach of such duty the master is liable in damages. 71 Ark. 55; 81 *Id.* 247; 73 *Id.* 49; 105 *Id.* 247; 115 *Id.* 380. See, also, to same effect, 82 Ark. 243; 90 *Id.* 473. Not only was defendant negligent in failing to warn plaintiff of the danger, but he was further negligent in failing to put in working order after the fire the compressed air starter. The question as to whether he was negligent in failing to do either was a question of fact submitted to the jury on proper instructions, and the verdict is sustained by ample testimony.

HUMPHREYS, J. Appellee instituted suit against appellant in the Clay Circuit Court, Western District, to recover damages on account of an injury received while engaged in cranking a gasoline engine by assisting others in turning a fly-wheel attached thereto, which engine was used as the power in the operation of a gasoline dredge boat. Two grounds of negligence were charged and made the basis of the action. The first allegation was that appellee was a minor, inexperienced in the use of the machinery, and that appellant failed to warn him of the dangers incident to the operation of the machinery and place in which he was required to work. The second allegation was that the machinery was defective, in that the engine was being operated without a compressed air starter.

Appellant interposed the defenses of assumed risk and contributory negligence on the part of appellee.

The cause was submitted on the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment in favor of appellee against appellant for $998.75, from which verdict and judgment an appeal has been prosecuted to this court.

Appellee, a reasonably intelligent young man of twenty years of age, was employed about the 15th day of December, 1916, by appellant, as a laborer on a dredge boat operated by a gasoline engine. His work consisted in getting wood for the cabin boat, dynamiting stumps, oiling machinery, etc. He worked in this capacity until the holidays. He returned after the holidays and was transferred to a steam dredge boat where he was engaged in the same character of work for about a month. The following month, he was employed to operate a 25-horsepower gasoline engine stationed on the ground and used for pumping water. The engine was cranked, or started, by hand in turning fly-wheels attached thereto. He then returned home and was re-employed the first part of April following, to assist in rebuilding the gasoline dredge boat, which, in the meantime, had been injured by fire. The rebuilding of the gasoline boat was completed

about April 20, with the exception of the compressed air starter, with which the engine had previously been equipped. There were two fly-wheels attached to the engine three and one-half feet apart; to one of which wheels a belt and pulley were attached. The engine was a 60 horsepower gasoline engine and the fly-wheels were much larger than the fly-wheels on the smaller gasoline engine which had theretofore been operated by appellee—being seven feet each in diameter. The engine was purchased directly from the manufacturer and was complete without an air starter. The method of starting it was to turn the fly-wheels by hand. Before the dredge boat was destroyed, the engine had a compressed air starter attached, which made it easier to turn the fly-wheels by hand. This starter had been bought separate and apart from the machinery and attached by appellee. It was destroyed during the fire and had not been replaced at the time appellee was injured. The engine was set on the deck, and the men could turn the fly-wheels by taking hold of them on the outside, without going in between them. Due to the fact that a pulley and belt were attached to one of the wheels through which the men would have to reach from the outside to take hold of the wheel, it was the custom for two or more men to take hold of the other wheel and turn same in order to crank the engine. Instead of taking hold of the wheel from the outside, often one of them got in between the fly-wheels, as it was more convenient and easier to turn the wheel in that way. It was a dangerous place to stand while turning the fly-wheel, because, if one's foot slipped, there was no way to get out. The engine and fly-wheels were on a level with the deck, open to the view of any one. Appellant had not instructed appellee on the dangers incident to going between the wheels in order to crank the engine. Appellee had, however, frequently seen other men, and had himself often assisted in starting the machinery, in the position he was at the time the injury occurred. When appellee was employed, he was told to do any kind of work about the boat, whether on duty or not. The period of appellee's

duty was from 12 o'clock noon until 12 o'clock midnight. The machinery was stopped and appellee went to bed at midnight before the injury occurred on the following morning. On that particular morning, he got up and ate breakfast with the rest of the employees. After breakfast he went out on the deck where the other shift of men were trying to start the engine, and, upon request of one of them, helped start the engine. In doing so, he went in between the fly-wheels, took hold of the wheel and attempted to turn it. As the engine fired, it jerked appellee's right hand between the spokes, his foot slipped, the wheel caught him by the shoulder and threw him down on the engine bed where the injury occurred. Had the compressed air starter been attached and in repair, it would not have prevented the injury if appellee had been in the same position he was in when the injury occurred. At the conclusion of the evidence, appellant asked a peremptory instruction, which was refused by the court.

The sole question presented on this appeal is whether the undisputed facts in the case show that appellee assumed the dangers incident to the work in which he was engaged. Appellee was not so young, unintelligent or inexperienced in the use of the engine in question as to come within the doctrine that the master must warn the servant of the dangers, patent or latent, incident to his work, and to instruct him how to avoid them. *River, Rail & Harbor Construction Co.* v. *Goodwin,* 105 Ark. 247. The evidence revealed that appellee was a young man, almost grown, of intelligence, and, at the time of the injury, he had had considerable experience in the operation of the machinery in which he was injured. If the failure to replace the compressed air starter was a defect in the machinery, it was patent to one of reasonable intelligence exercising ordinary care for his own safety. The danger in going in between the fly-wheels to assist in turning them, so as to crank the engine, was likewise obvious to such an employee. Under this state of case, established by the undisputed facts, the law attributes to the employee knowledge and appreciation of the danger

incident to the work in which the employee is engaged, and exempts the employer from any liability to him on account of the injury received. *Williams Cooperage Co.* v. *Kittrell,* 107 Ark. 341; *Wisconsin & Ark. Lbr. Co.* v. *Price,* 125 Ark. 480; *St. Louis S. W. Ry. Co.* v. *Compton,* 135 Ark. 563.

For error in refusing the peremptory instruction, the judgment is reversed and the cause dismissed.

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PIERCE OIL CORPORATION *v.* TAYLOR.

Opinion delivered January 24, 1921.

1. JUDGMENT—WHEN NOT A BAR TO SECOND ACTION.—A judgment for an administrator in an action for death of his intestate in a fire caused by defendant's negligence did not preclude the owner of money in intestate's possession as gratuitous bailee at time of fire, which was destroyed by the fire, from recovery therefor in a separate action against defendant.
2. BAILMENT—RIGHT OF ACTION FOR LOSS OF THING BAILED.—The right of action for injury to or loss of property while in the possession of a gratuitous bailee is in the general owner and not in the bailee as special owner.
3. DEATH—APPLICATION OF LORD CAMPBELL'S ACT.—Crawford & Moses' Digest, §§ 1074-5, providing for recovery of damages for wrongful death, relates only to actions for death, and not to actions for injuries to property.
4. COURTS—AUTHORITY OF DECISION OF FEDERAL COURT.—A finding of the Federal court as to the sufficiency of evidence to sustain a finding of negligence on the part of this defendant in an action by an administrator for death of his intestate is not binding on the State courts in a subsequent action by the owner of property in the intestate's possession at the time of her death, which was destroyed by defendant's negligence.
5. EXPLOSIVES—NEGLIGENCE.—Evidence held to justify a finding that defendant sold, as kerosene, oil that was dangerous, and which was not in fact kerosene of the standard required by law.
6. EXPLOSIVES — EXPLOSION — BURDEN OF PROOF.—In an action for damages caused by an explosion of oil sold as kerosene and alleged not to comply with the lawful standard, the plaintiff has the burden of proving negligence; there being no presumption from the happening of the explosion.

7. EXPLOSIVES—NEGLIGENCE.—Negligence in selling dangerous oil as kerosene may be proved by circumstantial evidence.

8. EXPLOSIVES—CONTRIBUTORY NEGLIGENCE.—In an action for destruction of property by an explosion of inflammable oil improperly sold as kerosene, the question whether intestate was negligent in attempting to start a fire with such oil *held* for the jury.

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

*J. J. Montgomery* and *James B. McDonough,* for appellant.

1. The court erred in sustaining the demurrer to the paragraph of the answer setting up the plea of *res adjudicata.* The loss of the money on the person of Alice Taylor, she holding same as bailee for the plaintiff, was a damage necessarily inhering in the judgment in the Federal court. All causes of action growing out of the death of Alice Taylor inhered in Elihu Taylor as administrator of Alice Taylor, and all the issues in this case were included, inhered in and were a part of the right of recovery in the former case. 79 Ark. 62 is decisive of this case. In death actions under the Arkansas law the administrator is the sole party and represents every child, whether of age or not, and hence the administrator represented Ed Taylor, appellee, whose money was burned. 113 Ark. 380. Ed Taylor can not maintain this suit because the money sued for or the cause of action belonged to Alice Taylor and inhered in the other action her right of action passed to her administrator. 118 Ark. 402. This case is squarely in point, and shows that Ed Taylor can not split up his cause of action. 79 Ark. 62. See, also, 97 Ark. 560; 63 *Id.* 259; 23 Cyc. 446. Cited with approval in 25 Ala. 450; 27 *Id.* 238; 31 *Id.* 162; 56 *Id.* 373; 73 *Id.* 607; 84 *Id.* 509; 4 So. 426; 5 Am. St. 387; 19 So. 180; 108 Ala. 327; 50 So. 106.

It follows from these cases that Ed Taylor is barred by the former recovery. There is but one injury for one wrongful act. The only courts holding otherwise are in

New Jersey and New York. 87 S. W. 1082; 91 *Id.* 194. See, also, 141 Mo. 252; 18 Pac. 636; 13 Ind. 103; 150 Mass. 261; 86 Cal. 415; 137 Pa. St. 82; 83 Mo. 660; 103 Ind. 314. A majority of the cases declare the principle the same way as it is in Arkansas, and the court erred in sustaining the demurrer to the second paragraph.

2. The court should have directed a verdict for appellant, as the evidence was entirely insufficient, and the burden was on plaintiff. 122 Ark. 445; 63 So. Rep. 484; 119 Fed. 572. There must be some breach of legal duty, and none was shown. 37 N. L. 5; 100 U. S. 195; 63 Fed. 400; 123 N. W. 1013; 212 U. S. 159; 64 Atl. 985. The mere fact of explosion is not evidence of negligence. 119 Fed. 572; 64 Atl. 985. Where an injury may be due to several causes for which the defendant would not be liable, a verdict should be directed for defendant, in the absence of a showing as to which produced the injury. 236 Fed. 690; 123 N. W. 992; 75 Pac. 1013.

3. Deceased was guilty of negligence as a matter of law. His action was the proximate cause of the injury, and there can be no recovery. 130 Fed. 199; 164 N. W. 668; 39 La. Ann. 344.

4. The instructions as a whole do not submit to the jury the actual questions involved, and the evidence is insufficient to show that the oil was not kerosene at the time it was sold. If it was kerosene at the time, there can be no recovery.

*Heartsill Ragon* and *G. O. Patterson,* for appellee.

1. There was no error in sustaining the demurrer. The issues in this case were not within the scope of the issues in the proceedings in the Federal court. A judgment is conclusive only between parties and privies. 105 Ark. 86; 96 *Id.* 454; *Ib.* 409; 83 *Id.* 157; 82 *Id.* 419. The question here was not determined in the Federal court. Alice Taylor had no rights against appellant, as she had no special property or ownership in the money destroyed and held it under no contract. She, as appellee's mother, simply held the money as a favor. Appellee was the

owner of the money and entitled to the immediate possession of it. 15 Ark. 159; 3 J. J. Marsh 307; 13 Ark. 437; 3 A. & E. Enc. Law 763; 5 Cyc. 208. Mrs. Taylor held the money subject to the will and pleasure of the bailor, and the possession of the bailee is that of the bailor. 15 Ark. 459. The present action is not within the scope of the issues in the Federal court. Mrs. Alice Taylor was a gratuitous bailee and only charged with due care to preserve it from destruction and only responsible for gross negligence. 11 Ark. 189; 23 *Id.* 61; 52 *Id.* 364; 103 *Id.* 12; 58 *Id.* 284; 3 A. & E. Enc. L. 750-1. The question here is taken out of the rule of *res judicata.*

2. There was no splitting of actions from one tortious act. 79 Ark. 62, and others cited, do not sustain appellant's contention. 53 Ark. 117.

3. The court should not have directed a verdict, as the evidence shows. The proof is convincing that the fluid was not kerosene. Defendant had the opportunity to have the fluid analyzed, but did not even take samples. Failure to have the fluid analyzed must be held adverse to appellant. 264 Fed. 829. See, also, 110 N. W. 20. Appellant was responsible for damages for using oil highly dangerous and explosive and sold for kerosene. 102 N. W. 227; 158 Fed. 241; 95 Atl. 931; 247 Fed. 921. The court properly refused to direct a verdict for appellant. 104 Ark. 267. The facts of this case bring it within the rule in 104 Ark. 267. Deceased was not guilty of negligence as matter of law. 264 Fed. 829. The presumption is that Alice Taylor in handling the oil acted with due care. 133 Iowa 11; 8 Thompson on Negl., § 7140; Ann. Cases 1912 A 625. The testimony shows that Alice Taylor used due care for her own safety. 255 Fed. 841. The burden to show contributory negligence was on defendant. 255 Fed. 841. The court properly instructed the jury, and the evidence sustains the findings and is conclusive.

4. There is no error in the instructions.

McCULLOCH, C. J. Mrs. Alice Taylor, the mother of plaintiff, lost her life on November 26, 1917, as the result of an explosion of some kind of oil sold by the defendant, Pierce Oil Corporation, as kerosene, and which Mrs. Taylor used in an effort to start a fire in a stove. It is alleged that the oil thus sold by the defendant and used by Mrs. Taylor was not kerosene, but was either gasoline or some other oil more inflammable than kerosene, and that the defendant was guilty of actionable negligence in selling the fluid and furnishing it for use as kerosene. Mrs. Taylor's clothing caught fire from the explosion, and she was burned to death. She carried on her person at the time the sum of $811 in paper currency, which was the property of the plaintiff and which was consumed by fire with her clothing. She merely had the money for safe-keeping at the request of her son, the plaintiff.

Elihu Taylor, the husband of Mrs. Alice Taylor, became the administrator of her estate and instituted an action against the defendant to recover damages for her death. The action was to recover damages for the benefit of the estate on account of pain and suffering endured by the decedent and also to recover for the benefit of the infant children of the decedent (not including the plaintiff in the present action, who is an adult) the damages sustained by them on account of the death of their mother. The action thus instituted by the administrator was removed to the Federal court, and the trial of the case resulted in a judgment in favor of the administrator against the defendant for the recovery of damages in the sum of $10,000. That judgment was affirmed by the Circuit Court of Appeals of the United States for the Eighth Circuit. *Pierce Oil Corporation* v. *Taylor,* 264 Fed. 829.

The present action is for the recovery of a sum equal to the amount of money destroyed on the person of Mrs. Taylor, which is alleged to have been the property of plaintiff and held by Mrs. Taylor for safe-

keeping at the request of plaintiff. It is alleged in the complaint in this case, as in the former case referred to, that the defendant negligently sold as kerosene the fluid used by Mrs. Taylor in attempting to start a fire, but which was in fact gasoline or some other fluid more inflammable than kerosene. The defendant filed its answer denying the allegations of negligence and also pleaded the judgment in the former action as an adjudication in bar of the right of plaintiff to recover in this action.

The ruling of the court in sustaining a demurrer to the paragraph of the answer setting forth the plea of *res judicata* is assigned as error. The contention is that Mrs. Taylor had special ownership of the property destroyed, and that the right of action for its destruction rested in her and passed to her administrator, and that the different causes of action could not be split. This is but another way of saying that the right of action for the destruction of the money was not in the plaintiff in the present action, but was in Mrs. Taylor and passed to her administrator. If that be true, then it would follow that plaintiff is not entitled to sue in the present action, but such is not the state of the law on this subject. It is undisputed that Mrs. Taylor was a gratuitous bailee without beneficial interest in the property thus held. The law is settled that under those circumstances the right of action for injury to the property or destruction thereof is in the general owner and not in the bailee as special owner. *Scott* v. *Jester,* 13 Ark. 437; *Overby* v. *McGee,* 15 Ark. 459; *Long* v. *Bledsoe* (Ky.), 3 J. J. Marsh. 307. In *Overby* v. *McGee, supra,* there is a statement of the law that is controlling in the present case. It is as follows: "But where the general owner merely permits another gratuitously to use his chattel, such owner may maintain trespass against the stranger for an injury done to it whilst thus held."

Conceding that an action might have been maintained by the bailee, as special owner, for the benefit of

plaintiff, as general owner, it does not necessarily follow that there was no right of action in favor of plaintiff as general owner. The fact is shown by the record of the other case set forth in the answer of the defendant that the administrator of Mrs. Taylor did not sue for the injury to plaintiff's property, and that there was no recovery on that element of damage, and, as we have already said, the plaintiff has the right to sue as the general owner.

It is, however, contended by counsel for appellant that whatever may have been the state of the law on this subject prior to the enactment of our statute (Crawford & Moses' Digest, §§ 1074, 1075), patterned after the statute known as Lord Campbell's Act, it was changed by that statute so as to eliminate the rule stated above, which would give the general owner of bailed property the right to sue for its injury or conversion. The answer to that contention is that the statute in question has no application to actions for injury to property. It only relates to actions for death caused by wrongful acts, neglect or default.

It is next contended that the evidence was not sufficient to sustain the verdict, and that the court erred in refusing to give a peremptory instruction. The question of the sufficiency of the evidence was raised in the other case decided in the Federal court, and the Circuit Court of Appeals decided that the evidence was sufficient to sustain the verdict finding negligence on the part of defendant. That decision is, of course, not binding on us in the present case, and it is also argued that it is not persuasive because the testimony is different in the present case from what it was in that case. Reference will be made later to the additional testimony adduced in the present case.

The defendant was engaged in selling kerosene and gasoline through local agents. Mrs. Taylor was living with her husband at or near Hartman in Johnson County. The defendant had a local agent named Williams at

Ozark, who handled the oil that was furnished the customers at Hartman. Early in November, 1917, defendant shipped to its agent Williams at Ozark, a tank car of gasoline and also a tank car of kerosene, both of which were unloaded into tanks at that place, and on November 24, 1917, Williams sent out for delivery to customers, on his truck, four barrels or drums of kerosene and four of gasoline; two of the barrels were delivered to Plugge Bros., retail dealers at Hartman. These barrels of fluid were sold to Plugge Bros., as kerosene. They did not handle gasoline at all and had never handled it. Two days later Mrs. Taylor sent her daughter to Hartman to purchase from Plugge Bros., a can of coal oil, and this is the oil Mrs. Taylor used in starting the fire which caused the explosion. According to the evidence there was no fire in the stove at the time the explosion occurred. It was a violent explosion which burst a can of oil near by and ignited Mrs. Taylor's wearing apparel. It was proved that some of the same fluid sold by Plugge Bros. to other customers when used showed a higher degree of inflammability than ordinary kerosene.

Arch Bell, a witness introduced by plaintiff, testified that he bought some of the oil from J. M. Bunch, another dealer, (who is shown to have purchased from the same tank out of which this oil came from) and that in using the oil he found that it would light more quickly and burn brighter than any oil he had ever attempted to use before. Another witness who used some of the oil testified that he attempted to use it in a lamp and that the lamp exploded. There is also testimony tending to show that immediately after the explosion occurred some of the oil was taken from the barrel where this oil came from, and after being securely sealed was sent to a chemist in Fort Smith. The chemist testified that he made a test of the oil and found that it flashed at a temperature of 80 degrees; that it contained ingre-

dients found in gasoline and not properly present in kerosene of the standard required by law.

The testimony adduced by defendant tended to show that the oil was tested in the tanks before shipment to Ozark and also after it was received at Ozark and found to be kerosene up to the standard required by law, and that the barrels of fluid sold to Plugge Bros. were taken from the tanks of oil thus tested and found to be in accordance with the requirements of the statute. The testimony in addition to that introduced in the trial in the Federal court was concerning the test made of the tanks of oil before shipment to Ozark. That testimony merely added to the volume of evidence in favor of the defendant, but did not eliminate the conflict in the testimony as to the fact that defendant, through its agents, furnished oil as kerosene which proved to be either gasoline or some other oil more inflammable than kerosene. We are of the opinion that the evidence was sufficient to show that defendant's agents were guilty of negligence in furnishing oil dangerous and unfit for use and which was not in fact kerosene of the standard required by law. The evidence is not directly conclusive on this issue, and there is no presumption of negligence. The burden rested on the plaintiff to prove negligence. But the circumstances in the case justify the inference that the oil furnished by defendant to the retail dealer at Hartman was not kerosene of the standard required by law—that it was gasoline or some other kind of fluid that was highly inflammatory and of an explosive nature, and that the defendant was guilty of negligence in permitting the oil to be delivered to the retail dealer for resale to customers as kerosene. This is not a mere matter of conjecture, but is one of legitimate inference from the facts and circumstances proved. Plaintiff was not required to establish those facts by direct evidence, but could do so by proof of circumstances which warranted such an inference. *Armour Packing Co.* v. *Drury,* 146 Ark. 310; *Pierce Oil Corporation* v. *Taylor, supra.*

It is next contended that the deceased was guilty of contributory negligence which prevents recovery. Waiving a decision of the question whether or not negligence of the deceased, who was a mere gratuitous bailee, would bar plaintiff from recovery, it is sufficient to say that there was no negligence, as a matter of law, on the part of the deceased in using the oil for the purpose of starting a fire in the stove. This was one of the issues to be submitted to the jury, and it was submitted on proper instructions, and the verdict is conclusive. *Pierce Oil Corporation* v. *Taylor, supra.*

Finally, it is contended that the court erred in giving instructions on issues not involved in the trial. Upon examination of the instructions we are of the opinion they were confined to the issues in the case and that there was no error in this respect.

Affirmed.

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* WALKER.

Opinion delivered January 24, 1921.

1. CARRIERS — NEGLIGENCE — SUFFICIENCY OF EVIDENCE.—Evidence that a carload of vegetables was properly iced when shipped, and that when received it was in a damaged condition on account of a lack of refrigeration, *held* to sustain a finding of negligence on part of the carrier.
2. CARRIERS—DAMAGE TO SHIPMENT—PRESUMPTION.—Proof of damage to a shipment during transit raises a presumption of negligence, and places on the carrier the burden to overcome that presumption.
3. CARRIERS—MEASURE OF DAMAGES TO SHIPMENT.—Where vegetables were damaged in transit by failure of the carrier to ice the car, the measure of damages is the difference between their market value in the undamaged condition at the place of destination and their market value in the damaged condition.

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

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

1. The testimony failed to show negligence on part of defendant and fails to sustain the verdict under the allegations of the complaint plaintiffs assumed the burden of proof, and the evidence failed to show negligence.

2. The verdict is excessive. The only testimony before the jury, that of Edward Coyne, shows that the damage to the radishes was not more than $3 per barrel. The judgment should be reversed or the judgment reduced in line with the testimony of the consignees.

*Hays & Ward* and *Neill Bohlinger,* for appellees.

1. The evidence shows negligence. The radishes were in good condition when loaded, and on arrival were in damaged condition. This raises a presumption of the carrier's negligence, which was not overcome by any testimony. 125 Ark. 577. The finding of the jury is clearly in accord with the preponderance of the testimony.

2. The verdict is not excessive. The measure of damages is well established (129 Ark. 316), and the testimony shows the verdict is not excessive but very reasonable.

McCulloch, C. J. Appellees instituted this action against appellant to recover damages alleged to have been sustained on account of negligence in the transportation of a carload of radishes and other vegetables shipped by appellees from Dardanelle, Arkansas, to a firm of brokers or commission merchants in Chicago. It is claimed that the negligence consisted of the failure of appellant to properly ice the car, and that as a result the radishes became heated and greatly depreciated in value.

It is first contended that the testimony was not sufficient to sustain the verdict. The carload of vegetables was shipped from Dardanelle by appellees April 20, 1917. There were eighty-seven barrels and six baskets of radishes and two barrels and twenty-four baskets of onions in the car. The vegetables were tied in bunches

or packed in baskets and barrels with about forty or fifty pounds of ice on top of each barrel and tow sacks and hoops were placed around the barrels. Mr. Walker, one of the appellees, testified that he found no ice in the bunkers when the car was ready to move, and that he purchased at his own expense two or three thousand pounds of ice and put it in the car. One of the men connected with the firm of brokers in Chicago testified that when the car was received there the radishes were in a damaged condition on account of lack of refrigeration, and that most of the vegetables were heated and were damaged to the extent that they sold for considerably less than the market price. He gave as his opinion that the damage was caused by lack of proper refrigeration, and that if the barrels were properly iced when loaded in the car the injury must have resulted from lack of refrigeration in transit. The testimony of Mr. Walker, one of the appellees, was sufficient to show that the barrels were properly iced at the time they were loaded in the car; so we are of the opinion that the evidence was sufficient to sustain the finding that there was negligence in failing to properly ice the car while in transit. It is true that the testimony adduced by appellant tended to show that there was proper icing of the car while in transit and that at three different points the car was reiced, but that merely raises a conflict in the testimony as to whether or not there was sufficient icing. Proof of damage to the shipment raised the presumption of negligence, and the burden rested on the carrier to overcome that presumption. *St. L., I. M. & S. Ry. Co.* v. *Cunningham Com. Co.,* 125 Ark. 577.

It is also contended that the verdict is excessive, but we are of the opinion that the evidence was sufficient to support the finding in that respect. There was direct testimony as to the market value of the vegetables on the day of the arrival of the car in Chicago, and also there was direct proof as to the market value of the vegetables on that day in the damaged condition they were in when

they arrived. The measure of damages is the difference between the market value in the undamaged condition of the commodity and the market value in its damaged condition, and the jury upon evidence sufficient to support the finding adopted that measure in awarding the damages in this case.

The judgment is therefore affirmed.

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TIMS v. MACK. (1)

MASON v. MACK. (2)

Opinion delivered January 24, 1921.

1. HIGHWAYS — LOCAL IMPROVEMENTS — POWER OF LEGISLATURE.—In providing for assessments upon land for the construction of road improvements, the Legislature may determine directly the area to be benefited and the rate of apportionment, and may levy assessments directly, fixing the amounts and determining the benefits to accrue; and the determination of the Legislature in these matters will be respected by the courts.
2. HIGHWAYS—LEGISLATIVE RATIFICATION OF ASSESSMENTS.—The ratification by the Legislature of assessments already made by a road improvement district is tantamount to an assessment made by the Legislature itself, and the legislative determination is not subject to review by the courts for mistakes of judgment, but only for an arbitrary abuse of power.
3. HIGHWAYS — LEGISLATIVE ASSESSMENTS.—The Legislature may adopt its own method of ascertaining the facts before ratifying and confirming assessments of benefits to lands in a road district, and is not bound by any fixed rules of evidence in conducting the inquiry.
4. HIGHWAYS—PRACTICABLE ROUTE—EVIDENCE.—On appeal from the county court's order approving the plans and specifications for a road improvement, evidence *held* to sustain a finding that the route selected was a practicable route.
5. HIGHWAYS — SELECTION OF ROUTE — VALIDITY.—The selection by road commissioners of a route for a road improvement district within a certain county was not rendered invalid by the fact that it ran near enough to the boundary line of another county to benefit lands in that county not assessable under the statute creating the district.

(1) Appeal from Jackson Chancery Court; *L. F. Reeder,* Chancellor; affirmed.

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

*Mehaffy, Donham & Mehaffy, John W. Newman* and *Gustave Jones,* for appellants.

1. Acts 82 and 55, Acts 1919, are arbitrary and void, and act 266 is invalid for reasons set forth in act 82. Act 82 was passed without notice in violation of § 26, article 5, Constitution 1874. It is invalid because it atempts to create more than one district and is in violation of the Fourteenth Amendment to United States Constitution. The assessment of benefits is largely in excess of the assessment against other property similarly located. The assessment as a whole is fictitious, arbitrary and unjust. The findings of the chancellor are against the clear preponderance of the testimony, and the assessment is arbitrary and void. Act 55 is void also, because it denies the right of appeal. 30 Ark. 181. See, also, 70 Ark. 83; 86 *Id.* 184; 78 *Id.* 364; 97 *Id.* 116; 110 *Id.* 479.

2. The county court erred in upholding act No. 82, Acts 1919. 214 S. W. 23; 125 *Id.* 325; 216 S. W. 690; 83 Ark. 54. The act violates the United States Constitution, Fourteenth Amendment. 239 U. S. 478. The action of the commissioners in locating the road was arbitrary, unreasonable and void. 217 S. W. 258. The court erred in finding act 55 void and in granting the injunction.

*G. A. Hillhouse* and *Rose, Hemingway, Cantrell & Loughborough,* for appellees.

1. The chancery case involves the same points that were disposed of by this court in 139 Ark. 524 and is settled by it. See also 140 Ark. 474, which is equally conclusive.

2. An improvement district is not void because lands will be benefited beyond its borders. 125 Ark. 325; 133 *Id.* 380; 131 *Id.* 59. Two courts have passed on the

question here as to the routes selected, and their findings should not be disturbed, as both the law and the evidence sustain the findings below.

McCULLOCH, C. J. These two cases, which have been briefed together for convenience, involve an attack on a special statute ratifying and confirming assessments of benefits to the lands in a road district in Jackson County, designated as "Arkansas and Missouri Highway Districts in Jackson County," and also involving an attack on the action of the board of commissioners of said district in selecting the route of the road to be improved.

The district was created by Act No. 82, at the regular session of the General Assembly of 1919, vol. 1, Road Acts, p. 134. Section 4 of that statute authorizes the commissioners of the district to select a route for the highway leading across the county "and joining with the highway selected by the commissioners of the adjacent counties" and it also provides for the laying out of the selected roads by the county court. Section 5 provides that when the route has been selected the commissioners "shall, with the aid of the highway engineer or of an engineer employed by them, prepare plans, specifications and estimates of cost of the road intended to be constructed, and shall file these with the county clerk of their respective counties." The statute provides for an assessment of benefits by assessors appointed by the commissioners.

The route of the road was selected by the commissioners, and plans and specifications for the construction of the road along that route were filed with the county clerk. Assessments of benefits were made by the assessors, and a list thereof was filed in the office of the clerk, and the General Assembly at the special session of 1920 enacted a special statute, which was approved February 5, 1920, designated as Act No. 55, ratifying and confirming said assessment of benefits then on file in the office of the county clerk of Jackson County.

Appellants in the first case mentioned in the caption of this opinion are the owners of real property in the district, and they instituted the action in the chancery court of Jackson County to restrain the commissioners of the district from enforcing the assessments on the ground that the same are void, and that Act No. 55 attempting to ratify and confirm the same is void. The appellants in the other case, who are also owners of property in the district, made themselves parties to the proceedings in the county court and appealed from the order of the county court approving the plans and specifications, and on said appeal being heard in the circuit court said plans and specifications were there approved, and an appeal has been prosecuted to this court.

Appellants attempt to establish the invalidity of act No. 55 ratifying the assessments by showing that the list of assessments was filed by the commissioners in the office of the county clerk of Jackson County on the day that the bill for the enactment of the statute was introduced in the General Assembly, and that it was physically impossible for the members of the General Assembly to have made inquiry and ascertained the facts with respect to the correctness of the assessments before enacting the statute. We have held in a long line of cases, beginning with *Sudberry* v. *Graves,* 83 Ark. 344, that the lawmakers in providing for assessments upon land for the construction of local improvements "may act directly, determining the area to be benefited, and the rate of apportionment, or may levy assessments directly, fixing the amounts and determining the benefits to accrue, and that the determination of the Legislature in these matters will be respected by the courts," and that the ratification by the Legislature of assessments already made is tantamount to an assessment made by the Legislature itself. We held in those cases that the legislative determination was not subject to review by the courts for mistakes of judgment, but that only the arbitrary abuse of the power would be controlled. *St. L. S. W. Ry.*

*Co.* v. *Board of Directors,* 81 Ark. 562; *Sudberry* v. *Graves, supra; Shibley* v. *Fort Smith & Van Buren District,* 96 Ark. 410; *Moore* v. *Board of Directors,* 98 Ark. 113; *Salmon* v. *Board of Directors,* 100 Ark. 366; *St. L., I. M. & S. Ry. Co.* v. *Board of Directors,* 103 Ark. 127; *Board of Directors* v. *Dunbar,* 107 Ark. 283; *Davies* v. *Chicot County Drainage District,* 112 Ark. 357.

The theory on which these decisions is based is that the lawmakers have in their own way ascertained and determined the facts, and their decision is conclusive upon the courts, unless it appears that such decision is, on its face, arbitrary and demonstrably erroneous. The Legislature may adopt its own method of ascertaining the facts. It is not bound by any fixed rules of evidence in conducting the inquiry. It can not therefore be said that it was physically impossible for the Legislature to have inquired into the facts in regard to the correctness of the assessment of benefits made by the board of assessors. It is not proper for us to make inquiry into the method by which the members of the Legislature satisfied themselves as to the correctness of these assessments, but we conclusively presume that they did make such inquiry. Appellants attempted to show that the only source of information available to the members of the Legislature was a telegram to the member from Jackson County who introduced the bill, informing him that the list of assessments had been filed, but it is not competent to impeach the proceedings of the General Assembly by such testimony, for, as before stated, we will indulge the presumption that they obtained such information as was necessary in order for them to determine the question of the correctness of the assessments. We are of the opinion therefore that the chancery court was correct in refusing to declare the statute invalid.

In the other case there is, as before stated, involved the question of approval of the plans of the board of commissioners and the selection of the route of the road. This was heard in the circuit court on oral testimony;

and, as we review only for errors in a law case, the question here comes down to the legal sufficiency of the evidence to sustain the finding of the circuit court. *C., R. I. & P. Ry. Co.* v. *Improvement District,* 137 Ark. 587.

The testimony relating to the issue as to the practicability of the route selected by the commissioners is voluminous and covers a wide scope. It consists of the testimony of expert engineers and of farmers and landowners who are familiar with the route, or portions thereof, and the locality generally. The witnesses are very numerous, and their opinions vary widely as to the advisability of adopting the route selected by the commissioners. Many land owners and several engineers were introduced by the commissioners, and they testified that the route was the most practical one, and on the other hand appellants introduced many witnesses of the same kind and character who testified just to the opposite. The principal objection to the route selected is that it is circuitous and less direct than the one which might have been selected, and that it runs through territory subject to overflow. It is conceded that the route selected is not the most direct one, and that it runs through territory subject to overflow of considerable depth from White River and from Departee Creek. It is also conceded that any route selected running from north to south through Jackson County would be through overflowed territory, it being a choice of routes through territory subject to overflow of varying depth, and also a choice of such route as will best accommodate the travel. As before stated, there is a very wide variance in the testimony of the witnesses on this subject. Some of the engineers contend that it is not practicable to maintain a hard-surface road through overflowed territory unless it is built above high water and provided with ample openings for the water to pass through. Other engineers who testified in the case contend that it is practicable to build such a road through overflowed territory by sodding the slope of the embankment with bermuda which

would protect the embankment from washing. In the face of this direct conflict in the testimony, we can not say that the trial court had no substantial evidence to sustain the finding that the route was a practicable one, and that the selection made by the commissioners and by the county court in approving it is erroneous.

It is further urged that the route selected should not be approved for the reason that it runs near enough to the Independence County line to benefit lands in that county which can not, under the statute, be assessed. The question of the validity of the selection of a route which would include lands of another county was decided adversely to appellants' contention in the case of *Van Dyke* v. *Mack,* 139 Ark. 524.

There being sufficient evidence to sustain the findings of the circuit court, it follows that the judgment must be affirmed. It is so ordered. Judgment of affirmance will be entered in each case.

HART, J., (dissenting.) It is true that this court has held that the legislative assessment of benefits is not subject to review by the court for a mere mistake of judgment, but that only the arbitrary abuse of the power will be controlled.

In *Bush* v. *Delta Road Imp. Dist.,* 141 Ark. 247, we held that taxation by special assessment is defensible only upon the theory of corresponding special benefits to the property assessed, and that the question of benefits is a question of fact.

This was but a reiteration of the rule laid down in *Coffman* v. *St. Francis Drainage District,* 83 Ark. 54. In that case the assessment of benefits was made by the Legislature, and it was held that the court could review the action of the Legislature upon proper allegations and proof showing that the assessment of benefits made by the Legislature was such an arbitrary abuse of the taxing power as would amount to a confiscation of property without benefit.

In the application of this rule to the present case we find that the assessment of benefits was filed by the commissioners in the office of the county clerk at Newport, in Jackson County, and that later on the same day a bill was introduced in the Legislature at Little Rock, one hundred miles distant, ratifying the assessment made by the commissioners. While the Legislature may adopt its own method of ascertaining the facts and is not bound by any fixed rules of evidence in doing so, it can not act in an arbitrary manner. The act of the Legislature purported to ratify and confirm the assessments which had been made by the commissioners. These assessments had not been completed until they were filed in the office of the county clerk.

It was physically impossible for the Legislature, or any committee selected by it, to have examined these assessments and made any report concerning the same that called for the exercise of judgment. The action of the Legislature was arbitrary because the members thereof could not have exercised any judgment whatever in ratifying and confirming the assessments made by the commissioners.

Therefore, Judge WOOD and the writer think that the legislative finding is subject to judicial review.

Again, the uncontradicted evidence shows that the route selected by the commissioners was seventeen miles longer than necessary and was subject to overflow of considerable depth for a long distance. The undisputed evidence shows that there were periodical overflows and that the water would rise for a considerable distance, eight or ten feet above the level fixed by the commissioners for the road.

It is true that some of the engineers testified that the caving of the roadbed could be prevented by planting Bermuda grass along the sides of the roadbed.

The road was to have a hard surface placed upon it. It is a matter of common knowledge that the water rising above the roadbed and standing there for awhile

would tend to soften and cause the roadbed to disintegrate and thus soon wear away. Then, too, during the overflow forest trees and branches thereof would necessarily strike the hard surface of the road and break and disintegrate it.

No amount of testimony can overcome these physical facts of which every reasonable man must be aware. Taxation by special assessments is defensible only upon the theory of corresponding special benefits. There can be no special benefits where the physical facts show that the roadbed will disintegrate and its surface be broken and torn away in many places so soon after the road is constructed.

Therefore Judge WOOD and the writer respectfully dissent.

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CANADAY v. SOUTHERN LAND DEVELOPMENT COMPANY.

Opinion delivered January 24, 1921.

1. SPECIFIC PERFORMANCE—WAIVER.—In an action for specific performance of a contract whereby defendant agreed to furnish the necessary cash payment for land purchased by plaintiff, and to furnish money for improvement of the land, a second contract between the parties, though void for want of mutuality of obligation, was competent as evidence to prove that by it the parties had not waived the provisions of their original contract.
2. MORTGAGE—ABSOLUTE CONVEYANCE AS MORTGAGE.—Where plaintiff conveyed land to defendant upon consideration that defendant should make a cash advance and within eight months thereafter should furnish certain advances for mking improvements, and defendant made the cash advance but failed to make the advances for improvements, in a suit for specific performance of the contract, the court properly treated plaintiff's conveyance to defendant as a mortgage, and held that defendant forfeited his rights under the contract by failing to make the advances for improvements, and directed that defendant should have a lien on the land for the cash advance and interest, and that upon payment of the same the deed to defendant should be canceled.

Appeal from St. Francis Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

*J. W. Morrow* and *Cary & Vorder Breugge*, for appellant.

The evidence wholly fails to sustain the allegations of any violation of the contract by appellant. The case as made by plaintiff in the record is wholly without merit, and the findings and decree should be reversed. Appellee never tendered any money until September 3, 1918. To comply with the contract the money should have been provided and tendered on or prior to August 31 or at least on September 2. The tender was also insufficient and was not kept good. 90 Ark. 206. The evidence wholly fails to sustain the allegations of any violation of the contract, and the case as made by appellee is wholly without merit.

*Mann & Mann*, for appellee.

1. The provisions of the contract were by letter extended to September 1, 1918. The contract is supported by due consideration. No reason for declining to execute the deed was assigned in the letter. 68 Ark. 505; 93 *Id.* 497; 96 *Id.* 156; 97 *Id.* 623.

2. If appellee forfeited the right to purchase under the contract of April 3, 1918, it had the right under the original contract to pay the amount advanced by appellant and receive a reconveyance of the property.

The chancellor found that appellee complied with its contract of purchase, but found that appellant breached the original contract, and the findings are sustained by the evidence, and there is no error.

WOOD, J. The appellee instituted this action against the appellant for the specific performance of a contract, the material parts of which are substantially as follows: That the appellee had bargained for and was about to receive a deed to 338½ acres in St. Francis County, which were described in the contract, and that the parties decided to enter into an agreement by which they would be mutually interested in the handling, development and sale of the land. Thereupon, it was agreed

that the appellant should furnish the amount of the cash payment, aggregating $2,920.50; that, upon the delivery of the deed to the appellee, it should convey the title to the appellant by warranty deed, the appellant assuming all deferred payments. It was then provided that the appellant should furnish not less than $1,500 for the improvement of said land during the ensuing eight months, such moneys to be expended under the joint direction of the parties. It was next provided that the appellee should have the right to sell said tract as a whole at any time within eighteen months from the date of the contract, at a price of not less than $65 per acre. It was further provided that, if the sale was not made before the payment of the purchase money note falling due in 1918, then the appellee should meet said payment, and that a failure so to do should work a forfeiture of all rights of the appellee under said contract. It was provided in paragraph seven of the contract that if the appellee should fail to make a sale of the property within eighteen months, in accordance with the provisions of the agreement, all of its rights should be forfeited, except that the appellant should repay whatever sums the appellee had paid out in connection with the property.

The above contract was executed September 25, 1917. On April 3, 1918, the parties entered into a supplemental contract which provided, among other things: That if the appellee should on or before June 1, 1918, pay to the appellant the sum of $3,070.50, with certain interest, the appellant would convey said land to it and relinquish all his rights under the contract of September 25, 1917. It further provides that, in the event this should not be done, then the contract of September 25, 1917, should remain in full force and effect. On June 29, 1918, the appellant wrote appellee as follows:

"I hereby extend to the 1st of September, 1918, the privileges of a certain contract made with you for the sale of the land at Blackfish; in section 5-5-5, which privileges were to expire June 1, 1918."

The appellee set up in its complaint the contracts and alleged that appellant had failed and refused to comply with his contract of September 25, 1917, by not advancing the $1,500 for improvements; that, by reason of such failure, appellee was unable to make an advantageous sale of the lands. The appellee also alleged that it tendered to the appellant the purchase price of said land, as agreed upon in the so-called "supplemental contract," which was refused, and that the appellee had at all times stood ready to comply with said contract. The appellee prayed for specific performance, and, in the alternative, that the deed by which appellee acquired title be declared a mortgage, and for general relief.

The appellant, in his answer, admitted the execution of the contracts of September 25, 1917, and April 3, 1918, and admitted writing the letter of June 29, 1918, but denied having failed and refused to comply with the contract of September 25, 1917. He denied also other allegations of the complaint.

The president of the appellee testified that the appellant did not advance any money to make improvements; that he made demand upon appellant for such money. The appellee did some repair work, purchased some lumber, and presented the bill to Canaday, amounting to $23, and he refused to pay this bill. He distinctly stated again and again that he was not going to advance the improvement money. He never at any time approached any member of the appellee company for the purpose of joint direction of any repairs or improvements on the property. Up to the time that the contract of April 3, 1918, was entered into, the appellee had lived up to its contract in every particular. The secretary and treasurer of appellee company testified that the first thing after the contract of September 25, 1917, was entered into, there were some little repairs to be done on the houses amounting to twenty odd dollars, and there were two or three contracts practically made for clearing which were not carried out for the reason that Cana-

day said he did not have the money to spare at that time. He said that he would settle the obligation already incurred when he furnished the other money. Witness stated that "time after time we asked him to let us go ahead with the work and develop it. We wanted to get it developed according to the contract so as to get the benefit of more development on the land." Witness had a gang of negroes working at West Memphis and made arrangements for those men to go to clearing on the land in controversy, but didn't send them on the land for the reason that appellant asked witness to hold up on it. Witness said: "Several times we asked Mr. Canaday to let us go ahead with the work, and he declined to make advancements."

The appellee testified and categorically denied the above testimony. The court specifically found that the "defendant breached his contract with the plaintiff by failing to make the advances provided by the original contract." The court entered a decree authorizing the appellee to pay the appellant such sums with interest as the appellant had paid out on account of the land, and all advances made by appellant to the appellee. From that decree is this appeal.

It may be conceded that the contract of April 3, 1918, was unenforceable because there was no mutuality of obligation. It did not bind appellee to pay the money. Nevertheless, the contract was competent as evidence to prove that by it the parties had not waived the provisions of the contract of September 25, 1917. The letter of June 29, 1918, extending the contract of April 3, 1918, to the first of September, 1918, was without consideration. At the time this letter was written, the contract of April 3, 1918, by its own terms, was dead. Under its provisions the money could be paid by appellee on or before June 1, 1918, which was not done. But, the contract of April 3, 1918, also expressly provided that, if the appellee did not pay the appellant the sum of money mentioned therein to be paid under paragraphs one and

two of that contract, "the contract of September 25, 1917, shall remain in full force as though this agreement had not been made." Therefore, at the expiration of the contract of April 3, 1918, the contract of September 25, 1917, was in full force and effect. The court found that the appellant had breached this contract in not advancing the money for improvements according to its terms. This finding is supported by the decided preponderance of the evidence and is in accord with our own view of the facts. Such being the case, the appellant had forfeited his rights under this contract before the supplemental contract of April 3, 1918, was executed. This latter contract did not have the effect of waiving such forfeiture. Up to this time there had been no violation of the contract on the part of the appellee. When the contract of April 3, 1918, passed out, *ipso facto* according to its terms, the contract of September 25, 1917, was revived and was in full force and effect, the same as if the contract of April 3, 1918, had never been executed.

The appellant, having violated his contract to advance the money for improvements, and having thereby, as before stated, forfeited all his rights under the same, the court took the only view that could be taken of his rights and equities in treating the conveyance to appellant as a mortgage to secure him for all the advances that had been made by him to the appellee. In this way, the chancery court endeavored to place the parties as near as possible *in statu quo* and to work out the equities between them. The appellee, under the facts, in equity was the owner of the land in controversy, and the effect of the contract between it and the appellant, after the contract had been first violated by the appellant, was to render the appellee the debtor of the appellant for the sums which the latter had advanced the appellee. The court correctly declared that for these sums the appellant should have a lien on the lands in controversy, and that, upon the payment of the same, the deed from the

appellee to the appellant should be canceled; but, if the amount of the decree was not paid by the appellee, then the lands should be sold to satisfy the amount adjudged to be due the appellant by the decree. The decree is in all things correct, and it is therefore affirmed.

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CRAWFORD v. DAVIS.

Opinion delivered January 24, 1921.

1. INJUNCTION—RETAINING JURISDICTION FOR COMPLETE RELIEF.—A complaint which alleged that defendants were trespassing and committing waste upon plaintiff's lands, and were insolvent, and prayed for an injunction, gave jurisdiction to the chancery court; and, having acquired jurisdiction, that court did not err in retaining the same and determining the disputed title to the lands.
2. ADVERSE POSSESSION—SUFFICIENCY OF POSSESSION.—Intermittent and fitful efforts by defendants to secure possession of lands *held* insufficient to show such continuous and notorious occupation of and dominion over the land as to indicate to the true owner an uequivocal intention to own and appropriate exclusively the lands to their own use.

Appeal from Independence Chancery Court; *L. F. Reeder,* Chancellor; affirmed.

*W. K. Ruddell,* for appellants.

1. Defendants' predecessors had been in possession of the lands for more than two years under a tax deed, and their possession was adverse and conferred a valid title. 79 Ark. 364; 126 *Id.* 86; 84 *Id.* 614; 60 *Id.* 499; 59 *Id.* 460. It is undisputed that Engles had been in possession for more than two years and that Andy Allen disclaimed his owning the land but stated that Engles did own it.

2. Two years' adverse possession makes a good title, regardless of whether appellees paid taxes. Appellees claim to have paid taxes for the year 1868. The record does not show this, but if it did it would make no difference. 79 Ark. 364. A statute of repose is not needed in favor of purchasers as valid sales. The validity of the

sale and precedent proceedings carries the title, and such statutes are unnecessary. 99 Ark. 364-5. Even if the tax sale were void, adverse possession for more than two years under a tax deed carries the title.

3. Tax sale under the description of the northwest quarter of southwest quarter of section 25 was not void. Judicial notice is taken by the courts of government surveys and descriptions, and hence there is and can be but one tract of land within the State in which the description here is applicable. 82 Am. St. Rep. 440.

Each tract of land shall be so described in the assessment for taxation as to identify it *if practicable* according to section and township. 64 Ark. 580; 12 Enc. of Ev. 302. This court is committed to the rule that a description may be good, although proof outside the government plats would have to be introduced to show that the description is sufficient. They think the government plat shows that there is such a description of land as the northwest quarter of the southwest quarter, but if it does not the description here is according to section or subdivision thereof and congressional township. The description is sufficient. 110 Ark. 571-4. The description can not be applied to any other tract and informs the owner and public with certainty of the tract intended. 79 Ark. 442-6. Evidence *aliunde* may be resorted to to identify the land. 79 Ark. 442.

The appellees admit that they paid taxes only on that part of the southwest quarter south of White River and west of the slough containing 21 35/100 acres, and the county surveyor stated that the southwest quarter south of White River and west of slough run up into the northwest quarter of the southwest quarter, and they admit that there is part of the northwest quarter of the southwest quarter that they did not pay taxes on. There is then a part of this land they did not pay taxes on, and they should have made a tender of the taxes before bringing suit. 35 Ark. 505; 50 *Id.* 384; 4 Crawford's Digest,

4845. Since no tender was made, the complaint should have been dismissed.

4. The northwest part of section 25 could not include any part of the southwest quarter. In the conveyance of land by deed in which land is certainly bounded, it is very immaterial whether any quantity is expressed, for the description by boundary is sufficient and conclusive. 3 Ark. 18, 58. The survey by the county surveyor is *prima facie* correct, and the surveyor stated that there was a nortwest part of the southwest quarter of section 25. Kirby's Digest, §§ 1142, 1145. He further stated that the northeast part of section 25 did not and could not extend into the southwest quarter. This is undisputed and an established fact. Notice was given to all owners of adjoining lands of the survey. Kirby's Digest, § 1135. The testimony shows that Andy Allen was notified.

5. Appellees are barred by laches from bringing this suit. Ann. Cases 1918 B 452-6; 95 Ark. 178; 103 *Id.* 58; 136 *Id.* 378; 103 *Id.* 58-60.

6. The chancery court had no jurisdiction, and the demurrer to jurisdiction should have been sustained. The Engles were in possession and had paid taxes for more than seven years. Kirby's Digest, § 5057; 64 Ark. 580. The court erred in refusing to transfer the case to the law court and in holding there was no such tract as the northwest quarter and that the assessment was void.

*Ernest Neill* and *Samuel M. Casey*, for appellees.

1. The alleged forfeiture for taxes was void on its face, as there was no such tract. A tax deed for lands not subject to taxation passes no title, is not even color of title. 95 Ark. 65. This case is conclusive under appellants' claim of adverse possession under the tax deed, and the northwest quarter of the southwest quarter would of necessity embrace a part of the 39-acre swamp land parcel which Allen purchased from the State in 1871, which was two years after the alleged forfeiture. The land in the tax deed is not susceptible to identification, and appellants would be required to hold actual posses-

sion of the entire forty acres for seven years before they acquired title. The fence mentioned and the river constituted a complete enclosure by the Allens. 76 Ark. 529. The burden of establishing title through the tax sale and possession thereunder was on appellants. 117 Ark. 579. The proof on actual possession is vague and indefinite. The proof falls short of establishing actual hostile and exclusive possession for two years in appellants. The proof must be clear and convincing. 126 Ark. 86; 92 *Id.* 321; 75 *Id.* 593; 68 *Id.* 551. Possession to confer title must be adverse, intentional, actual and continuous. An interruption of possession is a new point from which the statute will run. 27 Ark. 77; 48 *Id.* 277; 22 *Id.* 79. To acquire title to woodland by adverse possession, there must be actual use and occupancy and exclusive appropriation and ownership. 81 Ark. 296. Engles never held actual possession exclusive of the Allens for two years.

2. The doctrine of laches does not apply.

3. The seven years' payment of taxes act does not apply. The deed is void on its face, and there is no such legal subdivision in section 25, and appellees have paid taxes under the description employed by the government surveys; besides the lands were not wild and unoccupied or uninclosed, as they were inclosed under the Allen fence, and the statute does not apply. 80 Ark. 435; 81 *Id.* 258. The lands were accretions and belonged to the original entryman or grantees. 88 Ark. 38; 104 *Id.* 154; 49 U. S. (Law. Ed.) 857; 18 Rose's Notes to U. S. Rep. 1413; 1 R. C. L., p. 239, § 14.

4. The chancery court had jurisdiction, as Underdown and Crawford were hopelessly insolvent, and irreparable injury was proved. 14 R. C. L. 347, § 49. The facts of the case fall within 75 Ark. 286; 92 *Id.* 118; 219 S. W. 742.

WOOD, J. The appellees instituted this action against the appellants in the Independence Chancery Court on the 8th day of July, 1919. They alleged that

appellee, Ralph A. Allen, was the owner of certain tracts of land in Independence County, subject to the dower of his mother; that the other appellees were his tenants. The lands, including the land in controversy, are described in the complaint. The appellees deraigned title through mesne conveyances from the United States Government. Appellees alleged that appellants are committing numerous trespasses by cutting timber so near the river as to cause the land to wash; that appellants are insolvent, and, unless restrained, will cause appellees irreparable injury. The appellants answered denying all the allegations of the complaint and set up title in themselves to the land. They deraigned title through one John Henry Engles. They alleged that the lands were forfeited for the nonpayment of taxes for the year 1866, and that Engles purchased the same at a sale for such taxes on the 28th of December, 1885; that Engles went into possession for two years before the commencement of the action, and that he and his successors in title for more than seven years had paid the taxes on the tract in controversy.

The appellees filed a reply in which they denied that there was any tract of land known to the public survey as that described in appellants' answer and alleged that the tract of land in controversy was not subject to taxation at the time the same was forfeited, being swamp and overflow land belonging to the State. They alleged that the sale for taxes, under which appellants claimed, was null and void for various reasons unnecessary, in the view we have of the case, to set forth.

On the issue of title by adverse possession to the land in controversy, H. Underdown, a witness for the appellants, testified substantially as follows: That he trapped on the lands in the years 1886 and 1887, and that Engles claimed the land and called witness' attention to some yearlings he had thereon; that it was fenced with two and three strands of barbed wire attached to

posts where the trees were too far apart. During this time he did not see the Allens on the land.

Witness Flynn testified that he saw Engles making a survey of the land in December, 1885, and later saw him fencing the land with barbed wire in February, 1886; that Engles had cattle on the land in the years 1886-1887, and 1888; that Andy Allen offered him $10 an acre and board to clear up this land. Allen told witness that he didn't own it—that Engles had bought it from the State. He stated that he wanted to get possession of the land and was trying to induce witness and another man to enter thereon, saying that "he had dollars where Engles had cents." The first proposition by Allen to witness was made in 1887 and repeated in 1888. Witness knew of J. H. Engles working on the land and having stock there in the years 1886 and 1887.

Another witness testified that he went with Engles to the land in controversy in 1888 or 1889. At that time Engles had several head of cattle and called them up and gave them salt. In 1901 witness was assisting Robert Engles, the guardian of J. H. Engles, in a survey of the land. He was guided most of the way in running the line by an old wire fence which had been partly destroyed by overflow. After that survey he was again on the land and found it enclosed by a fence.

Another witness testified that in 1886 he heard a conversation between Andy Allen and J. H. Engles in which Allen stated that he didn't see why Engles did not give him (Allen) the same chance at the land that he did to one Egner, to whom Engles had sold the land, as witness thought. Engles had surveyed the land, as witness understood, and had put red paint on the trees where they had blazed it out, and they started to fence it, but witness couldn't say that they ever finished it. Witness frequently saw Engles on the land, but never knew of any of the Allens cultivating it. No fence was placed around it by any of the Allens when he was there. In the year 1886 Andy Allen said that he knew of a small

tract of government land lying near the land in controversy and said he guessed Engles would get it, so he (Allen) had some parties to take it up.

Another witness stated that he became acquainted with the land in the fall of 1892, and at that time it had a barbed wire fence around it on three sides; that he saw Engles repairing the fence which appeared to have been built two or three years. Lee Allen was helping Engles to repair the fence; that Engles sold a cow and calf out of the pasture on the land in controversy in 1892.

Mrs. Engles, the widow of J. H. Engles, testified that she saw the tract in controversy several times after 1902 and 1903; that there was a fence around it. She didn't know who put up the fence, but she furnished the wire. She cultivated the land in 1913 and 1914. There was a fence around it the first year she cultivated it. From 1904 until 1913 she went over the land every few weeks to see that no one was trespassing on it. She knew that the Allens had been clearing the land all around it for three years, but they had never touched this land.

The testimony in behalf of the appellees was substantially as follows: Witness Sullivan testified that he had known the land since 1889; that he was in partnership with Lee Allen in the stock business and for several years had used the land in controversy as a cane pasture, and he was over it more or less all the time. Andy Allen had a small portion of it in cultivation thirty-two or thirty-three years ago. There was a fence which separated the cleared land from the pasture. The Allens had held continuous possession by having it fenced as stated and by using it as a pasture from 1889 until the present time. No one else was ever in possession adverse to the Allens until 1904, when Pete Engles and some parties went in there and chopped off two or three acres. Witness informed the attorney of the Allens, and he instructed witness to tell them to get off, and they did so. Witness had farmed there all the time and never knew

of J. H. Engles having any stock in the cane pasture. There was no fence on the east line of the tract in controversy, and none on the south line of the land as late as 1906.

J. F. Shaver testified that he held the lands in controversy under a lease from the Allens and was in possession when the appellants put the fence around it in February, 1919. He had cleared six acres. Appellants cleared more and chopped too close to the river and made it liable to wash. Witness had been down there seven years. During that time the lands described in the complaint, including that in controversy, had been under one enclosure, and it was called the cane pasture. No one had attempted to take possession of the land hostile to the Allens till Crawford came there. Witness had no occasion to go out into the cane pasture in the summer, but there was no cleared land there. In 1904 there was a suit brought by the Engles to recover the land in controversy, which the Allens won. When witness first knew of the land it was in the possession of the Allens. The Engles made one or two efforts to squat and cut timber, but were always ousted.

Davis testified that he had the land in controversy leased from the Allens when the appellants entered upon it. Witness had been on the farm for the past eighteen years. The Allens had been in possession of the tract in controversy for twenty years, and witness had never heard of any one claiming it except at the time of the suit in 1904. Engles did not fence it then, but cut off a little cane and piled it up. The land in controversy had been fenced away from the cultivated land for twenty years. The Allens used it for pasture, and Joe Cain cut some timber from it for the Allens, as witness understood. Some of the land in controversy was the old slough bed and river bed, which had filled in. The thirty-nine-acre tract is in cultivation. Witness cleared part of it. Hall did the first clearing on it, and at that

time the fence went around the high ground bank over to the river. It did not cross the thirty-nine acre tract.

It was admitted by the appellants that the appellees held a regular chain of record title from the government to the lands as described in the complaint, and under those descriptions had paid the taxes on the same to June 3, 1920, the date of the rendition of the decree. It was also admitted that the appellants held a chain of record title through John Engles to the lands described in their answer, who purchased the same at a sale for the taxes of the year 1868.

The court, among other things, found "that the plaintiffs were in possession of the lands claimed by the defendants when the defendants took possession thereof; that the defendants entered upon said lands unlawfully, and that they were committing numerous trespasses thereon; that they were insolvent, each of them, and that they were clearing up a portion of the land so close to the river that it was liable to cause great and irreparable damage by the washing away of the soil, not only to the lands involved in this suit, but to other lands situated adjacent thereto." The court declared the law to be "that the plaintiffs, Ralph A. Allen and Maggie Hensley, are the owners of the lands of which the defendants took possession, and that they are entitled to a decree as prayed for in their complaint." The court entered a decree to that effect, from which is this appeal.

The allegations of the complaint were sufficient to give the chancery court jurisdiction. Having acquired jurisdiction, the court did not err in retaining the same and in determining the issue of title as to the lands in controversy. The appellants admitted that the appellees and their predecessors in title had record title from the government to the lands in controversy, but they contend that they acquired the title by two years' adverse possession of the lands under tax deed from the State. In the view we have of the evidence, it is wholly unnecessary to decide whether or not the tax deed, under

which appellants claimed, was a color of title. For, even if this be conceded, we can not say that the appellants had acquired title by adverse possession. On the contrary, we are convinced that a clear preponderance of the evidence shows that such is not the case. The evidence on this issue is in sharp conflict, and it could serve no useful purpose and would unduly extend this opinion to argue the same.

Our conclusion is that the preponderance of the evidence shows that the appellees had been in actual, open, continuous, exclusive and adverse possession of the tract of land in controversy for many years, holding the same under fence with other pasture lands, and were using same as a pasture, cutting timber and exercising other acts of ownership over it during all the time that the appellants were attempting to acquire possession; that the efforts of the appellants to acquire possession of the property were intermittent and fitful. These efforts were not sufficient to show such continuous and notorious occupation of, and dominion over, the land as to indicate to the true owner an unequivocal intention on the part of appellants to own and exclusively appropiate the lands to their own use. See *Brown* v. *Bocquin,* 57 Ark. 97; *John Henry Shoe Co.* v. *Williamson,* 64 Ark. 100; *Driver* v. *Martin,* 68 Ark. 551; *Boynton* v. *Ashabranner,* 75 Ark. 415; *Earle Improvement Co.* v. *Chatfield,* 81 Ark. 296.

The decree is correct, and it is therefore affirmed.

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## WASHINGTON v. STATE.

Opinion delivered January 24, 1921.

1. HIGHWAYS—WARNING TO WORK ROAD.—Service of a warning to work a public road can not be had by leaving it with the wife of the person to be warned, instead of serving it personally or by posting it in some conspicuous place.

2. HIGHWAYS—APPEARANCE AFTER DEFECTIVE WARNING.—Evidence that defendants appeared at the time and place stated in the warning notice, but refused to work, *held* sufficient to warrant the submission to the jury of the issue whether they appeared on the day they were warned to appear and put themselves under the dominion of the road overseer for the purpose of working the road.

3. HIGHWAYS—WHAT IS PUBLIC HIGHWAY.—A conviction for failure to work a public road will not be sustained where there is no evidence either that the road was laid out by the United States and known as a military road, or that overseers had been appointed by the county court with directions that hands be apportioned to work the road, or that the public, with knowledge of the owner, had claimed and exercised the right of using the road as a public highway for a period of seven years.

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

*Strait & Strait,* for appellants.

1. Under the undisputed testimony the State failed to make a case against defendants for failure to work the road *after having been legally warned.*

2. The road was not a public road, and if it was defendants were not subject to road duty.

3. The court erred in refusing to give instruction No. 2 for defendants. Three full days' warning was not given. 52 Ark. 265; *Ib.* 270-272; 42 *Id.* 93; Kirby's Digest, § 5263. The warning was not according to law. 62 Ark. 272; 35 *Id.* 501; 22 *Id.* 362.

*John D. Arbuckle,* Attorney General, and *Silas W. Rogers,* Assistant, for appellee; *Elbert Godwin,* of counsel.

1. The affidavit or information filed by the deputy prosecuting attorney was not defective or insufficient. The allegations were sufficient and complied with our law. Kirby's Digest, § 2243; 114 Ark. 38; 84 *Id.* 487; 5 *Id.* 444; 19 *Id.* 613.

2. The testimony shows that the road was a public highway by prescription and by proper orders of the county court. 47 Ark. 431; 102 *Id.* 553.

3. The warning was sufficient. 51 Ark. 103. The evidence sustains the verdict and defendants appeared in obedience to the warning, but failed to work and refused to work. Kirby's Digest, § 7255. The information was sufficient, as it enabled the court to correctly pronounce a judgment and was sufficiently certain. Kirby's Digest, § 2243; 84 Ark. 114 *Id.* 38; 5 *Id.* 444; 19 *Id.* 613.

WOOD, J. The appellants were convicted on separate informations filed by the deputy prosecuting attorney. The informations charged that appellants on the 19th day of August, 1920, did commit the crime of refusing to work public roads in Conway County, Arkansas, after having been lawfully warned so to do. The causes were consolidated for trial in the court below, and have been consolidated here for the purpose of briefing. The transcript in each case is identical except as to the names of the appellants.

On the 16th day of August, 1920, each of the appellants was warned to meet at I. Carter's on the 19th day of August, 1920, for the purpose of working the public roads in Welbourne Township. The above warning, or notice, was served by leaving the same with the wives of the respective appellants. The warning or notice was not posted in some conspicuous place.

The county judge of Conway County testified, over the objection of appellants, that he authorized the overseer to work the particular road in question; that he had told them two or three times to go ahead and work that piece of road. It was not an order of the county court. There were no proceedings in the county court to that effect. He told them to work it; that the order had been made sometime before witness came in about making rural routes public roads and witness considered it a public road. It was witness' understanding that there was a rural route over the road. The people up there had been after witness about working that piece of road, and witness told the overseer to go ahead and work it.

Witness did not know how many in the country up there used that particular piece of road. Witness instructed the overseer to work it because witness figured that it was in the interest of the public to have it worked.

Witness Stringer testified that he was the road overseer. He authorized Summerhill to warn the hands to work up there on that road. Witness went up there that day (the 19th). Witness had asked Summerhill to look after the road until witness arrived on the ground. Witness commenced to improve the road because they were all talking about that road being in bad shape to the Conway County folks. Witness came and asked the county judge what about working it, and he said, "Sure, you work that road over there, for it is a county road." Witness was not there when the negroes refused to work and went home. He was thirty minutes late. When witness arrived, he was told that they had come over to report, but that they wouldn't work and had gone home.

Charlie Summerhill testified that the manager up there on the road got witness to warn the hands and help him with the road. Witness did all the warning. He warned the appellants, and they came. Witness asked Junior if he had come to work. Witness couldn't recollect for certain what he said to him. Junior had something to say about it; that he couldn't work that day, and he went on down the hill a little piece further where some more (hands) were piling brush, and witness asked him why he didn't bring his team or something that way, so he could work on the road, and they talked on some little bit, but witness couldn't say exactly what was said between them. Another one he told to go up there and pull a tree down. They were pulling the tree over with a rope—had a block taking the tree down. Instead of doing that, he went down the hill and went across over the fence and left, and the other two just walked back up the road and walked off. Mr. Stringer, the overseer, at that time had not arrived. All three negroes appeared

on the place where they were warned to come. Witness was asked:

"Q. They reported ready for work, did they?

"A. Yes, sir; they were on time there at the time we were starting out."

Witness further stated that the road in question comes into the old military road, the Atkins road, at Oliver's. When it gets to that road, it stops. Witness was working on that road that comes out of Pope County, a road that leads from the public road back into the Pope County bottoms. They were trying to fix a road up there for people to get out of the Pope County bottoms. They traveled the military road, the Morrilton and Atkins road, about a quarter, there on this road, before they turned off to go to Blackville where witness had a gin. Witness understood all the time that the road in question was a public road to be worked as such. There hadn't been any road work on that side in three or four years. No one had been warned to work on this road until witness attempted to work it that time. Witness had lived up there pretty well all his life. The road in question had been considered a public road and mail route for a long time. Witness understood that it was on the section line. All the other hands came on the same kind of a warning he had given the appellants. Appellants came up there and stood around there some little bit and walked off.

Another witness testified that he was present the day the appellants were warned and appeared on the road. Appellants came up to work the road, passed off some little jokes and went away. One of them said he had a summer ax. They didn't bring anything to work the road. A little later when they went down near the county line to trim up some trees, there seemed to be something wrong, and the first thing witness knew the darkeys were gone. Witness heard them testify in the lower court that they had come up in answer to the summons. Witness was asked what reasons they offered

and answered, "They just walked away and didn't want to work."

Another witness stated that the appellants came on the road and stayed something like an hour. Witness asked them where their tools were to work with, and Dotson spoke up and said his tools were summer tools and wouldn't work. Gene Washington and the other one didn't say anything. Summerhill came along and took some of them down the hill side and left witness and Washington to cut down a tree. They had to get a block and tackle to pull the tree down. Washington went to get the hands to help, and witness went to get the block and tackle. Washington never came back. The other fellows said they would come back tomorrow.

The above is substantially all the testimony introduced on behalf of the State.

On behalf of the appellants, a witness testified that he had lived at Blackville for twenty years; that the road in controversy was not at that time a rural mail road; that the road from the Morrilton and Atkins road, the Wire road, was not a public highway and never had been worked as one, and it was not a mail road. It was not a county road. Witness had never seen a petition for a county road, and the mail had been cut off of the road, and that is the reason why the witness stated that it was not a county road. The public used it, but it didn't go through the court as a county road. There used to be a mail route over it.

The ruling of the court was correct in instructing the jury that the warning was not sufficient. *Lowry* v. *State,* 52 Ark. 270, and cases cited.

The testimony was sufficient to warrant the court in submitting to the jury the issue as to whether or not appellants appeared on the day they were warned to appear on the road and put themselves under the dominion of the overseer for the purpose of working the road. The instruction on this issue was correct.

There is no testimony to show that the road in question was laid out in pursuance of law, that it was laid out by the United States, and was known as a military road. There is no testimony to show that overseers had been appointed by the county court, and that such court had directed "that hands should be apportioned" to work this road. There is no evidence to show that the public, with the knowledge of the owner of the soil, had claimed and continuously exercised the right of using this road as a public highway for a period of seven years.

This particular road, therefore, does not come within any of the statutory definitions of a public highway, nor within the rules declared by this court for establishing a highway by prescription. Crawford & Moses' Digest, §§ 5222-5223; *Howard* v. *State,* 47 Ark. 431; *Patton* v. *State,* 50 Ark. 53; see, also, *Ayers* v. *State,* 59 Ark. 26; *Jones* v. *Phillips,* 59 Ark. 35; *State* v. *LeMay,* 13 Ark. 405.

The burden was on the State to prove that the road in question was a public road in order to warrant a conviction. *Howard* v. *State, supra.* There is no evidence to sustain the verdict. The judgment is therefore reversed and the causes are remanded for a new trial.

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## SWIFT v. IVERY.

Opinion delivered January 24, 1921.

1. LANDLORD AND TENANT—ESTOPPEL.—While, in an action merely to recover possession of land, the tenant can not deny the landlord's title to the premises, yet, where the landlord both seeks possession and asks that title to the land be vested in himself, the tenant is not estopped to dispute the landlord's title.
2. MORTGAGES—POWER OF SALE.—Where a mortgage authorized the mortgagee or his assignee to execute a power of sale, an attempted sale under the power made by a stranger not an assignee is without authority and void.

3. MORTGAGES—SALE UNDER POWER WITHOUT APPRAISEMENT.—A sale of mortgaged land under a power contained in the mortgage without first having the land appraised as required by statute is void.
4. MORTGAGES—PURCHASER AT VOID SALE.—When a sale of land under a power contained in a mortgage was void, the purchaser became only a mortgagee in possession where the mortgagor signed a rent note and paid rent to him.
5. MORTGAGES—PURCHASE AT VOID SALE—ASSIGNMENT.—A purchaser at a void sale under a power contained in a mortgage will be treated as an assignee of the mortgage.
6. MORTGAGES—MORTGAGEE IN POSSESSION—ADVERSE POSSESSION.—A mortgagee in possession, while occupying that position, could acquire no title adverse to the mortgagor.

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

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellants to cancel and set aside a deed from G. T. Whatley, trustee for D. L. King, to P. B. Swift for 160 acres of land in Lafayette County, Arkansas, and to quiet the title of appellees in said land.

The complaint alleged that the deed above referred to was void because it was given pursuant to the power of sale under a mortgage, and that the sale under the power was void because the agent or trustee making the sale was not authorized by the mortgage to make it, and because the land was not appraised as required by statute before the sale.

Appellants filed an answer in which they denied the material allegations of the complaint and averred that said mortgage was in all respects legally foreclosed. They also filed a cross-complaint in which they set up the foreclosure of the mortgage and the sale to P. B. Swift under the power contained in it. They also claim title to the premises by adverse possession after the sale under the power contained in the mortgage.

The prayer of their cross-complaint is that the complaint be dismissed for want of equity and that the title

to the land in controversy be declared and quieted in P. B. Swift.

The material facts are as follows: A patent was issued by the United States Government to Anthony Robinson to the land in controversy. Robinson lived on land from the time he received the patent until he died in August, 1897. He left surviving him his widow, Abbie Robinson, and his children, who are the appellees and who were the plaintiffs in the court below in this action. Abbie Robinson continued to reside on the land until she died in 1910. Prior to her death, she and two of her children executed a mortgage on the land to D. L. King to secure an indebtedness to him. The mortgage provided that, in case of nonpayment, the mortgagee, or his assignee, should have the power to sell the land in the manner prescribed by the mortgage. The mortgage was executed on the 1st day of May, 1909, and was duly filed for record. In 1911, Lula Ivery, one of the appellees, moved on the place and has resided there ever since. In February, 1911, G. T. Whatley, as agent and trustee for D. L. King, sold the land at public sale to satisfy the indebtedness due D. L. King. The land was duly advertised as prescribed by the mortgage, but the record does not show that it was appraised, as required by the statute, before the day of sale. P. B. Swift was the highest bidder at the sale, and G. T. Whatley executed a deed to him for the property. Lula Ivery executed a rent note to P. B. Swift for $12 for the rent of the land for the year 1912. According to the testimony of D. L. King, she also admitted in 1914 that she was holding the property as his tenant.

G. T. Whatley testified that Lula Ivery executed in his presence the rent note for the year 1920. Lula Ivery denied that she ever paid rent to any one after she moved on the place. She stated that she moved on the place at the instance of her brothers and sisters, and that they thought the place belonged to them as heirs of Anthony Robinson, deceased.

The chancellor was of the opinion that the sale under the mortgage above referred to was void, and that the sale by the agent and trustee of D. L. King, under and by virtue of the mortgage above referred to, was void, and that the deed executed by Whatley to Swift should be canceled; that the title of appellees to said land should be quieted and confirmed against appellants.

The court further found that certain of appellees were indebted to King upon the note and account which the mortgage aforesaid was given to secure, and that they should pay to appellants the sum found due within a designated time. In default of the payment, the land was ordered sold to satisfy the amount found due.

A decree in accordance with the finding of the chancellor was entered of record, and to reverse that decree appellants have prosecuted this appeal.

*King & Whatley*, for appellants.

1. The undisputed facts show that after the foreclosure under the power in the mortgage one of the appellees went into possession for herself and the other appellees and gave a rent note for 1912 and was a tenant of appellants. A tenant can not dispute the landlord's title. 206 S. W. Rep. 749; 211 *Id.* 142; 132 Ark. 1.

2. The suit is barred by statute.

A tenant can not oust the landlord. 225 U. S. 708. One who comes into equity must come with clean hands. 68 Ga. 482. 16 L. R. A. (N. S.), *Memphis Keely Institute* v. *Keely Co.* When the record diclosed that plaintiff was a tenant of Swift's, the suit should have been dismissed. 4 Am. Rep. 44 to 106. Lou Ivery was a tenant and is estopped. 135 Ark. 43; 110 Me. 428; 125 Ark. 146; *Ib.* 141. Swift's possession was under color of title and good. 124 Ark. 379; 129 *Id.* 270; 140 *Id.* 40.

*McKay & Smith,* for appellees.

A mortgagee having authority to sell under a power in the mortgage can not delegate to another the power to conduct the sale. 55 Ark. 327; 70 *Id.* 507. The sale

by Whatley to Swift was void. 27 Cyc. 1459; 19 R. C. L. 591; 70 Ark. 309; 84 *Id.* 298; 213 S. W. 2; 84 Ark. 304; 70 *Id.* 490; 55 *Id.* 268; 55 *Id.* 326-8. Appellees' cause of action was not barred by limitation.

HART, J. (after stating the facts). It is earnestly insisted by counsel for appellants that the decree should be reversed because the undisputed evidence shows that, after the foreclosure under the power contained in the mortgage, one of the appellees went into possession of the land for herself and the other appellees, and gave a rent note to one of the appellants for the rent for 1912, and that she continued to reside on the land as the tenant of one of the appellants.

Under this state of facts, counsel invoke the rule laid down in *Gibson* v. *Allen-West Com. Co.,* 138 Ark. 172, and cases cited to the effect that in an action to recover possession of land the tenant can not deny the landlord's title to the premises. The rule invoked is well settled and not open to controversy in this State, but it has no application in suits like the present one. While the landlord seeks to recover the possession of the land, he can do so under the lease, and the tenant gains no advantage over the landlord by taking a lease. There is an exception to the general rule, however, where the landlord goes further and demands to have his title in fee adjudicated against the defendant. If appellants' position is correct, the landlord might obtain a title in fee by estoppel against the tenant and thus acquire an advantage to which he is not entitled.

In *Stevenson* v. *Rogers* (Tex.), Ann. Cas. 1912 D, p. 99, the court held: "While, as a general rule, in an action by a lessor after termination of the lease for possession of the leased premises, the defendant can not dispute the plaintiff's title or right to possession without first surrendering the possession he received under the lease, where, however, the suit is to recover possession and establish the plaintiff's title, whereby the defendant's title would be destroyed, the defendant may

defend by showing a superior title in himself." Several cases are cited to sustain the holding of the court.

In *Hebden* v. *Bina* (N. D.), 116 N. W. 85, 138 Am. St. Rep. 700, a case in all essential respects like the present one, the court said that it is well settled that a tenant is not estopped to deny his landlord's title in any action such as this, but that he is thus estopped merely in actions arising out of the relation of landlord and tenant. Several cases are cited in it to support the decision.

In the instant case, appellants filed a cross-complaint in which they ask that the title to the land in controversy be invested in P. B. Swift and quieted in him. Therefore, appellees were not estopped from disputing the appellant's title.

It is contended by counsel for appellees that the sale by G. T. Whatley, as agent and trustee of D. L. King, to P. B. Swift was void. In this contention we think counsel are correct. The mortgage was foreclosed under the power of sale contained in it, and the right to do so is derived from the mortgage itself. The mortgage bestowed the power of sale upon the mortgagee and his assignee. By the terms of the power only King or his assignee could execute it. The right to substitute some one else did not exist. King never assigned the mortgage, and the sale by Whatley for him under the power was void. Hence the deed executed by Whatley to Swift was of no effect and conferred no title upon the latter. *Stallings* v. *Thomas*, 55 Ark. 326. See also, 27 Cyc., p. 1459, and 19 R. C. L., 591.

The sale was void for another reason. The record does not show that it was appraised as required by the statute. In *Craig* v. *Meriwether*, 84 Ark. 298, it was held that a sale of mortgaged land under a power contained in the mortgage, without first having the land appraised as required by the statute, is void. The sale being void, the attitude of the mortgagee toward the land was unchanged. The record shows that Lula Ivery went into

possession of the land for herself and her brothers and sisters. Two of these in connection with their mother, who had a dower interest in the land, had executed a mortgage on the land to D. L. King. The act of Lula Ivery under these circumstances in signing a rent note and paying rent to P. B. Swift constituted him a mortgagee in possession. The rights of the parties are therefore to be determined by the law regulating the rights and duties of such mortgagee. *Stallings* v. *Thomas,* 55 Ark. 326. The sale to Swift being void, he could only be treated as an assignee of D. L. King under the mortgage. Therefore the attornment of Lula Ivery to him constituted him a mortgagee in possession, and he could acquire no title while occupying that relation adversely to the rights of appellees. Appellants, therefore, being in the attitude of a mortgagee in possession, acquired no title by adverse possession, as pleaded and claimed by them. Therefore, the court was right in ascertaining the amount due them under the mortgage and providing for a sale of the land in satisfaction thereof in case default was made in the payment of the same by a designated time. There was also no error in quieting the title in the appellees in case such payment was made.

It follows that the decree of the chancellor was correct, as far as the appellants are concerned, and it will be affirmed.

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## WHITMORE v. BROWN.

Opinion delivered January 24, 1921.

1. DIVORCE—LIEN FOR ALIMONY.—Where a wife, who has been given a decree for alimony payable in installments, executed a quitclaim deed to the purchaser of lots from her former husband, she can not thereafter claim a lien for the alimony upon the lots.
2. DIVORCE — INSTALLMENTS OF ALIMONY NOT LIEN ON HUSBAND'S LANDS.—Installments of alimony to become due in the future do not become and can not be made a lien upon the husband's real estate, as this would embarrass alienation.

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

STATEMENT OF FACTS.

Appellee brought this suit in equity against appellant to quiet his title to lots 1 and 2 and the north five feet of lot 3, block 9, Fleming & Bradford's Addition to the city of Little Rock in Pulaski County, Arkansas.

Mrs. Eva W. Whitmore filed an answer for herself, and her minor children, who were also made defendants in the court below, filed an answer through their guardian *ad litem.*

The case was tried before the court upon a state of facts substantially as follows: Y. E. Whitmore and Eva W. Whitmore were husband and wife, and had three minor children. They owned the lots above described and resided on them. On the 21st day of April, 1919, a decree of divorce between said parties was entered of record in the Pulaski Chancery Court, and the custody of the minor children was granted to Mrs. Eva W. Whitmore. By consent of the parties judgment was rendered in her favor against Y. E. Whitmore for $3,000 alimony, to be paid in installments of $250 quarterly.

The decree further provided for a judgment against Y. E. Whitmore in favor of Eva W. Whitmore, in trust for the support and maintenance of their three minor children at the rate of $75 per month until the youngest of said children reached its majority. The decree further provided that an execution might issue as in cases of judgment at law.

On the 20th day of February, 1920, Y. E. Whitmore contracted in writing to sell the lots above described to R. O. Brown. On the 24th day of April, 1920, Eva W. Whitmore by a quitclaim deed conveyed her interest in said lots to R. O. Brown. On the 26th day of April, 1920, on the petition of Y. E. Whitmore and Eva W. Whitmore, the chancery court entered a decree setting aside that part of the former decree which provided for a judgment in favor of Eva W. Whitmore for $3,000 and

in favor of Eva Whitmore in trust for their three minor children for $75 per month until the youngest one reached its majority, and re-entered a decree against Y. E. Whitmore for $3,000 in favor of Eva W. Whitmore, and provided that it should be a specific lien on certain lots in the city of Little Rock which belonged to Y. E. Whitmore and on which Eva W. Whitmore resided with their minor children.

The decree further provided that Eva W. Whitmore should recover from Y. E. Whitmore for the support and maintenance of their three minor children the sum of $37.50 each per month, and provided that a lien be created on the property last referred to to secure the payment of the same. Said decree further provided that the property in controversy be released from any lien that may have been created by the original decree of divorce.

On the 26th day of April, 1920, Y. E. Whitmore married another woman, and on the same day he conveyed the property in controversy to R. O. Brown, and his wife relinquished dower in the deed.

The chancellor found that original decree of divorce of the date of the 21st day of April, 1919, did not constitute a lien in favor of Eva W. Whitmore for the $3,000, or in her favor in trust for her minor children for the sum of $75 per month until the youngest child became of age, and specifically found that the judgment for alimony did not create a lien on the property in controversy. The case is here on appeal.

The appellants, *pro se,* by A. B. Cypert, guardian *ad litem* for the minor heirs.

A decree for alimony creates a lien on the husband's real estate, including installments, falling due in future. The decree recites that "execution may issue as upon judgment at law" is a judgment under our statute, and a lien exists in favor of the minor children. 2 Blackf. 295; 21 S. E. 461; 68 Ill. 17; 29 Ill. 17;29 N. J. Eq. 9; 35 N. E. 58. See, also, 53 S. E. 769-774; 14 W. Va. 367: 35 N. E. 58; L. R. A. 1916 B 648; 48 L. R. A. (N. S.) 420.

*Asa C. Gracie,* for appellee Y. E. Whitmore.

1. The quitclaim deed from Eva W. Whitmore removes all question as to the lien in her favor under the divorce decree.

2. The decree of April 21, 1919, gives Mrs. Eva Whitmore in trust for the minor children a lien on the property in question for the allowance for the support of the children. It is not a judgment and a lien on the real estate under our statute, and the chancery court had no authority to modify the decree by the decree of April 26, 1920. The judgment on the original decree is not a judgment and not a lien. 38 Ark. 119; 38 *Id.* 477; Kirby's Digest, § 4438; Ib. §§ 2681-2. The court had the right to set aside the decree for alimony entered at a previous term of the court and cancel it. 93 Ark. 426; 42 *Id.* 495; 88 *Id.* 302-8. The decisions of other States cited by appellant on the question of decrees for alimony being a lien on real estate are not in point, as the matter is settled by statute in this State.

HART, J. (after stating the facts). The decree for alimony in gross in the sum of $3,000 was entered by consent of the parties and was for the benefit alone of Eva W. Whitmore. She saw fit to execute a quitclaim deed to R. O. Brown for the lots in controversy, and thus disposed of any possible interest she might have in the lots. Therefore, the question of whether the original divorce decree constituted a lien upon the lots in controversy to secure this amount passes out of the case.

The only question raised by the appeal is whether or not the original divorce decree of the date of April 21, 1919, gives to Eva W. Whitmore in trust for the minor children a lien on the property in controversy for the $75 per month which the court below decreed should be paid by Y. E. Whitmore until the youngest child became of age. Divorce proceedings are regulated by statute, and alimony is just what the statute makes it. There is no statute in this State providing that a decree for alimony or for the support and maintenance of the

minor children of the divorced parties shall be a lien on the real estate of the husband. There is a conflict in the authorities as to whether a decree for alimony payable in installments becomes a lien on the lands of the husband, or whether it may expressly be made a lien by the court upon the real estate of the husband.

It is insisted by counsel for appellants that the better reasoning supports the conclusion that a decree for alimony creates a lien on the husband's real estate, which extends to and includes the installments of such alimony falling due in the future. We need not consider where the better reasoning or the weight of authority on this question is, for this court as early as 1881 took the opposite view of the question, and the decision has never been overruled. This court expressly held that a decree for alimony payable in installments does not operate as a lien upon the real estate of the husband. In *Kurtz* v. *Kurtz,* 38 Ark. 119, it was held that the court should not make future payments of continuing alimony a lien on the husband's real estate for the reason that to do so would be likely to embarrass alienation. The court said that this was too obvious for discussion, and that "as for all matters ordered to be paid at once, and for which execution may issue, they are already general liens, without being so expressed." Again in the succeeding year, in the case of *Casteel* v. *Casteel,* 38 Ark. 477, in discussing the question, the court said: "We need not modify the decree, as it is not urged upon us to do so. Otherwise it would be proper to remand the cause for its correction. The alimony should not have been made a lien upon the lands of complainant. This is equivalent to charging them with an annuity, which the owner might do voluntarily, but the court should not *in invitum,* as it embarrasses alienation. If objection had been made, or were now insisted upon, the court might have secured the payment of the alimony by sequestration, or by exacting sureties. The appellant has, however, chosen to stand on other grounds." Thus it will be seen that the

court adhered to its former ruling on this question, and that the decree in that case was affirmed solely on the ground that appellant did not urge as error, either in the court below or upon appeal, that the decree for alimony was made a lien upon the land of the husband.

The effect of these decisions has never been impaired by subsequent ones, and they have become a rule of property in this State. It results from these considerations that the decree for continuing alimony for the support of the children did not create a lien on the lots in controversy, and R. O. Brown was entitled to have his title quieted.

Therefore, the decree must be affirmed.

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## PINE BLUFF COMPANY v. WHITLAW.

Opinion delivered January 24, 1921.

1. NEGLIGENCE — IMPUTED NEGLIGENCE OF DRIVER.—Where plaintiff was riding in an automobile over which she had no control, and was injured in a collision with a street car, the negligence of the driver of the automobile, if any, was not imputable to plaintiff.
2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE AS QUESTION FOR JURY.—In an action for injury to plaintiff while riding in an automobile, plaintiff's contributory negligence in not warning the driver of the danger of a collision with an approaching street car *held* a question for the jury.
3. STREET RAILROAD—CONCURRING NEGLIGENCE—INSTRUCTION.—An instruction that if defendant's motorman failed to give proper warning and such failure caused or directly contributed to plaintiff's injury, defendant was liable unless plaintiff was negligent and such negligence contributed to her injury.

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

STATEMENT OF FACTS.

Kathleen L. Whitelaw brought this action against the Pine Bluff Company to recover damages alleged to have been sustained by her from a collision between the

automobile in which she was riding with its owner and a street car at a street crossing in the city of Pine Bluff, Arkansas. On the 9th day of December, 1919, at about 1:30 o'clock in the afternoon, Kathleen L. Whitelaw, while riding in an automobile driven by W. P. Keith, was severely injured by a collision between the automobile and a moving street car at the intersection of Pine Street and Sixth Avenue, in Pine Bluff, Arkansas. Kathleen L. Whitelaw, at the time she was injured, was sitting on the front seat with W. P. Keith, and he was taking her to the Watson Chapel School to take a position as teacher. W. P. Keith was superintendent of public schools of Jefferson County and had known the plaintiff for about fourteen years. The plaintiff was about twenty-five years of age at the time she was hurt and resided in the city at 901 Pine Street. The car was being driven north on Pine Street and Professor Keith intended to cross Sixth Avenue to go over on Fifth Avenue because it was better driving on that street. The street car track was on Sixth Avenue, which runs east and west.

According to the testimony of Professor Keith, he understood operating an automobile, and had been driving the one in question since March 20, 1917. Previous to that time he had driven a Ford for about twenty months. On the day in question when they got nearly to Sixth Avenue, they met a Ford car and a Ford delivery truck. When he met these cars, Professor Keith slowed down until he was just barely moving good. He met the last car just south of Sixth Avenue. When he went into Sixth Avenue, he was going very slowly. Just as he got to Sixth Avenue, Professor Keith applied his brakes and then looked west on Sixth Avenue to see if there was a car coming east. He did this because he would have to cross the south track first. He saw there was no car coming on the south track and then looked east on Sixth Avenue. He did not see any car in that direction and took his foot off of the brake. He kept

his foot on the brake until he was sure there was no car approaching from either direction and then took his foot off of the brake and allowed the automobile to proceed across the street car tracks. At this time he looked across Sixth Avenue north on Pine Street to see if there was another automobile coming from that direction. Just as he was crossing the south track he heard the clicking of the trolley overhead and immediately looked up to see from which direction a car was coming. He was taken by surprise because he had just looked in both directions to see if there was a car in sight and had not seen any. When he looked up at the overhead wire, he found out that the car was approaching on the north track, going west on Sixth Avenue. Professor Keith saw that the car was approaching at a pretty swift rate of speed, and that he would have to get out of its way because the motorman did not see him. The motorman was standing on the front of the car, but had his face turned toward the north and was not looking in Keith's direction. The left side of the motorman's face was turned toward Keith as if he might be turning the handle of the fare register. Keith changed his gear from high to second and put on all the power he could, but the car hit his automobile before he could get across the north track. The car was nearly across the north track before the street car struck it. Keith was listening in order to ascertain if a street car was approaching from either direction on Sixth Avenue and did not hear any gong or other warning of its approach. The first intimation he had of the approach of the street car was the clicking of the trolley as above stated. The automobile was approaching the street crossing at an angle and he was going across Sixth Avenue facing northeast. Keith could see east on Sixth Avenue through his wind shield and curtains and said that the only way he could account for not having seen the street car was that its color blended with the front of Davis Floral Company, situated on Sixth Avenue. As he approached the cross-

ing, Miss Whitelaw took her glove and rubbed the mist or moisture off of the wind shield.

According to the testimony of Kathleen L. Whitelaw, the plaintiff, she knew that Professor Keith was the owner of the automobile and understood that he was a careful driver. She was being taken by Professor Keith in his automobile to take a position as teacher at Watson Chapel School. As they approached the street car crossing on Sixth Avenue, Mr. Keith was sitting on the left hand side of the front seat driving the automobile and she was sitting beside him on the right. She did not hear the street car approaching the crossing and did not hear it give any warning of its approach. She did not see the street car until she felt the jerk of the automobile just before the street car struck it. It was only an instant after she saw the street car until the crash came, and she was knocked unconscious and severely injured. The plaintiff saw Mr. Keith look in both directions for approaching street cars as they turned into Sixth Avenue, and she also looked for approaching cars, but did not see any. She was asked how she accounted for the fact that she did not see the street car when she looked east and testified that she did not know.

On the part of the street car company, it was shown that Professor Keith admitted to several persons just after the accident that it was due to his fault or negligence in driving the automobile. It was also shown that any one in the automobile by looking east could have seen the approaching car for more than a block before it reached the crossing on Sixth Avenue.

According to the testimony of the motorman, he saw the automobile as it turned into Sixth Avenue, and as he got nearer to it he could see the driver and could tell that he had seen the street car. From the way the automobile was being driven the motorman came to the conclusion that its driver was going to continue east on Sixth Avenue to Main Street, as that was the way many people did. He just let the street car run along and

when he got nearly even with Pine Street, the automobile shot right in front of the street car, and it was done so quickly that the motorman did not have time to stop the street car.

Other evidence tended to corroborate the testimony of the motorman.

The jury returned a verdict in favor of the plaintiff in the sum of $7,500, and judgment was rendered accordingly. The defendant has appealed.

*Bridges & Wooldridge,* for appellant.

1. The judgment is clearly contrary to the evidence and the law, as plaintiff was guilty of such negligence as to bar her right of recovery. Both she and Keith, the driver, were guilty of negligence, and a recovery should not be allowed. 136 Ark. 23; 102 *Id.* 351-4. The driver did not use due care and caution. 137 Ark. 217-224-5-6. A passenger can not rely implicitly on the care of the driver; he must use ordinary care and watchfulness. 29 Cyc. 551; 120 N. Y. 290; 24 N. E. 449; 17 Am. St. Rep. 648; 64 Pac. 624; 76 S. W. 973; 29 Cyc. 351. Plaintiff and Keith, the driver, were both guilty of carelessness and negligence and want of ordinary care. They kept no lookout and did not use the slightest care. It is the duty of a guest to exercise at least ordinary care for his safety and appellee was clearly guilty of contributory negligence. 136 Ark. 23, 32; *Ib.* 277-8; 29 S. E. 319; 89 S. E. Rep. 887-8.

2. The court erred in giving instructions 2, 3 and 5 for plaintiff. 61 Ark. 381; 90 *Id.* 333; 95 *Id.* 297-301; 137 *Id.* 217, 227.

*Coleman & Gantt,* for appellee.

1. From the physical facts as well as the direct testimony it is plain that the motorman of the street car company was guilty of gross negligence; that he was not keeping a lookout, nor sounding his gong.

2. Regardless of the question of Keith's negligence, it is plain that appellee was in no way to blame for her

injuries. She was watchful and kept a lookout, and no negligence is shown. There is no error in the instructions. 136 Ark. 277; 72 *Id.* 572; 136 *Id.* 23.

3. Ten per cent. damages should be added to the judgment under our statute. 80 Ark. 273.

HART, J. (after stating the facts). The negligence of Professor Keith, if any, in driving the automobile, can not be imputed to the plaintiff under the facts disclosed by the record. The car belonged to Professor Keith, and he was driving it. The plaintiff was his guest, and had no voice in directing and governing the movement of the automobile. Hence the parties can not be said to have been engaged in a joint enterprise within the meaning of the law of negligence, and the negligence of the driver, if any, could not be imputed to the plaintiff. *Carter* v. *Brown,* 136 Ark. 23. In that case it was also held that, while the negligence of the driver of an automobile can not be imputed to one riding merely as his guest, it is the duty of the guest to exercise ordinary care for his or her safety, and that a failure to exercise such care which contributes to the injury will constitute contributory negligence.

In the application of this rule to the present case, it is insisted that the plaintiff was guilty of contributory negligence, and the court should have so declared as a matter of law. Counsel for the defendant point to the fact that the testimony plainly shows that the plaintiff could have seen a street car approaching from the east, and that it was the duty of the plaintiff to have notified Professor Keith of the danger from the approaching street car, and that, not having done so, she is guilty of such contributory negligence as bars her recovery in this case. We can not agree with counsel in this contention. The automobile belonged to Professor Keith, and the plaintiff was riding with him as his guest. She was not assisting, advising, or controlling him in driving the machine, and had no right to do so. Whether she saw the approaching street car, there being nothing

to obstruct the view of the track before reaching the crossing, in time to have warned Professor Keith of their danger, was a matter proper to be considered by the jury. She had known Professor Keith for many years and considered him a careful driver. He was accustomed to driving about the streets of Pine Bluff, where he must have of necessity frequently crossed street car tracks. Occupants of automobiles are not required to stop when they see a street car approaching, regardless of how far away it may be. It was the duty of the driver of the automobile to use ordinary care in crossing street car tracks in front of an approaching car. If, under the circumstances, the driver thought he could cross the street car track before the street car reached the crossing, he had a perfect right to do so. The plaintiff is not barred of recovery because the driver of the automobile might have been negligent. It was only the duty of the plaintiff to exercise ordinary care for her own safety. The jury might have believed that the driver of the automobile and the motorman were both negligent, and still have found for the plaintiff, because they believed that she exercised ordinary care for her own safety. The jury had a right to receive such parts of the evidence as it believed to be true and to reject that which it believed to be untrue. It might have believed that the plaintiff saw the approaching street car, but thought that Professor Keith also saw it, and believed that he had time to drive over the crossing ahead of it. The jury also might have believed that the attention of the plaintiff was not directed to the approaching street car until it was so close upon them that she had not time to give Professor Keith any warning of its approach. Indeed, she says that this is what happened, that she did not see the street car until the automobile gave a jerk when Professor Keith increased the speed in order to cross the track ahead of the street car. Under the circumstances adduced in evidence, there is nothing that required the plaintiff to have kept a constant lookout for

approaching street cars, or other vehicles. Professor Keith was experienced in handling automobiles, and accustomed to driving one on the streets of Pine Bluff. The court submitted to the jury the question of whether the plaintiff exercised ordinary care for her own safety under the circumstances adduced in evidence, and did not err in refusing to tell the jury as a matter of law that she was guilty of contributory negligence.

Counsel for the defendant also insist that the court erred in giving to the jury instruction No. 2, which reads as follows:

"If you should find from a fair preponderance of the evidence that the motorman in charge of defendant's car failed to give warning when approaching Pine Street by sounding his gong or otherwise, and in so doing failed to give such warning as an ordinarily prudent person in the exercise of ordinary care under the circumstances would have done, and that his said failure caused or directly contributed to plaintiff's injury, then it was negligence for which the defendant is liable, unless you further find the plaintiff herself was also negligent, and that such negligence caused or contributed to her injury."

There was no error in giving this instruction.

In *Bona* v. *Thomas Auto Co.*, 137 Ark. 217, the court held that where two concurring causes produce an injury which would not have resulted in the absence of either, a party responsible for either cause is liable for the consequent injury. But counsel for the defendant contend that the instruction is erroneous because it tells the jury that defendant was liable in the event of only directly contributing to the injury. They contend that this may have been accepted by the jury in the sense of aggravating; or that it may have been misleading to the jury because it might have thought that different care or different circumstances might have diminished the shock of the collision, by checking the speed of the street car.

We do not think the instruction is open to the objection made. If counsel thought the instruction was open to any such objection, they should have made a specific objection, and doubtless the court would have corrected the verbiage to meet the objection. The court simply meant to submit to the jury the question of concurring negligence within the rule above announced.

Other instructions are objected to for the same reason. We do not deem it necessary to set out these instructions, because the reasoning just given would apply equally to them.

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

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WHITE v. ARKANSAS & MISSOURI HIGHWAY DISTRICT.

Opinion delivered January 24, 1921.

1. HIGHWAYS—INFRINGEMENT OF JURISDICTION OF COUNTY COURT.—Acts Nos. 23, 25, and 356, of the Special Session of 1920, providing for construction of lateral roads in the Arkansas and Missouri highway district within Pulaski County, in providing that if any portion of said roads have not been laid out as a public road, the county court of Pulaski County, if approved by it, shall lay the same in the manner provided by Acts 1911, No. 442, do not infringe upon the jurisdiction of the county court by attempting to authorize the laying out of new roads without the approval of the county court.
2. HIGHWAYS—VALIDITY OF ACTS AUTHORIZING LATERAL ROADS.—The above mentioned acts in effect create three new highway districts, and are void, since they provide no machinery for making assessments.

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

*R. E. Wiley* and *Marvin Harris,* for appellant.

1. Acts 23, 25 and 356, of the Special Session of 1920, as also act 82 of 1919, are void. The proposed improvement does not constitute a single local inprovement, and the unity of the district is destroyed by these acts, and they are void. 50 Ark. 116, 129; 89 *Id.* 513-16. The

legislative determination that the improvement is a single one and local in its nature is not conclusive in this case. 130 Ark. 307.

2. The cost will exceed the limits allowed by law.

3. All these acts invade the jurisdiction of the county court. Article 7, § 28, Constitution 1874; 138 Ark. 549; 141 *Id.* 247.

*Cohn, Clayton & Cohn, amici curiae.*

The acts are unconstitutional and void. 89 Ark. 513; 218 S. W. 389, 392-3; 138 Ark. 549; 92 *Id.* 93; 91 *Id.* 274; 138 *Id.* 549; 139 *Id.* 153-341; 141 *Id.* 247.

*Coleman, Robinson & House,* for appellees.

1. The unity of the district is not destroyed, and the acts are not void. 95 Ark. 496; 216 S. W. 1047; 218 *Id.* 381. See, also, 213 S. W. 762; 209 *Id.* 81; 130 Ark. 507.

2. The costs will not exceed the limits allowed by law.

3. Section 15 of act 82 was complied with, and the decisions of our court sustain the decree.

SMITH, J. Appellant is a landowner in the Arkansas and Missouri Highway District in Pulaski County, and seeks by this suit to enjoin the commissioners of that district from constructing certain lateral roads authorized by the terms of acts 23, 25 and 356 of the Special Session of the General Assembly of 1920. The original district was created by Act No. 82 passed at the regular 1919 session, and the contention is made that the unity of the district is destroyed by acts 23, 25 and 356, and that these acts are therefore void.

There were other acts amending act 82, but we need not consider them here, as the prayer of the complaint is that "the defendant district be enjoined from the construction of any of the roads laid out in the acts in reference to said district except the road known as the Jacksonville cut-off, which is being properly constructed under the terms of the act and which will carry out the purposes for which the district was organized." So

that the acts attacked are acts Nos. 23, 25 and 356, and those only need be considered.

A brief has been filed by *amici curiae,* more extensive in its scope, but the questions for decision can not thus be enlarged.

Two of the amendatory acts which are presented for review contemplate the construction of lateral roads all of which had not previously been laid out as a public road by the county court, and it is insisted that the acts are void on that account. But in each of those acts there is a provision that "if any portion of said road has not been laid out as a public road, the county court of Pulaski County, if approved by it, shall lay the same out in the manner provided by act No. 422 of the Acts of the General Assembly of the State of Arkansas of the year 1911, entitled, An Act to amend section 7327 of Kirby's Digest of the Statutes of Arkansas, approved May 31, 1911."

We think there is no infringement of the jurisdiction of the county court by attempting to authorize the laying out of new roads and improving them without the approval of the county court. The language quoted negatives that idea, and it affirmatively appears from the pleadings that the new roads were laid out and established by appropriate orders of the county court. We think there was no legislative intent to control the jurisdiction of the county court in laying out these roads by depriving it of its discretion. The Legislature only provided for the manner of the exercise of the jurisdiction in laying out the new roads, which was, of course, a proper thing for it to do, as the proceedure in any and all of the courts is subject to legislative control and regulation.

The purpose of act No. 82, as declared in the first section thereof, "is to secure the construction of a highway running from the city of North Little Rock, Arkansas, through the counties of Pulaski, Lonoke, White, Jackson, and connection with the Alicia and Walnut

Ridge Highway on the Lawrence County line at or near Alicia, thereby giving a through route to the Missouri line. * * *" To promote that purpose four improvement districts were organized by act No. 82, one for Pulaski County, one for Lonoke County, one for White County, and one for Jackson County.

This act was reviewed and upheld by us in the case of *Van Dyke* v. *Mack,* 139 Ark. 524.

Act 23 of the special session provides for the construction of the lateral road known as the Tate's Mill road, and section 3 of the act provides that the cost thereof shall be borne entirely by all quarter sections of land north of the Arkansas River some part of which is within five miles of the road, and that no property south of the Arkansas River nor any quarter section of land north of the Arkansas River no part of which is within five miles of said lateral shall pay any part of the actual construction cost.

Act 25 of the special session provides for what is called the East Ninth Street lateral, and section 2 of that act provides that the cost thereof shall be borne entirely by property within the city of north Little Rock and by all quarter sections of land north of the Arkansas River some part of which is within five miles of the road, and that no property south of the Arkansas River nor any quarter section of land north of the Arkansas River no part of which is within five miles of said road shall be taxed.

Act 356 is substantially identical in its provisions in regard to the lateral which it authorizes to be constructed.

Section 1 of act 23, after describing the lateral to be constructed, if approved by the county court, concludes with this sentence: "Said road shall be built under all the terms and conditions of said act No. 82, or other acts amending same, and in such manner as the commissioners of the district deem best, provided, that the commissioners shall grade said road and shall only

pave said road as the commissioners deem best with the funds available."

The other two acts are substantially identical in this respect, and there is no other authority in any of them for making assessments.

The territory specifically exempted in each act from contributing to the cost of building the lateral roads there provided for is included in the Arkansas and Missouri Highway District of Pulaski County as constituted by act No. 82. So that we have, in effect, a legislative declaration that a part of the lands in the district shall be exempted from contributing to the construction cost of a part of the proposed improvement. Such exemption could be made upon the theory only that all the lands in the district would not be benefited by all the improvements in the district. This manifestly was the basis of the exemption.

It is obvious that there was no legislative declaration or purpose of furthering the plan to build an improved highway from Little Rock to the Missouri line in passing acts 23, 25 and 356. These laterals could never be a part of that scheme, as they branch out from the main line practically at right angles. If all the improvements were constructed, and a traveler should mistake one of these laterals, he could only go about six miles on one, and a shorter distance on the others, when he would reach the end of the lateral and would have to retrace his course to the junction with the main road, when he could again pursue his journey.

We do not mean to say that the General Assembly might not have authorized a single improvement district to construct, as one improvement, the main line and these laterals. We have sustained numerous legislative acts which did authorize both a main road and laterals: but in all of those cases we assumed there had been a legislative finding that there was such unity of trade, commerce, social and business intercourse, and interests.

as to make the whole improvement beneficial to the whole district which was to bear its cost.

Here there is a legislative declaration to the contrary and a positive inhibition against assessing certain lands in the district for certain improvements in the district.

It is alleged in the complaint that the commissioners of the district created by act 82 are about to issue bonds in the name and against the credit of all the lands in the district, the proceeds of which will be used to construct all the roads authorized by all three of the amendatory acts mentioned. The truth of this allegation is admitted; and, if this is done, who can know that no money will be spent on the laterals which will not be repaid by taxation imposed on lands outside those districts but which are in the original district. The bond issue will be secured by all the property in the district, yet the proposed improvements are so diverse that the very acts creating them provide that a portion of the district of which they are to be a part shall pay nothing for their construction.

It is admitted that there has been but one assessment. The assessment against the lands in the lateral districts is a unit. The assessment as returned does not reflect what benefit is assessed for the laterals as distinguished from the main road. It is admitted the assessment was made as a unit, but it is contended that the betterments were separately assessed. But the amendatory acts provide no machinery for making assessments. The language last quoted refers to the construction work and authorizes the commissioners to build the laterals in such manner as act No. 82, or any act amending act No. 82, may provide, but there is a lack of authority in the amendatory acts for making assessments. The property owner is entitled to know how much he is taxed for each improvement, so that he may complain against any part which he thinks is excessive. Yet here an assessment is made under the provisions of act 82 both for the improvement provided for in act 82 and for the im-

provements provided in the amendatory acts, and this, despite a legislative finding that all the lands in the district will not be benefited by all the improvements proposed, in all the legislation.

We think a fair construction of this legislation is that more than one improvement district has been created. As to each of these laterals there is a legislative declaration that only certain portions of the original district shall contribute to their cost. Yet the whole improvement is to be built as a unit. The entire betterment is assessed as a unit. There is to be but one contract for the construction of the improvement. For some purposes there is but one district; for some other purposes there are four districts.

These amendatory acts are not sufficiently definite to stand alone. No machinery is provided under which these laterals can be constructed unless they are to be treated as being an enlargement of the original improvement, and, as we have shown, the inhibition in regard to assessments negatives that idea.

In the respect just stated the case is not unlike that of *Easley* v. *Patterson,* 142 Ark. 52. There a provision of the act construed reads as follows: "Said board of commissioners are further required to, upon the petition of 51 per cent. of either a majority in number. acreage, or valuation of property owners in any defined district or part of Benton County not now included in this act, asking that additional territory be embraced in this district for the purpose of building or improving any road or roads not now included in this district, it shall be the duty of said board of commissioners to include said territory in said improvement district, and to assume jurisdiction over it, and to proceed to build, maintain and to construct a public road or roads as is herein provided in this act."

It was there contended that the section quoted (which was section 8 of act 238 of Special Acts of 1919, vol. 1, Special Road Acts 1919, p. 935), rendered the en-

tire statute void. We held that section void, and, in doing so, said: "It is difficult to discover the meaning of the lawmakers from the language used in this provision. It does not provide merely for the change of boundaries for the purpose of including laterals or changes in the route of the road, for that is provided for in another section. Giving the language the force which its use necessarily implies, it seems to confer authority for the creation of entirely new districts; but it is ineffectual for that purpose, for the reason that there is no provision made in the statute for the assessment of benefits and the levy and collection of taxes for that purpose. The section is entirely inoperative, and is therefore void. * * *"

We also said that striking down the section quoted did not render the entire act void, because it was there provided that the fact that any section might be found unconstitutional should not affect the remaining portions of the statute. We think these amendatory acts are void for the reason given in the case of *Easley* v. *Patterson,* quoted above, and, being void, the prayer of the complaint should have been granted, and the decree of the court below will be reversed and the cause remanded with directions to enjoin the commissioners from the construction of these laterals as a part of the proposed improvement.

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

WOOD and HART, JJ., concur.

MCCULLOCH, C. J. (dissenting.) I dissent from the conclusion of the majority on the ground that acts No. 23, 25 and 356 are sufficiently definite to authorize the construction of laterals as independent improvements with the cost to be assessed against the lands found to be benefited, and that the case does not fall within the

rule announced by this court in *Easley* v. *Patterson,* 142 Ark. 52.

Section 1 of act No. 23 provides that the laterals "shall be built under all the terms of said act No. 82 and other acts amending the same." The language expressly confers the power to build the road and refers to another statute for the method and machinery and brings it squarely within many of our decisions. *School District* v. *School District,* 102 Ark. 411.

The exclusion of the lands from the original district created by act 82 from the assessment of benefits to construct the laterals shows that the lawmakers intended to make the laterals independent improvements, and, as before stated, I think that adequate provision is made for separate assessments for the purpose of constructing those independent improvements.

Now the effect of these three statutes is to join the lands described in those statutes to the original district, but there is no objection to doing this, if it is sufficiently expressed in the new statute, and I think it is expressed with sufficient definiteness in each instance. In other words, I think that the new statutes constitute findings on the part of the lawmakers that the lands added to the original district will be benefited by the construction of the original improvement and may be added so as to share in the cost, but that the additional improvements provided for under those statutes will not result in benefits to lands in the original district and those lands are to be excluded from the additional assessments to pay for the laterals. I see no reason why the Legislature can not adopt this form of authorizing the additional improvement and adding the same lands to the old district upon the finding that they will be benefited by the original improvement. If the commissioners of the district are exceeding their authority by joining the improvements together and commingling the funds, they may be restrained from so doing without impairing the force and validity of the statute itself. In other

words, they can be compelled to carry out the terms of the statute, instead of evading or disregarding them. *Phillips* v. *Tyronza and St. Francis Road Improvement District,* 145 Ark. 487.

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## FRANKS v. BATTLES.

Opinion delivered January 24, 1921.

1. ARBITRATION AND AWARD—AGREEMENT FOR STATUTORY ARBITRATION.—An agreement that the parties to a dispute would submit the testimony of certain witnesses to the court and let the court say whether defendant was guilty, and assess his punishment, whereupon the court should appoint three disinterested men, counsel them and let them hear the testimony, the parties to abide by their decision, was a contract for statutory arbitration.
2. ARBITRATION AND AWARD—COMPLIANCE WITH STATUTE.—A statutory arbitration is abortive where the statute is not complied with.
3. ARBITRATION AND AWARD—JURISDICTION.—An action for damages for assault and battery was not within the jurisdiction of a justice of the peace, under Constitution 1874, article 7, § 40, and a justice of the peace had no jurisdiction to appoint arbitrators under a contract for statutory arbitration.
4. ARBITRATION AND AWARD—CLAIM FOR CRIMINAL ASSAULT.—A claim for damages for assault and battery may be arbitrated under Crawford & Moses' Digest, § 415, although the subject-matter of the arbitration constitutes a violation of the criminal laws of the State.
5. ARBITRATION AND AWARD—COMMON LAW AWARD.—An award under abortive statutory arbitration can not be upheld as a common-law award, the parties not having agreed to that method of arbitration.

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

*Humphries & LaMore* and *Oscar E. Ellis,* for appellant.

The court below erred in overruling the demurrer of plaintiff and in holding that the defense of an arbitration and award was a complete defense. The parties tried

to have a statutory arbitration and award under our statute. So intending, appellee must now defend this proceeding as a statutory arbitration and award. It is a statutory arbitration and award or nothing and binds no one. 2 A. & Eng. Enc. (2 ed.) 541. The intention was to have such arbitration and award, but it was not good as a statutory proceeding because it was supervised and controlled by a justice of the peace court which had no jurisdiction. Kirby's Digest, § 4552. There must be jurisdiction. *Ib.*, §§ 278, 289; 36 Ark. 316; Kirby's Digest, chap. 5; 2 A. & E. Enc. (2 ed) 650. The arbitration was void. 10 Ark. 560; 2 A. & E. Enc. (2 ed.) 755; 3 Ark. 324; 1 *Id.* 206. This arbitration can not be upheld as a statutory or common law one, for the reason that it is not a legal and binding contract but void, being contrary to public policy. 63 Ark. 318; Anson on Contracts, 242 and note 1; 7 Am. & Eng. Enc. (2 ed.) 121. The construction of this contract is controlled by 53 Ark. 318, and the agreement is void against public policy and the court erred in not sustaining the demurrer.

*Northcutt & Goodwin* and *C. E. Elmore*, for appellee.

1. There was no error below. There was an arbitration which bound both parties. The provisions of the statute do not repeal the common law, and the arbitration was good and binding without any intervention of any court. 28 Ark. 519; 36 *Id.* 316; 37 *Id.* 348; 44 *Id.* 166; 49 *Id.* 235-7; 68 *Id.* 580.

2. The arbitration is not void for uncertainty as to the subject-matter to be arbitrated. The demurrer admits the facts stated in the second paragraph of the answer..

3. Nor is it void as against public policy.

SMITH, J. The appellant, Talmage Franks, filed in the circuit court of Fulton County a complaint against the appellee, Enoch Battles, in which he alleged that the defendant had, on June 19, 1920, assaulted and wounded

him with a knife, and he prayed judgment for damages in the sum of $1,620. To this complaint an answer was filed denying the commission of an unlawful assault.

The second paragraph of the answer contained the following recitals: That the parties to the controversy had entered into the following agreement:

"AGREEMENT.

"July 12, 1920, this agreement entered into between Enoch Battles, party of the first part, and Talmage and Raymon Franks, party of the second part, as follows: Said party of the first part agrees to submit the evidence of Owlen Carroll and Dewey Phillips to the court and let the court from their testimony say of what charge said party of the first part is guilty, and assess his punishment, if guilty; all other witnesses being barred, except at the discretion of the court. After this has been disposed of, if the party of the second part believes they are entitled to damages from the party of the first part, the court is to select three disinterested men, let them qualify as if they were serving as jurors, call for such testimony as they may desire, let the court be their own counsellor, and whatever may be their decision we agree to abide by the same.

"It is further agreed, that this agreement shall remain in the Bank of Viola until settled.

"Enoch Battles, party of the first part.

"Talmage Franks, party of the second part.

"Raymon Franks, party of the second part.

"Subscribed and sworn to before me, this the 12th day of July, 1920.

"(Seal). "N. J. Baty, Notary Public.

"My commission expires Feb. 7, 1923."

Pursuant to this agreement proceedings were had which are reflected in the following order of the justice of the peace:

"Talmage Franks,

v.

"Enoch Battles.

"On this the 15th day of July, 1920, Talmage Franks and Enoch Battles filed before me a contract for arbitration, whereas a certain difference has arisen and now exists between them, authorizing me to select three disinterested men and let them qualify as if they were serving as jurors, call for such testimony as they see fit; whatever may be their decision, they agree to abide by the same.

"W. W. Campbell, H. C. Risner and G. P. Keith were selected and sworn by the court according to law, after examining the evidence of both parties, returned the following decision:

" 'We, the arbitrators in the above case, have decided that the plaintiff, Talmage Franks, is entitled to no damages against the defendant, Enoch Battles.'

"W. W. Campbell,
"H. C. Risner,
"G. P. Keith.

"Henry Lakey, J. P."

The defendant pleaded this agreement and this order and judgment of the justice of the peace in bar of the suit.

A demurrer to this second paragraph was overruled, as was a motion of plaintiff that the cause be tried upon his complaint and the first paragraph of the answer—the court holding that the second paragraph of the answer recited facts which, if true, constituted a complete defense to the cause of action alleged.

It is quite apparent that the parties contracted for a statutory arbitration of their differences, and that there was an effort to execute that agreement. It is equally obvious that the attempt was abortive, as the statute on the subject was not complied with in several respects. Moreover, the subject to be arbitrated—an action for damages for personal injuries—was not within

the jurisdiction of the justice of the peace. Art. 7, sec. 40, Constitution 1874.

It is first insisted that the subject-matter of the suit could not be arbitrated for the reason that the offense alleged to constitute the cause of action would, if true, also constitute a violation of the criminal laws of the State. But the statute on the subject provides that "all controversies which might be the subject of a suit or action may be submitted to the decision of one or more arbitrators, or to two and their umpire, in the manner provided in this chapter." Sec. 415, C. & M. Digest.

The parties did not undertake to settle the criminal branch of the case. It was expressly left to the court to "assess his punishment, if guilty." In fact, the employment of the language quoted is one of the circumstances in the case which makes it appear, as a matter of law, that the parties contemplated a statutory arbitration through the aid of the justice court, as only a court could punish the misdemeanor.

It is insisted, however, that the award should be upheld as a common-law arbitration, and decisions of this court are cited to the effect that the provisions of the statute for an arbitration and award did not repeal the common law on the subject, and that such awards are good, notwithstanding the provisions of the statute.

It has been said by this court, and by numerous others, that it is the policy of the law to encourage and to uphold settlements of disputes in this manner. But an award can be upheld only as a common-law award, or as a statutory award. It is one or the other. But, for either to be valid, there must be a precedent agreement of the parties to submit to one or to the other. Here the parties, by their written contract, have chosen the statutory method of arbitration. In section 3 of the Articles on Arbitration and Award in 2 R. C. L., page 353, it is said: "But the submission is a matter of contract between the parties, and, therefore, when their minds have met in choosing the statutory method of arbitration, that

method becomes exclusive, and if the submission does not conform to the statute it is not valid as a common-law submission. The principle involved is that the law will never make a contract for the parties, though it will sometimes disregard matters of form in carrying their intentions into effect, as where a bond given pursuant to a statute, if insufficient as a statutory bond, may be upheld as a common-law bond. Subsequent ratification on their part, however, may render an award binding, though it would be otherwise invalid by reason of its noncompliance with the statutory requirements." In a note to the text quoted the case of *Wilkinson* v. *Prichard*, 123 N. W. 964 (145 Iowa 65), is cited. This case is annotated in Ann. Cas. 1912-A, page 1259, where many cases on the subject are collected. See, also, Morse on Arbitration and Award, pages 47, 48.

The award, being abortive, did not constitute a defense, and the judgment of the court below will, therefore, be reversed and the cause remanded with directions to sustain the demurrer to the second paragraph of the answer.

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## DESHA BANK & TRUST COMPANY *v.* DORAN.

Opinion delivered January 24, 1921.

1. HUSBAND AND WIFE—HUSBAND USING WIFE'S PROPERTY.—Where a husband used his wife's property with her knowledge or consent as a basis of credit, she is estopped to assert her title as against her husband's creditors.
2. HUSBAND AND WIFE—GENERAL ASSIGNMENT AS COLLATERAL—EFFECT.—Where a wife with her husband executed on assignment to a bank of an insurance policy on the husband's life payable to her, the assignment reciting that the transfer was intended "as collateral security, as its interest may appear," though the wife intended to secure a particular loan which was subsequently repaid, yet where she did not notify the bank to that effect nor request the return of the policy, and the bank made subsequent advancements to her husband on the security of the collateral, she will be held bound thereby, though such advancements were made without her knowledge.

Appeal from Desha Chancery Court; *E. G. Hammock,* Chancellor; reversed.

*E. E. Hopson* and *Coleman, Robinson & House,* for appellants.

1. Appellee, innocently perhaps, but none the less effectively, permitted her husband to use and deal with her property as his own, and in such manner as to lead creditors to extend him credit and lend him money, and she is estopped to deny her husband's right to so manage her property. 57 Am. St. Rep. 175 and notes; Ann. Cases 1914 C 1059 and note; 74 Cal. 54; 80 Wis. 605; 199 S. W. 380.

2. Doran had the right to assign the policy to the bank. 134 Ark. 554.

*J. A. Rachels,* for appellee.

1. The finding of the chancellor is not clearly against the preponderance of the evidence and must be affirmed. 134 Ark. 454-9; 140 Ark. 366; 71 *Id.* 643; 139 *Id.* 542; 135 *Id.* 205.

2. Under the testimony and circumstances Ed Doran did not have the power to pledge the policy. 68 Ark. 394; 133 *Id.* 224; 23 A. & E. Ann. Cases 894-5.

SMITH, J. This cause was tried in the court below upon an agreed statement of facts, from which it appears that Ed Doran carried a policy of life insurance for $5,000 in favor of his wife, Eva B. Doran, which they assigned to the Desha Bank & Trust Company on December 18, 1914. This assignment reads as follows:

"FOR VALUE RECEIVED,

"We hereby assign and transfer unto Desha Bank & Trust Company of Arkansas City, Arkansas, as collateral security, as its interests may appear, all our right, title and interest in and to policy No. 1459 issued by the Citizens' Life Insurance Company, Anchorage, Kentucky, on the life of Ed Doran and all dividends and benefits thereunder whatsoever, subject to the conditions and

regulations of the company. We do also, for ourselves, our executors and administrators, guarantee the validity and sufficiency of this assignment to the above named assignee, its successors and assigns, and its title to the said policy will forever warrant and defend.

"Witness our hands and seals this ..... day of September, 1914.

"Ed Doran, Insured.
"Eva Doran, Beneficiary."

This assignment was acknowledged before a notary public, and was later approved by the president of the insurance company.

The assignment was made to secure a debt then due the bank by Doran and which was paid within a year. When Doran paid the debt, he advised the president of the bank that he would leave the policy with the bank as general collateral for anticipated future accommodations. Mrs. Doran was not present at that time, and knew nothing of this arrangement, but she allowed the policy, with the assignment thereof, to remain at the bank until the death of her husband about two years later, during which interval he obtained credit from time to time from the bank. Mrs. Doran did not know that her husband was using the policy as collateral, and did not know that the bank was not aware of her attitude, but on the faith of this collateral the bank advanced to her husband the sum of money sued for. The bank sought to hold the policy as collateral—in lieu of which a sum of money equal to the sum sued for was, by consent, deposited by Mrs. Doran with the bank.

The court found for Mrs. Doran, and this appeal is from that decree.

It will be observed that, while Mrs. Doran did not intend that the policy should be held as collateral for any debt of her husband except the debt then due, and did not know that her husband was using the policy and the assignment thereof as a basis for additional credits, the fact remains that she did not thus limit the use of the policy in the assignment which she made. The writing

is a general assignment, and transfers the policy to the bank as collateral security "as its interests may appear." The officers of the bank did not know that the assignment was not intended to be as general as it appeared to be from its face.

Here the husband used the wife's property as a basis of credit. Had this been done with her knowledge or consent, the case would be free from difficulty. Under numerous decisions of this and other courts, she would then be estopped to assert her title as against her husband's creditors. But it is agreed that she did not have this actual knowledge, and the question is, shall that knowledge be imputed to her?

We think the equities of the case require this to be done. The bank must lose its debt, or Mrs. Doran must pay it. One of two innocent persons must suffer. Mrs. Doran made no request for the return of the policy. She must have known that the debt which it secured had matured, and as no fraud is shown in the procurement of the execution of the assignment she is charged with notice that she had executed a writing sufficiently comprehensive to enable her husband to make the use of the policy which he did make. She knew the policy and the assignment were in the hands of the bank, but made no inquiry as to whether her husband had taken up either of them.

Under the circumstances we think the bank was warranted in assuming that Doran was not using the policy as collateral without authority from his wife; and, if this be true, Mrs. Doran is as much bound as if she had consciously permitted her husband to use the policy as collateral.

The decree of the court below will therefore be reversed, and the cause will be remanded with directions to enter a decree against Mrs. Doran for the sum due by her husband at the time of his death, with interest.

GARDNER v. GOSS.

Opinion delivered January 24, 1921.

1. SCHOOLS AND SCHOOL DISTRICTS—ACTS OF DE FACTO DIRECTORS.—The acts of school directors who hold office by virtue of a fraudulent election are valid as to third parties, though performed during the pendency of a contest which afterward resulted in their ouster; they being *de facto* officers.

2. SCHOOLS AND SCHOOL DISTRICTS—DISCHARGE OF SUPERINTENDENT.—Though the discharge of a school superintendent was a breach of his contract of employment, this did not justify him in refusing to surrender possession of the property and affairs of the district to the directors, as his remedy is an action at law for breach of contract.

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

*Mehaffy, Donham & Mehaffy,* for appellants.

1. The court erred in sustaining the demurrer of plaintiffs to the cross-complaint of defendants. The demurrer admits the truth of all its allegations as to conspiracy and fraud. If plaintiffs were guilty of the acts of fraud as admitted by the demurrer, they do not come into equity with clean hands. 1 Pomeroy, Eq. Jur. (4 ed.).

2. The school board had no legal right to discharge Gardner and no cause for his discharge. No notice was given him, and no cause of discharge was assigned. The board was not legally organized. 37 S. W. 277.

3. A board of directors can not dismiss a teacher arbitrarily and without cause. 53 Ark. 471; 45 Pac. 119; 73 *Id.* 954; 25 So. Rep. 669; 35 Cyc. 1094; 39 L. R. A. 510; 40 Pac. 826.

4. Mann and Machin were not even *de facto* officers when Gardner was discharged and Davis employed. 29 Cyc. 1392. The rule which upholds the cases of *de facto* officers is one of public policy, and only those who deal with such officers in good faith are protected. Mecham, Pub. Officers, § 328; Throop on Pub. Officers, § 649. The rule was approved in 133 Ark. 277. The defect in title of Mann and Machin was notorious and well known to

Davis, and they were not even *de facto* officers, and Gardner's discharge was illegal.

*Coleman, Robinson & House,* for appellees.

1. The only question or issue here is whether or not a school board may discharge a teacher employed under written contract before his term of contract expires. Gardner was a mere employee, not a public officer, and no hearing was necessary before his removal. He was discharged for cause, as the evidence shows. The board had the right to discharge him without notice or hearing, if cause existed, and it did. He was a mere employee. R. C. L., "schools," § 69. The appointing power may remove for cause and it is the sole judge. 39 Ark. 24; 24 R. C. L. 618. See, also, 5 Pac. 119.

2. A teacher discharged rightfully or wrongfully must seek his remedy by a suit for damages. 24 R. C. L. 619; 51 L. R. A. (N. S.) 336; 49 *Id.* 62.

3. Mann and Machin were *de facto* officers, and their action valid. 132 Ark. 58; 133 *Id.* 277; 117 Ky. 47; 4 Anno. Cases 671; 22 R. C. L. 317; 118 U. S. 425, § 324; 45 L. R. A. (N. S.) 1101; 24 *Id.* 408. See, also, 38 Ark. 158; 55 *Id.* 81; 52 *Id.* 356; 25 *Id.* 336.

Gardner was discharged by vote of a majority of the qualified members of the board. 109 Ark. 129.

SMITH, J. In May, 1919, appellant Gardner was employed as superintendent by the School Board of North Little Rock for the term ending July 1, 1921. On May 15, 1920, a school election was held, and Machin and Moore were given certificates of election as directors. The election was contested by Ryan and Bennett, and the contest was decided in the county court August 16, 1920, in favor of the contestants. In September, 1920, Moore and Machin were removed as school directors by order of the circuit court.

Machin and Moore took the usual oath of office, and entered upon the discharge of the duties of school directors, and at a regular meeting of the board on June 21, 1920, attended by them and the other four directors, a

resolution was introduced and passed discharging Gardner as superintendent. Three of the old members of the board, together with Moore and Machin, voted to discharge Gardner, and shortly after his discharge Davis was elected to succeed him. Gardner refused to recognize the appointment of Davis, and announced his intention of opening and running the public schools. Gardner had a contract for a year at a salary of $3,360, payable in amounts of $280 at the end of each calendar month.

Gardner had the support of an organization known as the North Little Rock School Improvement League, which actively assisted him in asserting his right and authority to conduct the schools.

The cause was heard on an agreed statement of facts, from which statement the facts recited above are taken. The court entered a decree enjoining Gardner and the officers and members of the School Improvement League from interfering with Davis in the opening and operation of the schools, and this appeal is from that decree.

It is very earnestly insisted that the school board had no right to discharge Gardner, for the reason that Moore and Machin were in office by virtue of a fraudulent election, and that without their votes the necessary majority could not have been obtained. It is further insisted that the discharge of Gardner was void, because he was discharged without notice and without cause. And for all these reasons it is insisted that a court of equity should not lend its aid to accomplishing and perpetuating a wrongful act.

Counsel for appellant cite the case of *Thompson* v. *Gibbs*, 37 S. W. 277, in which the Supreme Court of Tennessee held that, where a teacher, who had been wrongfully dismissed, continued in possession of school property, a court of equity would not aid the directors in dispossessing him. That decision, however, was controlled by a statute of that State which limited the right of school directors to summarily dismiss a teacher to certain causes specified in the statute. We have no such statute. So

that, while the directors may not have been justified in discharging Gardner, they had the power to do so.

It is true Moore and Machin participated in the action, and the resolution to that effect was adopted by their votes; and it is also true that at the time the resolution was adopted the contest was pending which terminated in their ouster from office. But they were *de facto* officers, and were exercising the functions of directors, and their acts as such were valid as to all third parties. This question was thoroughly considered by this court in the recent cases of *McClendon* v. *State,* 129 Ark. 286; *Faucette* v. *Gerlach,* 132 Ark. 58; *Inland Construction Co.* v. *Rector,* 133 Ark. 277.

If Gardner was wrongfully discharged—a fact which may be conceded for the purposes of the present case—he has his remedy at law for the breach of the contract of employment. But the right to recover damages for the broken contract—if that right exists—does not justify him in refusing to surrender possession of the property and affairs of the school district to its legal custodians, the directors of the district, and the decree of the court enjoining interference on his part will be affirmed. It is so ordered.

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HARRINGTON *v.* WRIGHT.

**Opinion delivered January 24, 1921.**

HIGHWAYS—ASSESSMENT OF PERSONAL PROPERTY.—Acts 1920, No. 237, providing for assessment of personal property in a road improvement district is unconstitutional, as personal property can not be specially benefited by a local improvement.

Appeal from Benton Circuit Court; *W. A. Dickson,* Judge; reversed.

*Duty, Duty & Nance,* for appellants.

Act 237, Acts 1920, assessing and levying an asessment of benefits on personal property in the district, is unconstitutional and void. The right to levy a special tax for local improvements can not be justified on the

theory that the property, real estate, receives special benefits. 86 Ark. 1. The only time this has ever been attempted was in the Newport Levy District case where the 1917 act was declared invalid in the Snetzer case, Such acts have been held valid in Louisiana, and possibly Indiana, to maintain levees (39 La. 455; 52 *Id.* 1392), but personal property can not be specially benefited by a local improvement. 86 Ark. 1; 129 *Id.* 542; 119 *Id.* 188; Page & Jones on Assessments, §§ 2, 4, 11; Hamilton on Special Assessments, § 275; 199 Ark. 258.

*Lee Seamster,* for appellee.

1. This case differs from the Snetzer case in 129 Ark. 542: (1) There is a legislative finding that personal property in the district is specially benefited, and (2) an annual assessment and levy is provided for. 90 S. E. 441; Anno. Cases 1917 A 1046. Act 237 is presumed to be valid (6 R. C. L. 97-8), and the courts should so hold, unless the act is clearly unconstiutional. Anno. Cases 1916 C 734; *Id.* 1917 C 274; *Ib.* 1918 B 627; *Ib.* 1916 E 522; *Id.* 1918 E 68, 574; 11 Ark. 481; 32 *Id.* 131; 39 *Id.* 353.

2. The act is not in conflict with any provision of our Constitution, and the legislative determination is conclusive. 85 Ark. 112; 1 Page & Jones on Tax by Assessment 876. See, also, 39 La. Ann. 455. These special assessments are not "taxation" within the meaning of the Constitution. 46 L. R. A. 193; 11 *Id.* 835; 27 La. 273; 13 R. C. L. 159; 111 U. S. 701; Elliott on Roads and Streets, p. 393, and notes. It is for the Legislature to determine what property shall be assessed and how the apportionment shall be made. 90 S. E. 441.

HUMPHREYS, J. This suit was instituted by appellee, an owner of real estate in Road Improvement District No. 2, in Benton County, Arkansas, against appellants, commissioners of said road improvement district, to compel them to assess benefits against, and levy an assessment on, all personal property within said district, for

the purpose of constructing roads therein and paying for same. Act No. 237 of the Acts of the General Assembly of 1920 was made the basis of the action.

Appellants resisted the petition for mandamus to compel them to assess benefits against, and levy an assessment on, the personal property in the district, on the ground that the act, under which the proceeding was had, is unconstitutional and void.

Section 1 of the act in question declared that all personal property within the district was benefited and received advantages in the use thereof by reason of the improvement of the road, or roads, therein, during the period from 1920 to 1939, inclusive. The remainder of the act provided the *modus operandi* for assessing annual benefits, levying them upon said property and for the collection and expenditure thereof.

The court declared the act constitutional and adjudged the issuance of a writ of mandamus compelling appellants to carry out the provisions of the act. From that judgment an appeal has been duly prosecuted to this court.

The sole question presented by the appeal is whether it is permissive under the Constitution of this State for the Legislature to subject personal property to taxation for local improvements. The only theory upon which a special tax may be levied against property is that special benefits accrue to it on account of the local improvement. No special benefit can result to personal property on account of an improvement made in a district wherein situate. Its value can not be enhanced by reason of the construction of good roads. This court announced in the recent case of *Snetzer* v. *Gregg,* 129 Ark. 542, that "personal property can not be taxed, for the reason that it can not be specially benefited by a local improvement. The owner may be benefited in the enjoyment of the use of his personal property in that locality, but the property itself derives no benefit. * * * Assessments for local benefits must be confined to real estate receiving peculiar benefits from the improvement to be constructed and

maintained, and must be limited to those benefits, and personal property can not be taxed for that purpose." It is contended by appellee that the instant case is unlike the case of *Snetzer* v. *Gregg,* in that the act in question differs from the act involved in the Snetzer case in two respects, first, that there is a legislative finding that the personal property in the district is specially benefited; second, that an annual assessment and levy of benefits is provided for. We can not agree with learned counsel for appellee in this contention. A declaration by the Legislature that a special benefit accrues to property, which in the nature of things can not be benefited, can not enhance its value or otherwise benefit it. Neither can frequent assessments of benefits add value or benefit to property to which benefits can not attach on account of the assessments.

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

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MORRIS v. COBB.

Opinion delivered January 24, 1921.

1. EQUITY — CROSS-BILL GIVING JURISDICTION.—When a defendant files a cross-bill, setting up equitable grounds for relief, to a complaint in a suit in equity which should have been brought at law, the case should proceed in equity.
2. DEEDS—BURDEN OF PROVING FORGERY.—A deed purporting to have been executed and acknowledged by plaintiff can be impeached by him only by clear, cogent and convincing evidence.

Appeal from Lonoke Chancery Court; *J. E. Martineau,* Chancellor; affirmed.

*J. B. Reed* and *Trimble & Trimble,* for appellant.

1. The court had no jurisdiction, as the issues were purely a matter of law, and it was error to refuse to transfer to the law court. Kirby's Digest, § 5770; 71 Ark. 548; 70 *Id.* 432. Equity has no jurisdiction in suit for partition of land adversely held.

2. Under the evidence appellant has shown that the conveyance purported to be signed by appellant was a forgery.

*James B. Gray* and *Morris, Morris & Williams,* for appellees.

1. Equity has jurisdiction of cases for laches, as laches can not be pleaded in a court of law. 67 Ark. 230, 321; 60 *Id.* 50; 88 *Id.* 395; 55 *Id.* 85; 95 *Id.* 178; 101 *Id.* 230. See, also, 146 Ind. 243; 1 Am. St. Rep. 785; 53 Fed. 415.

2. Appellant is barred by limitations. Cases cited *supra;* 25 Cyc. 1186-1190. A conveyance by a cotenant of the entire estate gives color of title, and if possession is taken and the grantee claims title to the whole, it is an ouster, and the possession is adverse. 102 Ark. 611; 77 *Id.* 201; 57 *Id.* 97; 1 Am. & E. Enc. Law (2 ed.) 806.

3. Equity was vested with jurisdiction by appellant's cross-bill and answer. 71 Ark. 327; 31 *Id.* 345; 37 *Id.* 286; 77 *Id.* 570; 71 *Id.* 327; 100 *Id.* 28; 46 *Id.* 96; 48 *Id.* 312; 99 *Id.* 438; 92 *Id.* 15; 87 *Id.* 206. The case is fully developed, and was below, and the testimony shows that appellant is entitled to no relief. 18 Ark. 469; 96 *Id.* 320. S. C. Cobb was an innocent purchaser for value and the chancellor's findings should be sustained. All the exhibits of handwriting were inadmissible in evidence because not relevant to the case. 17 Cyc. 164; 32 Ark. 337. The testimony is not clear and convincing, and the burden was on appellant. 96 Ark. 564; 117 *Id.* 326; 96 *Id.* 251. The testimony shows that appellant did sign the deed, and if he did not he had constructive notice of it and is barred by limitation and laches.

HUMPHREYS, J. Appellees instituted suit against appellant in the Lonoke Chancery Court to quiet the title in appellee S. C. Cobb to the north half, northwest quarter, and the northwest quarter, northeast quarter, section 29, township 1 south, range 9 west, in said county, and to enjoin appellant from interfering with his possession.

The petition alleged ownership of said real estate in appellee S. C. Cobb by purchase from appellee W. N. Morris, who had theretofore purchased it from the heirs of W. H. Hollingsworth, deceased, one of whom was appellant.

Appellant answered, admitting ownership by inheritance of an undivided interest in said land from W. H. Hollingsworth, but denying the sale of same to appellee W. N. Morris, and, by way of cross-bill, charging that the deed, purporting to convey his undivided interest therein to said appellee, was a forgery; that he resided upon said land, claiming an undivided interest therein as cotenant; that said appellee had appropriated appellant's interest in the rents and profits derived from the land until the year 1914, at which time appellant took up his residence thereon. The prayer of the cross-bill was for a cancellation of the deed charged to be forged, a partition of the land and an accounting of the rents and profits. The cause was then transferred to the Lonoke Circuit Court on motion of appellant. After the transfer was effected, appellee filed a reply to the cross-bill of appellant, denying all material allegations therein, and, by way of defense thereto, pleading limitations and laches against appellant. The cause was then transferred to the Lonoke Chancery Court over the objection and exception of appellant. Appellant moved for a retransfer of the case in the Lonoke Chancery Court, which motion was overruled by the court over the objection and exception of said appellant.

The cause was then submitted for hearing upon the pleadings, evidence and exhibits, which resulted in a decree quieting and confirming the title to said real estate in appellee S. C. Cobb, as against appellant, and for writ of possession, from which decree an appeal was taken and the cause brought to this court for trial *de novo*.

The record discloses that W. H. Hollingsworth died intestate, on November 15, 1898, seized and possessed of said real estate, leaving appellant and five others his sole

surviving heirs; that said land was conveyed to appellee W. N. Morris by said heirs, for a consideration of $1,000, on the 4th day of April, 1899, by warranty deed, duly executed and acknowledged, and duly recorded in Lonoke County on the 5th day of July, 1899. The grantee in the deed died a short time after the institution of this suit and did not testify concerning the deed. W. C. Templeman, the notary public before whom the deed was acknowledged, had died prior to the institution of the suit. Appellant testified that the signature purporting to be his, appearing upon the original deed, was a forgery; that he did not sign it and had no knowledge of it until the year 1914. Appellant further testified that at the time of the death of W. H. Hollingsworth appellee W. N. Morris took possession of the real estate for the purpose of paying the indebtedness against the estate, promising that, when paid, he would surrender appellant's interest therein to him; that, on account of the kinship existing between him and said appellee and the fact that he resided in appellee's home as a member of the family and reposed confidence in him, he relied upon his promise to return the land to him until the year 1914, at which time he discovered that appellee claimed the land adversely under the warranty deed of date April 4, 1899; that, immediately upon the discovery of this fact, he took counsel, and, under advice of his attorney, moved upon the land and had been residing thereon for more than six years at the time this suit was instituted; that, at the time he consulted his attorney, he claimed that his signature to the disputed deed was a forgery. George Dancy and Jim Bell testified that they heard appellant demand his lands from W. N. Morris several years before they gave their testimony, and that W. N. Morris replied that when the taxes were paid he would look up the notes and give appellant his part of the lands. To identify appellant's true signature, he introduced two letters, which he claimed were written and signed by him to the heirs in reference to the purchase of the real estate, and a time-book, which he claimed was partly written in his

own handwriting, and another book in which he claimed entries were made by him on the several sheets therein in the years 1895, 1896, 1897, 1898, 1899, 1900, 1901 and 1905. Four expert witnesses on handwriting testified that the purported signature of appellant on the deed of date April 4, 1899, was not, in their opinion, his signature, based upon a comparison with the writing contained in the books, papers, etc., aforesaid.

The estate of W. H. Hollingsworth was administered by J. A. Venable, an uncle of appellant. He testified that the estate was indebted in the sum of $15,000, and that W. N. Morris offered to pay the indebtedness and give each heir $150 for his interest in the estate; that all the heirs, including Jas. T. Morris, agreed to accept the proposition made by W. N. Morris; that he was very familiar with the handwriting of Jas. T. Morris, and, in his opinion, the signature to the deed made pursuant to the agreement was the true signature of appellant; that the first time he ever heard of appellant denying the execution of the deed was four or five years ago. Mrs. Dee Morris, stepmother to appellant, testified that he told her, soon after he inherited the land, that he had sold it. The evidence reflects that, after obtaining and recording the deed of date April 4, 1899, appellee W. N. Morris retained exclusive possession of the land until 1914, at which time appellant moved into a house on it and set up a claim to his undivided interest in the lands; that, during the entire time and until the death of said appellee, W. N. Morris paid the taxes upon the land. Appellees introduced a note, purporting to have been executed at Chickasha, Indian Territory, by appellant, in 1899, and a written appearance in a suit brought by Amelia Harris and others in the Pulaski Chancery Court against J. A. Venable, as administrator of the estate of W. H. Hollingsworth, deceased, and his heirs, including Jas. T. Morris. Appellant denied signing either the note or the written appearance. Three expert witnesses testified in behalf of appellees that, in their opinion, appellant signed the disputed deed, basing their testimony on a

comparison of the signature on the deed with the note and written appearance.

The record contains much evidence responsive to the issues of limitations and laches. Some of this evidence tended to show that appellant possessed a weak mind, and, on account of an injury received in the year 1914, became irresponsible until an operation was performed in 1918, as an excuse for not asserting his rights sooner than he did. We deem it unnecessary, under our view of the case, to set out any of this testimony in detail.

It is first insisted by appellant that the chancery court rendering the decree had no jurisdiction of the cause of action; that the issues involved were exclusively within the jurisdiction of a court of law. We can not agree with learned counsel for appellant in this contention. It is unnecessary to determine whether the original bill stated a cause of action for equitable relief, because appellant himself filed a cross-bill in the instant case stating an equitable cause of action. He alleged that the purported deed, conveying his interest in said real estate to appellee W. N. Morris, was a forgery, and prayed that it be canceled. It was said by this court in the case of *Conger* v. *Cotton,* 37 Ark. 286 (syllabus 3), that "when a defendant files a cross-bill, setting up equitable grounds for relief, to a complaint in equity which should have been brought at law, the case should proceed in equity." This rule has been consistently adhered to, as will be seen by reference to *Radcliffe* v. *Scruggs,* 46 Ark. 96; *Crease* v. *Lawrence,* 48 Ark. 321; *Polack* v. *Steinke,* 100 Ark. 28.

The next and last contention made by appellant for reversal of the decree is that it was established by the weight of the evidence that the disputed deed was a forgery. In addition to his own testimony on this point, appellant places much reliance upon the fact that the specimens of his handwriting contained in the books and papers introduced by him show, by comparison, that his signature to the deed was a forgery, and the fact that four experts gave it as their opinion that the signature

to the deed was a forgery, when compared with his handwriting in said books and papers. The genuineness of his handwriting in the books and papers introduced was not established by any evidence other than his own. To allow one to introduce and use as a basis for establishing his true signature one's own creations would open the door for fraud. Even if permissible to introduce the books and papers for the purpose of identifying appellant's true signature by comparison—a question we do not decide—the genuineness of the writing in the papers and books was not sufficiently established to be used as such a basis. The same rule would exclude a consideration of the note and entry of appearance introduced by appellees to be used as a basis for the purpose of establishing the true signature of appellant, as well as the opinions of the expert witnesses introduced by appellee. On the issue of forgery, we have, then, the evidence of appellant testifying that he did not sign the deed, as against the deed itself, the testimony of Mrs. Dee Morris to the effect that appellant told her he had sold the land, of J. A. Venable, appellant's uncle, to the effect that he agreed with all the other heirs to sell the land to appellee W. N. Morris, and to the effect that, in his judgment, the signature to the deed was appellant's signature, and the circumstances that W. N. Morris held exclusive possession of the land from the 4th of April, 1899, until the year 1914, and has paid the taxes continuously upon the land from the date of the deed aforesaid until the date of his death, a short time after the institution of this suit. Again, appellant is in the attitude of impeaching the deed purported to have been executed and acknowledged by him. He could only do this by clear, cogent and convincing evidence. *Bell* v. *Castleberry,* 96 Ark. 564; *Polk* v. *Brown,* 117 Ark. 326. His evidence does not meet this requirement.

No error appearing, the decree is affirmed.

ILLINOIS BANKERS' LIFE ASSOCIATION v. RHODES.

Opinion delivered January 31, 1921.

1. INSURANCE—SURRENDER OF POLICY—EFFECT.—A soliciting agent of an insurance company having no authority to make contracts for the company, but authorized to make deliveries of an insurance policy, has authority to permit insured to examine the policy before delivery; and where the agent consented to the surrender of the policy and delivered to insured the premium note, the contract of insurance was terminated.
2. INSURANCE — RIGHT OF BENEFICIARY TO OBJECT TO SURRENDER.—One who is named as beneficiary in an insurance policy which gave the insured the absolute right to change the beneficiary has no vested interest in the policy which would limit the right of insured to surrender the policy.
3. INSURANCE—RIGHT TO SURRENDER POLICY.—An insured having the right to surrender a policy of life insurance may surrender it at any time by agreement with the agent authorized to deliver it; the consent of the company not being essential.

Appeal from Clay Circuit Court, Eastern District; *R. H. Dudley,* Judge; reversed.

*T. E. Helm* and *W. E. Spence,* for appellant.

1. There was no evidence to sustain the verdict. It is clearly shown that the policies were rejected or voluntarily surrendered and that the contract was abandoned and rescinded.

2. Whether or not the right of cancellation is reserved in a policy, there may be an immediate cancellation, abandonment or rescission of the contract by agreement of the insurer and insured, either by parol or in writing. 112 Ark. 582; 55 S. E. 11; 42 S. W. 180; 94 Pa. St. 394; 81 Tenn. 340; 109 Ark. 17; Cooley's Briefs on Ins., 2833. 89 N. E. 612, 49 Ind. 411, is conclusive of this case.

3. The assured had the right under the policy to change the beneficiary, as he had no vested right. 19 Cal. App. 191; 52 N. Y. Supp. 766. A policy may be surrendered by mutual agreement so as to terminate the rights and obligations of the parties. 77 N. E. 951; 178 U. S. 345. Stough voluntarily surrendered his policy,

as he had a right to do, and there was no liability. The policy and the premium note constituted the contract and it was rescinded by mutual agreement. 39 Am. Rep. 792; 12 S. W. 155. The beneficiary is estopped by the abandonment and rescission. 109 Ark. 17.

4. The policy was issued on the life of Isaac C. Ward, and he had the right to change the beneficiary, and the beneficiary had no vested right in it and could not prevent the surrender or abandonment. 1 Bacon on Life & Acc. Ins., 361, 364; 36 Pac. 113; 89 N. E. 612; 52 N. Y. Supp. 766; 19 Col. App. 191.

5. It was error for the court to refuse to permit appellant to show that Magee, the State agent, never remitted the part of the premium received to the company and that the money was replaced or credited back to Wright, the local agent.

6. The court erred in its instructions. It was within the power of the agent and Ward to abandon or rescind the contract. 81 Tenn. 340; 68 So. Rep. 871; 89 N. E. 612. There was no evidence to sustain the verdict, and the cause should be reversed and dismissed.

*L. Hunter* and *S. R. Simpson,* for appellee.

1. The case was properly decided by the jury, and should be affirmed unless the evidence shows there was a mutual agreement between Ward and some one representing the company to rescind and cancel the policy; that was the only issue, and there is no error in the instructions, and the verdict is conclusive. 25 Cyc. 784; 73 S. W. 978; 65 Ark. 581; 122 *Id.* 58; 94 *Id.* 578.

2. There was no abandonment of the contract. 25 Cyc. 785. Delivery of the policy completed the contract and binds the company in the absence of a mutual agreement to abandon or cancel. 130 Ark. 387; 97 *Id.* 229; 65 *Id.* 581.

3. Penalty and attorneys' fees were properly allowed. 98 Ark. 132; 100 *Id.* 10; 102 *Id.* 675; 104 *Id.* 120.

McCULLOCH, C. J. This is an action instituted by appellee on a policy of insurance written by appellant on the life of Isaac C. Ward, payable, in the event of his death, to appellee who was his wife. The material facts in the case are undisputed; and, if appellee is entitled to recover, the alleged errors of the court in its instructions and in its ruling on the admissibility of evidence are unimportant.

Appellant is a foreign corporation engaged in the life insurance business, and J. D. Wright was its local soliciting agent in Clay County, Arkansas. On July 26, 1918, Isaac C. Ward gave his written application to Wright for a policy in the sum of $1,500, and gave his note to Wright for a sum sufficient to cover the first semi-annual premium. Wright forwarded the application to appellant, and a policy was issued, dated September 3, 1918, and was forwarded to Wright to deliver to Ward on the payment of the premium. Wright delivered the policy to Ward, the exact date of the delivery not being shown in the evidence, but on October 10, 1918, Ward returned the policy to Wright by mail, with a letter to Wright stating, in substance, that the policy was not satisfactory to him and that he was returning it. His reasons for refusing to keep the policy were set forth at length in the letter. On October 14, 1918, Wright replied to the letter urging Ward to accept the policy and giving reasons why he thought that Ward was making a mistake in deciding to drop it. In the meantime Wright had placed the policy in the hands of the cashier of a bank where he had left Ward's note for collection. Wright also forwarded to the company at some time during these transactions, the particular time not being shown in the evidence, a sum sufficient to pay the company's part of the first semi-annual premium.

Ward wrote to Wright again on October 20, 1918, reiterating his determination not to take the policy. In that letter he made this statement: "Your insurance is not what I want and not what I taken it for and have

made other arrangements. And the note I gave you is no good and no other note like it. But, Joe, I don't want you to be out your money for nothing, so just to be fair with you, I am willing to pay you what you have actually been out if it is no more than six or seven dollars." Ward wrote to Wright again under date of November 17, calling attention to the fact that he had not received a reply to his last letter and stating that he was willing to pay Wright $10 if he was out that much in the transaction, but that he would not pay the note as he felt certain that the policy did not afford satisfactory insurance. Wright finally accepted the offer and directed the cashier of the bank to surrender the note to Ward on the payment of ten dollars. Ward paid that sum to the cashier of the bank and received his note. This occurred on November 29, 1918, and on December 3, 1918, Wright, on being informed that the payment had been made, wrote to Ward acknowledging receipt of the payment, but urging Ward not to drop the policy. His letter contained this sentence, "Now if you want to drop this I feel that I have done all I know to do." This appears to have been the last communication between the two parties. At least nothing else is shown by the proof. It does not appear that the policy was returned to the company, nor that the company was advised of Ward's refusal to keep the policy, but it was never returned to Ward.

Ward died on January 19, 1919. After Ward's death Wright, at the request of appellee, communicated to the cashier of the bank appellee's request that the cashier write to the company for blanks to make proof of death. On April 15, 1919, the president of the appellant company, without notice of the fact that Ward had not kept the policy, sent out a formal notice by mail directed to Ward, calling attention to the fact that the quarterly call for assessments would be due the next month. It is shown that this was a circular letter which was sent in all instances of advance notice to the assured of the

maturity of premiums. According to the undisputed evidence, Ward did everything in his power to signify his refusal to accept the policy and to abandon it. He returned it to Wright, who was the agent of the company for the purpose of making the delivery, and he steadily refused to accept the policy and finally consummated the agreement with Wright to pay $10 as reimbursement to Wright for the amount he had expended, and to receive his note back and treat the policy as canceled or "dropped" as he expressed it.

Wright was the soliciting agent, and it does not appear that he was authorized to make contracts for appellant, but the policy was sent to him with authority to make delivery thereon on payment of the premium, and this clothed him with all things necessary in connection with the delivery of the policy. It was in fact handed over to Ward, but later returned to Wright with the statement that it was not satisfactory and would not be accepted. This was an abandonment of the policy and a refusal to treat it as having been delivered, and was tantamount to a refusal in the first instance to accept the policy. Wright's authority to deliver the policy included the power to adopt the method of delivery and to give Ward an opportunity to examine it, and the effect of his allowing Ward to return the policy was the same as if he had merely handed it to him for the purpose of examination and had allowed him to return it when found to be unsatisfactory. The fact that Wright was not a general agent of the company with authority to make contracts is not material, for the reason that, as before stated, the return of the policy with Wright's consent made it the same as if the policy had never been delivered to Ward. The policy, in express terms, gave the assured the right to change the beneficiary at will, and for that reason appellee as the specified beneficiary had no vested right or interest in the policy limiting the right of the assured to surrender or abandon it, even if it had been finally accepted.

Ward was not bound to keep the policy. His sole obligation was to pay the premium and he had the right to abandon and surrender the policy whenever he saw fit to do so. This was completely done by the surrender of the custody of the policy and his agreement with Wright that his note was to be surrendered on the payment of $10 and that the policy should be treated as canceled. The consent of the company was not essential, for, as before stated, it had no right to insist on Ward keeping the policy. Its part of the premium had been paid, it is true, but that was not paid by Ward. It was paid by Wright, and Ward reimbursed Wright on the express agreement that his note was to be surrendered and the policy canceled.

The case of the *Equitable Life Insurance Society* v. *Stough,* 45 Ind. App. 411, is precisely like the present case as to the facts, and the court reached the conclusion, as we do in this case, that the policy was not in force at the time of the death of the assured, and that there was no liability. The only difference in the facts in that case was that there was a fixed time specified within which the policy could be delivered, and it was to be returned to the company if not delivered within that time. It does not appear that there was any such rule in the present case, but we do not attach any importance to that difference in the facts. In that case there was a note given for the premium, and the agent paid over to the insurance company its portion of the first premium, but thereafter, by agreement between the assured and the agent, the note was surrendered and the policy canceled.

We are of the opinion that the assured completely abandoned his policy and for a consideration canceled his obligation for the premium note and with it the policy itself, and that there was no liability, even though the company had received from its own agent the portion of the premium to which it was entitled under the contract of the agent. The facts being undisputed, it is unneces-

sary to remand the cause for further proceedings. The judgment will, therefore, be reversed and the cause dismissed.

WOOD and HART, JJ., dissent.

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SPRINGFIELD BUSINESS COLLEGE *v.* STEPHENS.

Opinion delivered January 31, 1921.

1. APPEAL AND ERROR—DEFECTIVE TRANSCRIPT.—A transcript on appeal containing copies of the pleadings, the proceedings before the justice of the peace, the evidence, instructions and verdict, motion for new trial and order overruling same, the trial judge's certificate stating that "the plaintiff presents this as its bill of exceptions," etc., and the clerk's certificate stating that the foregoing pages "contain a true and complete transcript of the record and proceedings," etc., *held* that the condition of the record was too uncertain for the court to determine what the bill of exceptions contained.
2. APPEAL AND ERROR—DISMISSAL.—Where the record on appeal does not contain the judgment properly certified by the clerk, the appeal will be dismissed.

Appeal from Clay Circuit Court, Western District; *R. H. Dudley,* Judge; affirmed.

*C. T. Bloodworth,* for appellant.

1. In view of the undisputed facts as disclosed by the evidence, the verdict is contrary to the law and the evidence.

2. The court erred in admitting Willam Stephens' testimony to go to the jury, and the verdict is contrary to law. 28 Ark. 550.

3. The instructions are clearly error in submitting undisputed facts to a jury. 69 Ark. 489; 67 *Id.* 147.

4. Taylor was the agent and president of the college corporation, and his contracts bound the Springfield Busniess College. The instructions are in direct conflict with the undisputed eveidence.

*F. G. Taylor,* for appeellees.

There is no proper bill of exceptions in the record. 84 Ark. 342; 80 *Id.* 410. If there were, there is no merit in the appeal. Every question raised has been settled in the former decision in this case. 134 Ark. 311. Appellants, having received the machine, are liable for it. 48 Ark. 188; 92 *Id.* 335; 17 Cyc. 409 and note 80. The evidence overwhelmingly sustains the verdict.

McCULLOCH, C. J. This action was commenced by appellant before a justice of the peace of Clay County, and was tried there on the right of action asserted by appellant and a counterclaim of appellee. On appeal to the circuit court it was tried anew, and judgment was in favor of appellee.

The errors complained of are such as must be shown in a bill of exceptions. The record is in substantially the same condition as was the record in the case of *Berger* v. *Houghton,* 84 Ark. 342, where we decided that the condition of the record was too uncertain for us to determine what the bill of exceptions contained, and that the judgment must be affirmed on that account. The transcript begins with copies of the pleadings and proceedings before the justice of the peace, including the note sued on, and then follows what purports to be the evidence adduced in the circuit court, the instructions, verdict, motion for new trial and order overruling same and the certificate of the trial judge stating that the plaintiff "presents this as its bill of exceptions herein and prays that the same be filed and approved, and the court, after examination, doth approve said bill of exceptions and doth order that the same shall be filed by the clerk and made a part of the record." Then follows the certificate of the clerk that "the foregoing thirty-three pages of typewriting contain a true and complete transcript of the record and proceedings, etc."

We said this in the case just cited: "We can not presume that the judgment of the court and other record entries which are preceded by the other papers recited

above, were included in the bill of exceptions, as those proceedings find no proper place in a bill of exceptions."

It is impossible for us to determine from the certificate of the trial judge where the bill of exceptions begins or what it contains, for, if we assume that all of the transcript precedes the certificate, then there is no judgment properly certified by the clerk and a dismissal of the appeal would necessarily have to be entered. *London* v. *Hutchens,* 80 Ark. 410. We assume, however, that the judgment entry is not a part of the bill of exceptions but a part of the transcript certified by the clerk, and, that being true, there is nothing in the transcript following the copy of the judgment entry which would disclose the errors of the court complained of.

Judgment affirmed.

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## BUSINESS MEN'S ACCIDENT ASSOCIATION OF AMERICA *v.* GREEN.

Opinion delivered January 31, 1921.

1. DESCENT AND DISTRIBUTION — RIGHT OF SOLE HEIR TO COLLECT PROPERTY WITHOUT ADMINISTRATION.—Under Crawford & Moses' Digest, § 1, authorizing action by adult heirs to collect the ancestor's property without administration in certain cases, a complaint by the sole heir of a decedent must allege, either that the creditors consented, or that all of decedent's debts have been paid, or that decedent was under no legal liability, either matured or incipient, to any person.
2. DESCENT AND DISTRIBUTION—RIGHT OF SOLE HEIR TO SUE.—To authorize a suit by a sole heir to collect a claim due decedent under the above statute, it is not necessary that the probate court shall have previously adjudicated that there were no unpaid debts; the circuit court having a right to determine that fact itself.

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

*Solon T. Gilmore* and *Prickett, Pipkin & Mills,* for appellant.

1. The court erred in sustaining the demurrer to the complaint. The probate court has exclusive jurisdiction in matters of estate of decedents. Const. 1874, art. 7, § 34; Kirby's Digest, § 56, chap 1.

2. No other court has power to administer the estate or pass on the rights of creditors and distributees, and the court erred in rendering judgment, as the complaint did not state a cause of action. 47 Ark. 222; 51 Id. 361-6; 48 *Id.* 544; 40 *Id.* 433.

3. Our statute requires plaintiff to bring suit either with the consent of the creditors or allege there are no creditors. No allegation of either of these conditions is shown or alleged. Kirby's Digest, chap. 1, § 15.

4. Under our Constitution it is essential that there should have been a binding order or adjudication of the probate court that the creditors consented, had been paid or that no creditors existed, and that plaintiff is the sole heir or distributee of Jesse J. Green, deceased. Const., art. 7, § 34; Kirby's Digest, chap. 1, § 56; 47 Ark. 222; 51 *Id.* 366; 48 *Id.* 544; 40 *Id.* 433.

5. Plaintiff must bring himself clearly within all provisions necessary to authorize him to maintain the action. 31 Cyc. 19; 175 Ind. 98; 262 Mo. 25; 19 Cal. 551; 80 Ky. 69; 77 Me. 490; 6 Ind. App. 80. It was error to overrule the demurrer.

McCULLOCH, C. J. Appellant issued a policy to Jesse J. Green, insuring him against accident and against loss of time occasioned by sickness. Liability accrued on account of "loss of time occasioned by sickness" in the sum of $645.71, and appellant paid to Green the sum of $100 on this liability. Green died, and this action was instituted by appellee, the father of said decedent, to recover the balance due under the policy, and the complaint contains the following paragraph:

"Plaintiff states that the said Jesse J. Green was the son of plaintiff, was unmarried and died intestate, and that plaintiff is his sole heir at law and next of kin; that, under the terms and provisions of the policy or

certificate hereinabove mentioned, there is due and owing the estate of said Jesse J. Green, and to plaintiff as the sole heir of said estate, the sum of $645.71, of which amount the defendant has paid the sum of $100, leaving a balance due thereon of $545.71, with interest thereon from the 1st day of June, 1919, until paid."

There was a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action and also that appellee had no right to sue on the policy. The court overruled the demurrer and, appellant declining to plead further, the court rendered judgment in favor of appellee. We have no briefs in favor of appellee, but he doubtless claims the right to sue under the following statute:

"When all the heirs of any deceased intestate and all persons interested as distributees in the estate of such intestate are of full age, it shall be lawful for them to sue for, recover and collect all demands and property left by the intestate, and to manage, control and dispose of such estate without any administration being had thereon in all cases where the creditors of such estate consent or agree for them to do so, or where they have paid or satisfied all valid debts and demands against such intestate, or where such intestate was, at the time of his death, under no legal liability, either matured or incipient, to any person; and in every such case after they have taken such control and management of the estate no letter of administration shall be granted thereon, or, if granted, the same shall, on their application, be revoked." Crawford & Moses' Digest, § 1.

The allegations of the complaint are not, however, sufficient to bring appellee within the terms of this statute, in that it is not alleged that the creditors of the estate consent or agree for appellee to maintain the action, or that appellee has "paid or satisfied all valid debts and demands against such intestate, or where such intestate was, at the time of his death, under no legal liability, either matured or incipient, to any person."

This omission is fatal to appellee's right to maintain the suit, and the demurrer should therefore have been sustained. *Chisholm* v. *Crye,* 83 Ark. 495.

It is contended further that the statute quoted above is not applicable, unless there has been an adjudication by the probate court to the effect that the debts have been paid, or that there were no debts of the estate. It is argued that any other interpretation of the statute would constitute an invasion of the exclusive jurisdiction of probate courts. We can not agree with this contention, for there is no invasion of the jurisdiction of the probate court in the matter of estates of deceased persons by allowing suit to be instituted in another court by the heirs of the decedent. The circuit court has jurisdiction of the subject-matter of the litigation, and it was within the province of the lawmakers to declare who could maintain an action to recover the debts due a decedent. The circuit court, in exercising its jurisdiction in adjudicating the right of parties with respect to the recovery of debts, draws to it the power to determine whether the jurisdictional facts exist, and it constitutes no invasion of the jurisdiction of the probate court to permit the circuit court to ascertain whether the debts have been paid in order to determine whether or not the plaintiff in a given action has the right to sue.

In the recent case of *Metropolitan Life Ins. Co.* v. *Fitzgerald,* 137 Ark. 366, we upheld the right of the sole heir of a decedent to maintain suit on a policy, and based the decision on the statute hereinbefore quoted. The question of jurisdiction was not raised, but the decision in that case was necessarily determinative of the question of the validity of the statute in its application to sue where there had been no adjudication by the probate court. The record in the case did not show that there had been no adjudication by the probate court, but the plaintiff was allowed to sue on an insurance policy, under the allegation that she was an adult and that there were no debts against the estate of the decedent.

However, for the reason indicated above, the court should have sustained the demurrer, and the judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

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## ROSEBURR v. McDANIEL.

Opinion delivered January 31, 1921.

1. MECHANICS' LIEN—EVIDENCE.—In a suit to enforce a mechanics' lien on a house built for defendant, evidence *held* to sustain a finding for plaintiff.
2. MECHANICS' LIEN—PERFORMANCE OF CONTRACT.—Where a building contract was substantially performed, though there are omissions and deviations therefrom, if such defects do not impair the structure as a whole and are remediable without doing material damage to other parts of the building in tearing down and reconstructing or may, without injustice, be compensated by deductions from the contract price, there may be a recovery for the amount found due after making such deductions.
3. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—In a suit to enforce a mechanics' lien, the objection that there was no proof that the lien was claimed in the manner provided by Crawford & Moses' Digest, § 6922, can not be raised for the first time on appeal.

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

*Strait & Strait,* for appellant.

We recognize the rule that a contractor who has contracted to erect a building and who has substantially complied with the plans agreed upon is entitled to recover the contract price, less material, unauthorized changes made, or the difference in value of the work done according to the original plans and specifications. The rule applies where the omissions or defects were not intentionally or deliberately made through bad faith. This is an exception to the rule, as McDaniel, by his own statement, showed a wilful intent not to perform the contract in its entirety.

One who holds himself out as a workman impliedly covenants that he will do the work contracted for in a skillful manner. 3 Ark. 324; 4 *Id.* 523. One who undertakes to do certain work for a fixed compensation can not sue for compensation until he has done the work. 3 Ark. 324. A contract must be performed according to the terms of the agreement before a party has any right of action. 28 Am. Dec. 336; 89 *Id.* 381; 6 R. C. L., par. 331; 17 L. R. A. (N. S.) 231. Where the defects in the work are intentional and not the result of an attempt in good faith to perform the contract, the rule of substantial compliance can not be invoked. 24 L. R. A. (N. S.), p. 327, notes. See, also, 102 Ark. 152; 64 *Id.* 34. The chancellor erred in his findings as to a substantial compliance with the contract. No claim for lien was ever filed with the clerk. Appellee was not entitled to recover on a *quantum meruit* or upon the principle of substantial compliance.

*J. W. Johnston,* for appellee.

1. The testimony shows that no part of the work was omitted and only one small defect. The work was *substantially done* in compliance with the contract, and appellee was entitled to recover the contract price, less the cost of defects. 79 Ark. 278, 506; 9 Cyc. 603.

2. Whether there was a substantial compliance or not was a question of fact for the court. Appellant did not raise the issue, and it is too late to raise it here for the first time. 64 Ark. 305; 80 *Id.* 384; 82 *Id.* 260.

3. The findings are sustained by the evidence.

MCCULLOCH, C. J. Appellee is a carpenter by trade and built a house for appellant on the latter's land, under contract for a price to be paid in the sum of eighty-five dollars. The house was constructed, and appellant paid $20 on the price, and this is a suit in chancery instituted by appellee to recover the balance of $65 alleged to be due, and to enforce a lien on the premises.

Appellant alleged in the answer that the house was not constructed in accordance with the contract. He alleged that the roof and gutters were defective, and that it would cost $40 to repair the defects; that appellee had failed to construct a stairway in accordance with the terms of the contract, and that it would cost an additional sum of $10 to construct same; that appellee had failed to construct a partition for the rooms upstairs, which would cost $50 to do; and that certain other finishing would cost ten dollars.

The issues thus raised by the answer were tried before the chancellor on oral testimony which was conflicting. The testimony introduced by appellant tended to show that the house was not constructed in accordance with the contract; that no partition was built to divide the two rooms upstairs, and that the tin work in the valleys and roof was poorly constructed, and that appellee also failed to build a stairway in accordance with the terms of the contract. On the other hand, the testimony introduced by appellee showed that the house was constructed in accordance with the contract, with the exception of certain unimportant and inexpensive details. Appellee testified himself that the contract did not call for the construction of a stairway nor for the construction of a partition wall between the upstairs rooms. There was also other testimony tending to show that the defect in the roof was very slight and could be remedied at a very small expense. The court allowed a credit to appellant for the sum of $10 to cover the cost of repairing the defects and rendered a decree for the balance claimed by appellee. The finding of the chancellor is not against the preponderance of the evidence.

The rule established by decisions of this court is that where a building contract is substantially performed, even though there are omissions and deviations therefrom, if such defects do not impair the structure as a whole and are remediable "without doing material damage to other parts of the building in tearing down

and reconstructing, and may without injustice be compensated by deductions from the contract price," there may be a recovery for the amount found due after making such deductions. *Mitchell* v. *Caplinger,* 97 Ark. 278; *Fitzgerald* v. *La Porte,* 64 Ark. 34.

It is also contended that there was no proof that the lien was claimed in the manner provided by statute (Crawford & Moses' Digest, § 6922), but that question is raised here for the first time and can not now be taken advantage of. It was alleged in the complaint that the account was duly filed as required by statute, and that a copy of same was exhibited with the complaint. The answer does not contain any denial in regard to the filing of the lien. Therefore, the question is not raised for decision. *Whitcomb* v. *Gans,* 90 Ark. 469.

Decree affirmed.

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## BENNETT v. SNYDER.

Opinion delivered January 31, 1921.

1. APPEAL AND ERROR—EVIDENCE VIEWED FAVORABLY TO APPELLEE.—In testing the sufficiency of the evidence, the Supreme Court must view it in the light most favorable to the party who secured the verdict.
2. MUNICIPAL CORPORATIONS—NEGLIGENCE OF TRUCK DRIVER.—Evidence *held* to warrant finding that the driver of defendant's auto truck, with the exercise of ordinary care, could have avoided striking plaintiff's horse after he discovered that it was frightened and was getting into a place of peril.
3. TRIAL—INSTRUCTION—GENERAL OBJECTION.—In an action for damages sustained by plaintiff in a collision between his horse and buggy and defendant's motor truck, a general objection to an instruction that "if the driver of the truck failed to exercise ordinary care in handling the truck, with [in] his failing to stop or driving around the plaintiff, or in his failing to exercise ordinary care to prevent the accident and damaging plaintiff," the defendant was negligent, was insufficient to call the court's attention to the objection that the instruction might be construed as meaning to tell the jury that the failure of the driver to stop and his driving around the plaintiff constituted negligence.

4. APPEAL AND ERROR—AMENDMENT OF PLEADINGS TO CONFORM TO PROOF.—Defendant can not on appeal complain because the court submitted to the jury the question of negligence in using a truck with defective brakes, though that issue was not raised by the pleadings, where defendant proved such fact, and made no claim of surprise, as the pleadings will be treated as amended to conform to the proof.

5. APPEAL AND ERROR—INSTRUCTION—HARMLESS ERROR.—An instruction that "if you find for plaintiff, you will assess his damages at whatever amount you find the value of the horse was or is at this time" was not misleading, where the horse was killed by reason of the injury, and all of the evidence related to his value at the time of injury.

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

*Ben F. Reinberger,* for appellant.

The evidence does not establish negligence in the operation of the truck and shows no liability of appellant. No negligence or carelessness was proved, and the court erred in its instructions given for plaintiff. This is a plain case for reversal, and no authorities need be cited.

*Geo. F. Jones,* for appellee.

1. Negligence, carelessness and recklessness were shown by the testimony. The evidence sustains the judgment and there was no error in the instructions. 97 Ark. 109.

2. The objections to instructions were in gross and too general. 105 Ark. 157. If any error, it was harmless. 50 Ark. 68; 54 *Id.* 289.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover damages alleged to have been sustained on account of the negligence of appellant's employee in the operation of an automobile truck.

Appellee was driving his horse hitched to a buggy along the road between North Little Rock and Camp Pike, and the horse came into collision with a truck driven by

one of appellant's employees. Appellant was having some hauling done from Camp Pike to Little Rock and was operating two trucks driven by his employees. The trucks were a short distance apart, and the one that collided with the horse was the rear truck. The horse's leg was broken in the collision, and a veterinary, who was immediately called, advised that the horse be killed, which was done. Appellee sued for the value of the horse and also for damages done to the buggy and harness. There was a verdict in appellee's favor awarding damages in the sum of two hundred dollars.

The main contention of appellant is that the evidence does not establish negligence in the operation of the truck. In testing the sufficiency of the evidence we must, of course, view it in the light most favorable to appellee. The collision occurred about 11 o'clock in the daytime and on the paved road which runs between North Little Rock and Camp Pike. At the place of the collision the road was straight. Appellee was driving along the road when he met the two trucks, and the horse became frightened at the noice of the first truck. He was struck by the second truck.

The evidence adduced by appellee was to the effect that the horse was in the middle of the road and that the truck was running in the middle of the road with sufficient space on the side to turn out to the side of the road far enough to avoid striking the horse. There was a sharp conflict in the testimony. That introduced by appellant tended to show that the truck was close to the side of the road when the horse became frightened, but this is contradicted by the testimony of appellee himself, who said that there was a space of four or five feet between the truck and the side of the road, which gave an opportunity for the driver to turn out sufficiently to avoid striking the horse. In addition to this, there was testimony to the effect that the truck was going at a very slow speed—about five miles an hour—and the jury could have found that a driver using ordinary care could have

stopped the automobile in time to prevent striking the horse. There was other testimony to the effect that the truck was being operated at a greater rate of speed than stated above, but this conflict raised a question for the determination of the jury.

There was also testimony to the effect that the truck was an old one and out of repair, and that the brakes would not work. The driver of the car, who was introduced as a witness by appellant, stated that the reason he did not stop the truck was because the brakes would not work. Upon the whole we are of the opinion that the evidence was sufficient to warrant the finding that the driver of the truck could, with the exercise of ordinary care, have avoided striking the horse after he discovered that the horse was frightened and was getting into a place of peril.

It is contended that the court erred in giving the followng instruction:

"You are instructed that if the driver of defendant's truck failed to exercise ordinary care in handling the truck, with his failing to stop or driving around the plaintiff or in his failing to exercise ordinary care to prevent the accident and damaging plaintiff, the defendant will be guilty of negligence, and your verdict will be for the plaintiff."

The contention of counsel is that this instruction is erroneous in telling the jury that the failure of the driver to stop the truck or to drive around the plaintiff constituted negligence as a matter of law. The instruction is not necessarily open to the interpretation that it was meant to tell the jury that this constituted negligence, and it should have been met by a specific objection to that feature, if it was feared that the jury might so interpret. The objection to the instruction was only general and was not sufficient to call the court's attention to the ambiguity in the instruction.

In the second instruction given at the instance of the appellee, the court submitted the question of negligence

of appellant in using the truck with defective brakes on it. The contention is that this was not an issue in the case according to the original pleadings and that it should not have been submitted to the jury. The evidence of the defective brakes was first brought out by appellant from one of his own witnesses, an automobile mechanic, who was introduced to prove the condition of the truck and the rate of speed at which it could be operated. The driver of the car, who was introduced as a witness by appellee, also testified that the brakes were defective, and he gave that as the reason why he did not stop the truck. Appellant did not claim surprise or offer to introduce any other testimony on the subject, nor did he ask time to produce testimony as to the condition of the truck. All that was done was to interpose a general objection to this instruction. The court had the right to treat the pleadings as amended to conform to the proof, in the absence of an objection made at the time by appellant on the ground of surprise.

The remaining assignment relates to an alleged error of the court in giving instruction number three:

"If you find for plaintiff, you will assess his damage at whatever amount you find the value of the horse was, or is at this time. Also the amount of medical bill and the damage for his wagon and harness."

This instruction was undoubtedly erroneous in telling the jury to consider the value of the horse "at this time," meaning the time of the trial, but this language was evidently incorporated in the instruction by inadvertence, and its effect was harmless because there was no proof introduced in the case as to the value of the horse at the time of the trial. All of the proof related to the value of the horse at the time it was struck by appellant's truck. The amount of recovery is abundantly sustained by the testimony, and it is not conceivable that the jury was misled by the language inadvertently put in the instruction about the value of the animal at the time of the trial.

Judgment affirmed.

## McGINNIS v. LESS.

Opinion delivered January 31, 1921.

1. DEEDS—INSTRUMENT CONSTRUED TO BE CONVEYANCE.—An instrument conveying land to the grantee to have and to hold to the grantee, his heirs and assigns, the grantor reserving a lien for the prompt payment of the purchase-money notes, *held* a deed and not an executory contract to sell and convey.
2. VENDOR AND PURCHASER — VENDOR IN POSSESSION.—Where a grantor of land took possession to collect rents in accordance with a stipulation in his deed, he was in the attitude of a mortgagee or lienor in possession, and he and his successors were subject to accounting in equity to the holders of the legal title.
3. ADVERSE POSSESSION—VENDOR IN POSSESSION.—Where a vendor of land takes possession to enforce his lien, in order to set the statute of limitations running by adverse possession, there must be either express notice to the owners or acts of such notorious hostility as to put the owners on notice.
4. EQUITY—ACCOUNTING—LACHES.—The mere lapse of time does not justify the application of the doctrine of laches to deny to the owners of the legal title their right to call for an accounting and to recover possession from the grantor in possession under stipulations in his deed for the purpose of enforcing his lien for the purchase money.
5. EQUITY—LACHES—SUFFICIENCY OF DEMURRER.—Either laches or the statute of limitations may be raised by demurrer in a suit in chancery where the allegations of the complaint are sufficient to show the existence of those defenses.

Appeal from Lawrence Chancery Court, Eastern District; *Lyman F. Reeder,* Judge; reversed.

*Smith & Gibson,* for appellants.

1. The demurrer should have been overruled and the cause submitted on the question of an accounting by the Less heirs to plaintiffs for the rents collected by their ancestor and same applied to the satisfaction of the vendor notes, because (1) the adverse possession, if same is adverse, commenced when Less took possession; the plaintiffs were all minors, and laches could not bar their rights; (2) being a homestead and no abandonment by the widow, limitation did not run; (3) possession being taken by the holder of the vendor lien notes, laches or

limitation did not take place until the debt was paid and not until the vendor brought home to the minor plaintiffs or heirs that he was holding adversely; (4) the ancestor of defendants and Gussie Less, the grantor reserved the option in the deed (a) to take possession and apply the rents to the payment of the notes and a crop lien to go to the assignee of the notes; (b) to have the land sold and notes paid as shown by the reservation in the deed. Appellants are not barred by laches or limitation. 33 Ark. 490.

The title of plaintiffs became fixed at the time of their grandfather's death, and minors can not be ousted by adverse possession unless the possession extended beyond the period prescribed by statute. The lands were the widow's homestead, and title adverse to the heirs did not begin to run until the widow's death. See 34 Ark. 346; 16 *Id.* 122. As to homestead, see 126 Ark. 1; Kirby's Digest, § 510; 126 Ark. 180; 13 *Id.* 541; 94 *Id.* 51.

The lien reserved is not a technical vendor's lien, but a security in the nature of an equitable mortgage. All persons dealing with it take the land subject to it. 39 Cyc. 1793; 37 Ark. 511.

2. The statute of limitations can only begin after the relation of mortgagor and mortgagee terminates in some one of the modes known to the law. The homestead estate of Ellen McGinnis did not expire until her death and the right of the heirs to possession did not commence until her death. 128 Ark. 344.

3. A vendor's lien is treated as a mortgage, and a mortgagee in possession after payment of the debt shows that he holds adversely. 106 Ark. 79; 1 Am. & Eng. Enc. (2 ed.) 817, 819, note 2.

The rents of the land went to Ellen McGinnis, subject to the right of the vendor to take same and apply them on his debt. Having done so, these plaintiffs, being also the heirs of Ellen McGinnis, are entitled to have applied to the payment of the debt, interest and taxes and repairs necessary, and adverse possession

would not run until the debt, taxes, interest and repairs were paid. 34 Ark. 346; 71 *Id.* 484. The demurrer should have been overruled, and an accounting had for the rents collected by the ancestor applied to the vendor notes, because adverse possession commenced when Less took possession and all the plaintiffs were minors and not barred by laches nor limitation.

*A. S. Irby,* for appeellees.

1. The widow's homestead right was only for life and ended on her death.

2. Granting that the grandchildren were minors when their grandfather died, this does not give them the right to join the widow, their grandmother, in a suit for possession of the homestead. No provision in our Constitution whereby grandchildren could share a homestead with the widow. 104 Ark. 316. The mothers of appellants were not seized of an estate of inheritance in the homestead, and appellants have no rights they could assert. Appellants failed then to state a cause of action.

3. Appellants are barred by limitation and laches. 103 Ark. 191; 113 *Id.* 433.

4. The demurrer was properly sustained because (1) if the widow had any homestead rights she abandoned them; (2) the grandchildren were never seized of an estate of inheritance and no right to join the widow in a suit for possession of the homestead; (3) they are barred.

McCULLOCH, C. J. Appellant, Ellen McGinnis, is the widow of T. J. McGinnis, who departed this life intestate in the year 1898, and the other appellants are grandchildren and heirs at law of said T. J. McGinnis. On April 16, 1898, Isaac Less sold and conveyed to T. J. McGinnis a tract of land containing 160 acres in Lawrence County, for the price of $2,500, evidenced by ten promissory notes due and payable annually for ten years after that date, with interest at the rate of ten per cent. per annum. The deed contained the following clause:

"To have and to hold the same unto the said T. J. McGinnis and unto his heirs and assigns forever against all lawful claims of all persons, and the grantor herein reserves to herself a lien upon said land for the prompt payment of said notes, and she reserves a further lien to herself upon all crops that may be raised upon said lands for the further security of said notes, for the payment of any note that may become due during the year that said crop may be raised, and it is further understood that if said grantee does not pay the principal during the crop season when same becomes due, the amount so paid shall be considered as rent upon said described premises and the remaining notes to become due and the vendor's lien herein retained shall be enforced by said grantor at her option, as well as the enforcement of her lien upon the said crop; the lien herein reserved upon said crop and land herein shall follow the title to any note that may be assigned, and the crop lien shall go to the assignee of the note, and the year that said note may become due and crop raised."

Isaac Less died on January 29, 1916, and appellants instituted this action in the chancery court of Lawrence County against appellees, who are the heirs at law of Isaac Less, alleging that T. J. McGinnis took possession of the lands purchased aforesaid and occupied the same as his homestead up to the time of his death; that after the death of T. J. McGinnis the said Isaac Less took possession of said lands under the aforesaid clause of the deed and collected the rents up to the time of his death, and that his said heirs (appellees) have collected said rents since that time. The prayer of the complaint is for an accounting of the rents and profits of the land, and that the notes given by McGinnis to Isaac Less for the purchase price of said land be canceled. Appellees filed a demurrer on the ground that the complaint failed to state facts sufficient to constitute a cause of action; that the complaint shows on its face that appellants are barred by their own laches and that they are barred by

the statute of limitations. The court sustained the demurrer, and, appellants declining to plead further, the complaint was dismissed.

The action is one treating the appellees and their ancestor as mortgagees in possession, and asking for an accounting. Appellees are in error in assuming that this is an action to compel specific performance of an executory contract. The writing set forth in the complaint as the basis of the title of appellants is a deed of conveyance, and not an executory contract to sell and convey. The title passed to T. J. McGinnis and descended to his heirs at law, subject to the widow's homestead and dower rights. When the grantor took possession for the purpose of collecting rents in accordance with the stipulation in the deed, he was in the attitude of a mortgagee or lienor in possession. Though Isaac Less as a lienor was not a mortgagee in a strict legal sense, his attitude clothed him with all the rights and obligations of a mortgagee in possession. He and his successors were subject to an accounting to the holders of the legal title, and a court of equity was the proper forum to afford that remedy. Such an occupancy is deemed to be in subordination to the rights of the mortgagor or the holder of the legal title where, as in this case, there has been a deed of conveyance. And in order to put the statute of limitations in motion against such owners there must be notice of the change in the relationship and the hostility of the occupancy by the mortgagees who are in possession. Either this or acts of such notorious hostility as to put the owners on notice. Nor does the mere lapse of time justify the application of the doctrine of laches in denial of the rights of the owners to call for an accounting and to recover possession. There must be some other intervening equity to call for the application of this doctrine. Now there is nothing on the face of the complaint to show that there was an adverse occupancy of the land by the appellees or their ancestor for more than the statutory period. Nor does

the complaint show on its face sufficient facts to call for the application of the doctrine of laches. Either laches or the statute of limitations may be raised by demurrer in a suit in chancery where the allegations of the complaint are sufficient to show the existence of those defenses. In such an action these defenses go to the equity of the complaint and may therefore be raised by demurrer.

We are of the opinion, however, as before stated, that the facts stated in the complaint do not show that appellants are barred by laches or by the statute of limitations and that, if either of those defenses exist, they must be pleaded in the answer by the allegation of facts which call them into operation. The decree is therefore reversed and the cause remanded with directions to overrule the demurrer.

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MOORE v. ZIBA BENNITT & COMPANY.

Opinion delivered January 31, 1921.

1. EVIDENCE—PAROL EVIDENCE TO EXPLAIN AMBIGUOUS CONTRACT.—Where a contract for the sale of cotton was ambiguous in respect to whether the seller was acting as agent for his mother, parol evidence was admissible on the issues whether the seller was acting as agent and whether he had authority, real or apparent, to make the sale.
2. PRINCIPAL AND AGENT—RELATIONSHIP SHOWN BY CIRCUMSTANCES.—While the relation of principal and agent can not be presumed and can not be established by the acts or declarations of the agent in assuming authority, yet such relation and the authority of the agent, after the relation is proved, can be shown by circumstances as well as by positive proof.
3. PRINCIPAL AND AGENT.—Evidence *held to* warrant a finding that defendent had constituted her son her general agent to sell cotton grown on her plantation.
4. PRINCIPAL AND AGENT—APPARENT AUTHORITY.—Where a defendant permitted her son to make numerous sales of her cotton to cotton buyers, many of them to plaintiff, the latter had a right to conclude that the son was authorized to make a contract of sale of her cotton.

5. SALES—BREACH BY SELLER—DAMAGES.—Where a seller of cotton violated her contract, the measure of the buyer's damages was the difference between the contract price and the reasonable market value of the cotton at the place and on the date that same should have been delivered with interest at 6 per cent. from that date.

6. SALES—CONSTRUCTION OF CONTRACT.—It is the duty of the court to construe a contract of sale if possible so as to effectuate the intention of the parties.

7. SALES—VALIDITY OF CONTRACT.—Where a contract of sale of 200 bales of cotton contemplated that, if the cotton were delivered in two lots as it was picked, the seller should receive for the first hundred bales 46 cents per pound, and for the second hundred bales 45 cents per pound, or if the entire two hundred bales were delivered in one lot that she should receive 45½ cents a pound, the contract was not void for uncertainty.

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

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

1. Carter Murphy, who signed the contract, was not appellant's agent nor was he authorized to make the agreement for her. There is no testimony that appellant authorized Carter to make this sale nor that she held him out as her agent. The writing was signed by Murphy alone, not as "agent," and there is no testimony that appellant held Murphy out as her agent with her knowledge. The agent only was bound, and not the principal. 2 C. J. 670, par. 321; *Ib.* 682. The writing was not the contract of the principal, and she is not bound. 2 C. J. 679; 17 Ind. 495; 17 Am. Dec. 529; 25 Am. Rep. 199; 52 Am. Dec. 771; 46 *Id.* 238; 66 Ark. 10; 55 *Id.* 423. The authority of the agent will not be presumed and can not be proved by mere acts and declarations of the agent; authority must be proved by positive proof or by circumstances showing the assent of the principal. 126 Ark. 405; 105 *Id.* 446; 132 *Id.* 155; 105 *Id.* 450; 2 C. J. 436-8; 53 Ark. 208; 105 *Id.* 148. There is no evidence of any agency of Murphy, and the former transactions should not have been admitted in the evidence. 105 Ark. 449; 61 N. Y. S. 727; 56 Ark. 221. Authority can not

be implied from proof of authority in a particular instance. 2 C. J. 592, 920. Agency can not be established by proof of similar transactions with others in no way connected with the transaction in question. 2 C. J. 948; 4 So. 34. The testimony of A. W. Nunn was inadmissible. 2 C. J. 587-8; 130 N. Y. S. 136. It was not shown that appellant knew of these transactions. 2 C. J. 947. It was error to allow witnesses to testify that Murphy was appellant's agent. The facts alone were admissible. 110 Ark. 90.

2. The contract is void for uncertainty. 159 S. W. 82.

3. The instructions were error as given. The defendant's tenth should have been given. 2 C. J. 564; 62 Ark. 33; 94 *Id.* 305.

4. There was no ratification. 3 Cyc. 255; 55 Ark. 423; 216 S. W. 20; 19 N. H. 369. Appellant was in no manner responsible for Murphy's lack of information or negligence. 1 Mechem on Agency (2 ed.) 297.

*Bridges & Wooldridge* and *Coleman & Gantt,* for appellee.

1. Murphy was appellant's agent, as the testimony proves. To deny his agency would be a fraud on innocent parties and can not be allowed. Mechem on Agency, § 283.

2. One who holds out another as his agent is bound by his acts. Mechem on Agency, §§ 83-4; 41 N. E. 888-91; 53 Ark. 208. One dealing with an agent, in the absence of notice to the contrary, has the right to presume he is a general agent. 103 Ark. 79; 132 *Id.* 171; 107 *Id.* 322; 100 *Id.* 240-4; 112 *Id.* 68; 219 S. W. 319; 131 Ark. 197. The intention was to bind the principal. 2 C. J. 670, § 322; *Ib.* 813, § 437; 101 U. S. 392; 1 Williston on Contracts, §§ 287, 295. See, also, 10 N. W. 433-4; 65 N. Y. S. 225.

3. Parol evidence was admissible to show that the principal was bound where the contract is in the name

of the agent. 43 Pac. 378; 117 N. E. 526-7; 60 Pac. 839; 216 S. W. 20; 142 *Id.* 1150; 25 R. C. L. 657, 686.

4. Bennett's testimony as to purchases of cotton prior to the one in question was admissible. 21 R. C. L. 858; 96 Pac. 48; 17 L. R. A. (N. S.) 239. The relation of principal and agent may be shown by circumstances and parol proof. 83 N. E. 773; 94 N. W. 427; 69 *Id.* 927. Previous dealings are admissible to show notice. 78 Ark. 327; 99 S. E. 490. Where evidence tends to show agency, it is evidence for a jury to pass upon. 21 R. C. L. 820; 111 N. W. 119; 21 R. C. L. 821-2.

5. Although evidence is not full or satisfactory, the better practice is to submit it to a jury. 21 R. C. L. 821-2.

The instructions given cover the case and have been approved by this court, and those refused were sufficiently covered by those given. 134 Ark. 284.

It is the duty of courts to so construe contracts as to uphold them. 13 C. J. 539; 2 Williston on Cont., 1202, § 620. If there is a conflict in the provisions of the contract, the first will prevail and the last be rejected. 34 Atl. 648-52. Murphy's authority was fairly submitted to a jury on proper instructions, and their decision is final. 93 Ark. 600; Mechem on Agency, § 106. Where there is a ratification as here, it is unnecessary to prove agency. 139 N. W. 101. To repudiate an agency notice must be given. 90 S. W. 737. Ratification was shown. 8 Pick (Mass.) 9; 78 Atl. 379-81; 93 Pac. 577. Appellant had knowledge of the acts of the agent and did not object, and hence there was ratification. 80 N. W. 520; 116 N. W. 611. Appellant was silent after the acts of the agent were known and is bound. 11 Ark. 189; 96 *Id.* 505; 124 *Id.* 360. Appellant did not disaffirm the contract and is bound. 11 N. E. 700.

WOOD, J. The appellee, an Arkansas corporation, engaged in the business of buying and selling cotton in the city of Pine Bluff, Arkansas, brought this action against the appellant. The appellee alleged that the ap-

pellant for many years had been a planter engaged in the growing and selling of cotton; that Carter Murphy, appellant's son, had been for many years her duly authorized agent through whom she had sold the cotton and cotton seed grown by her; that Carter Murphy sold and agreed to deliver to the appellee the first two hundred bales of cotton picked on appellant's plantation at Fairfield, Arkansas, for the price of 45½ cents per pound; that it was agreed that each of the bales should weigh five hundred pounds and should be delivered to the appellee on board the cars at the compress in Pine Bluff as quickly as possible after the date of the agreement, and that the appellee should pay for the same according to the compress weight; that the cotton was ready for delivery October 29, 1919; that appellant had failed to deliver the same; that appellee had at all times been ready and willing to receive and pay for the cotton according to the contract; that appellee, relying on the contract, had contracted to sell the cotton and would be compelled to buy other cotton of the same grade and staple to comply with its contracts; that the market price of the cotton on the day the same should have been delivered was 75 cents per pound; that the difference between the price at which appellant agreed to sell the cotton and the market price of the cotton at the time when the same should have been delivered was 29½ cents per pound, or a total of $29,500, which the appellee had lost by reason of the failure of appellant to comply with her contract. The appellant denied all the allegations of the complaint and set up that the cotton alleged to have been sold exceeded in value the sum of $30 and pleaded the statute of frauds. The alleged contract was made an exhibit to the complaint and over the objection of appellant was introduced in evidence as follows:

"Mr. Carter Murphy, September 25, 1919.

"City:

"Dear Sir: This confirms purchase from you today of 200 bales of Mrs. Moore's staple cotton, as follows:

"100 bales first picked, f. o. b. Pine Bluff Compress, compress weight, 46 cents per pound.

"100 bales second picked, f. o. b. Pine Bluff Compress, compress weight, 45 cents per pound.

"Or the first 200 bales picked at an average price of 45½ cents per pound, f. o. b. Pine Bluff Compress, compress weights, we to take up freight bills.

"To be delivered as quickly as possible.

"Yours truly,

"Ziba Bennitt & Company, Inc.

"By Ziba Bennitt, Pres.

"Above accepted September 25, 1919.

"Carter Murphy."

Ziba Bennitt, the president of the appellee company, testified substantially as follows: That he had been dealing with Murphy with reference to appellant's cotton for about six years; that he had bought cotton from him nearly every season. Murphy generally solicited witness in connection with the selling of the cotton. In the present instance, Murphy told witness that he had some cotton for sale and asked witness what he would pay for it. Witness offered him 46 cents per pound for the first 100 bales picked and ginned and 45 cents for the next 100 bales picked and ginned of the cotton grown on the Fairfield place. In the sales and purchases the matter had never been taken up with appellant, but was consummated directly through Murphy. The cotton that Murphy sold to witness under the contract in evidence was grown on appellant's plantation at Fairfield. The checks that were made in payment for the cotton of former sales were made payable to Carter Murphy. In the dealings witness had with Murphy witness knew that it was appellant's cotton that he was buying. Witness supposed that he had made at least eight or ten purchases from Murphy before the one in controversy. For the last of these purchases, a check was issued to Carter Murphy in the sum of $35,000. The check was introduced in evidence. This check was endorsed by C. B.

Murphy to Merchants and Planters Bank with instructions to credit account of appellant, and the check was paid August 30, 1919. Witness supposed that Murphy was appellant's agent in all these dealings. In the purchase in controversy witness and Murphy agreed on a price that would average 45½ cents per pound. After witness and Murphy had agreed upon the terms of the sale, witness stated that he would confirm the oral contract in writing and asked whether he should address it to Mrs. Moore (appellant) or to Murphy, and Murphy replied to address it to him. Whereupon witness prepared the contract in evidence. There was no difference between this contract and other contracts made with Murphy except as to the price and quantity. The grade and staple of cotton produced on appellant's plantation at Fairfield was well known around Pine Bluff. It generally graded up to an average of 1¼-inch cotton, and witness understood at the time that he was buying cotton of 1¼-inch staple. Witness never received the cotton from Murphy, but ascertained that it was in compress and could have been delivered on October 29, 1919. Witness arranged to accept and pay for the same, but was advised by Murphy that appellant would not deliver the cotton at all. The market value of such cotton at that time in Pine Bluff was from 75 cents to 80 cents per pound. After that time it had ranged from 75 cents to $1 per pound. The recognized standard weight of a bale of cotton according to custom at Pine Bluff was 500 pounds. Murphy told witness that he was appellant's agent, and witness knew that he was her agent because she entrusted the handling of her business to him, and his authority to sell and collect for her cotton had never before been questioned. Witness did not know whether Murphy had consulted with appellant about these sales or not. Murphy seemed to have full authority in running the place and selling the cotton. The cotton sold was the Mary K. Moore cotton, and it was so stated in the contract. Witness had the cotton purchased under

the contract sold to spinners at 70 cents or better at the time appellant refused to deliver the same. All witness knew about Murphy's agency was from witness' dealings with him and the general understanding around Pine Bluff.

There was testimony of several other witnesses, over the objection of appellant, corroborating the testimony of Ziba Bennitt. Some of these witnesses had several times bought cotton belonging to the appellant grown on her Fairfield place from Carter Murphy. None of these deals had been made by the appellant herself, but were consummated solely through Murphy. One witness testified that the last check issued by his firm in such a transaction was issued to Murphy in payment of the cotton purchased from him belonging to appellant and that the check was endorsed by Mary K. Moore and Carter Murphy. One of the corroborating witnesses testified that he did not know whether appellant had authorized Murphy to make the sales or not.

The manager of the Cotton Oil Mill at Pine Bluff testified, over the objection of appellant, that for four years he had purchased cotton seed from Murphy from cotton raised on appellant's plantation at Fairfield. The accounts of the purchases were kept in the name of appellant. They were paid for by checks issued to appellant, and she receipted the vouchers for same. Witness had had no discussion with Murphy as to what authority he had to make these sales.

The manager of the Pine Bluff Compress and Warehouse Company testified that for seven years cotton belonging to appellant had been sent to the compress of which he was manager. It was grown on her Fairfield place. The warehouse receipts were issued to her where it was not sold before it was shipped in. The witness' instruction with reference to the samples and delivery of the cotton were in all instances from Carter Murphy, representing appellant, until the present year. During the year 1919 the 212 or 215 bales of cotton sent to the

compress from the plantation of appellant were consigned to her, but handled differently. Witness, during the early part of the season, had instructions from Murphy with reference to the cotton, but later appellant took the matter up with witness direct. Witness did not know whether during all the time the cotton was handled by Murphy through his own initiative or whether he was carrying out the instructions of appellant in each particular instance.

Another witness testified, over the objection of appellant, that he had been president of the Hammett Grocery Company and that for more than ten years he had sold supplies to the appellant to be used on her plantation at Fairfield; that most of his dealings were with Carter Murphy. The account of supplies and cotton was kept with appellant who paid for the same and received the pay for the cotton that was sold. The goods were paid for by checks signed by appellant. Murphy would place all orders, and the grocery company would deliver the same. Witness did not know whether Murphy ordered the supplies on his own initiative or whether he was authorized to do so by appellant.

It was shown on behalf of appellee by Carter Murphy that the first 200 bales of cotton grown on appellant's plantation at Fairfield were sent to the Pine Bluff Compress & Warehouse Company, and that this was the cotton that he agreed to sell to the appellee.

The appellant testified in her own behalf that she had owned the Fairfield plantation since 1893; that Carter and Clifton Murphy were her sons; that during this time she had attended to her own business. When she wanted anything done, she would have her husband or her sons attend to it for her. Neither Carter nor Clifton Murphy had authority to sell cotton or purchase supplies for the farm without first consulting her, and to her knowledge they had never done so. Carter had no right to transact any business for her except as directed by her in each instance. She never gave any one authority

to sell her cotton or cotton seed except when they first took the matter up with her, and that was the case in every one of the transactions with reference to the sale of her cotton and cotton seed, which the witnesses for the appellee had testified to. Carter had no authority to sell the cotton to appellee under the contract dated April 21, 1919. She first learned that he had signed the contract when he told her that Bennitt had brought suit against her for failure to deliver the cotton. She saw the contract before the suit was brought, the day before she was taken sick, and looked at it, but was busy at the time and laid it down. She thought it was a proposal to purchase her cotton. She was not ready to sell it at that time and didn't pay much attention to it. She had not signed any contract. She did not advise Bennitt that she was ready to sell after receiving the contract because the next day she was taken sick and was ill about a month, and when she got up she was advised that Mr. Bennitt had brought suit. She didn't think it was necessary to advise Mr. Bennitt, and she had never entered into an agreement for the sale of the cotton. She would not have sold the cotton at the price stipulated in the contract because it was not a fair price.

Witness Graham testified that he was in the business of selling cotton, and that cotton like that involved in the suit the 22d day of October, 1919, was selling for 43 cents per pound. This witness further testified that the market value of the best of appellant's cotton on October 29, 1919, was from 63 to 65 cents per pound, and that since October he had offered cotton as good as appellant's to the appellee for 61 cents. There was testimony on behalf of appellee in rebuttal to the effect that the cotton which Graham offered at 61 cents was inferior to appellant's cotton.

At the instance of the appellee, over the objection of appellant, the court submitted to the jury the issue as to whether or not Carter Murphy was the agent of the appellant, and whether or not as such agent he entered

into the contract with the appellee, and whether or not he had express authority to make such contract or was held out by the appellant as having such authority, and told the jury in considering these issues they could take into consideration the facts and circumstances introduced in evidence. The court also, at the instance of appellee, instructed the jury that if they found that appellant held Murphy out as her agent to sell her cotton and if the appellee had reasonable grounds to believe and did believe that he was such agent and dealt with him as such, the contract would be binding on the appellant. The court also instructed the jury that if they found for the appellee the measure of its damages would be the difference between the contract price and the reasonable market value of the cotton at the place and on the date that same should have been delivered with interest at 6 per cent. from that date.

The appellant contended that there was no testimony to show that Murphy was the agent of appellant to sell her cotton; that Murphy did not assume to act for appellant in making the sale, but if there was any such assumption of agency on his part it was wholly unauthorized by appellant and was not binding on her; that all former sales made by Murphy were by her special authority and were not evidence of any authority from her to make the sale in controversy. Appellant also contended that the contract alleged in the complaint did not fix any definite price for the cotton alleged to have been sold and that the contract was therefore void for uncertainty. Appellant prayed for instructions to be given the jury presenting her contentions which the court refused. There was a verdict in favor of the appellee in the sum of $24,175.42. A judgment was entered in appellee's favor for that sum, from which judgment is this appeal.

It is not claimed by the appellant that the cotton in controversy belonged to her son, Carter Murphy, and she does not dispute that she was the owner of the cotton

at the time the same was sold by her son. The first clause of the contract, towit: "This confirms purchase from you today of 200 bales of Mrs. Moore's staple cotton" shows that Murphy was not acting for himself in making the sale, but that he was selling cotton belonging to the appellant. The contract itself, therefore, shows that Murphy was assuming to act as an agent in making the sale and that he revealed the name of the person or principal for whom he assumed to act. It occurs to us that this is the plain purport of the contract, but, if we are mistaken in this, then the contract, to say the least, was ambiguous in this respect, and the court was warranted in allowing oral testimony on the issues as to whether or not Murphy in making the sale was the agent of the appellant and whether or not he had authority, real or apparent, to make such sale. In determining such issues parol evidence was admissible. *Boren* v. *Schweitzer,* 117 N. E. (Ind.) 526-27, and other authorities there cited; *Davis* v. *Lynch,* 65 N. Y. Sup. 225; *Arkadelphia Milling Co.* v. *Campbell,* 141 Ark. 25.

While the relation of agent and principal can not be presumed and can not be established by the acts or declaration of the agent in assuming authority, yet such relation and the authority of the agent, after the relation is proved, can be shown by circumstances as well as by positive proof. See *Wales-Riggs Plantation* v. *Grooms,* 132 Ark. 155; *Daly* v. *Arkadelphia Milling Co.,* 126 Ark. 405; *Wales-Riggs Plantation* v. *Dye,* 105 Ark. 446. There was testimony on the part of the appellee tending to prove that Murphy, for several years prior to the alleged sale in controversy, had been selling the cotton of appellant grown on her Fairfield plantation. While the appellant testified that in each case she had expressly authorized her son, Carter Murphy, to make these specific sales, nevertheless the fact that many sales of this character had been made from year to year, which she expressly approved, were circumstances from which the jury might have found that the relation of principal and

agent did exist between the appellant and her son, Carter, and that the latter was authorized by her to make the sale of the cotton in controversy. Without arguing the facts in detail, we are convinced that the testimony was sufficient to warrant a finding that appellant had constituted her son her general agent for the purpose of making sales of the cotton grown on her Fairfield plantation. But, if he did not have express authority to make the sale of the cotton in controversy, she had, by her course of conduct in not challenging any of the sales that had been previously made by him, held him out and clothed him at least with apparent authority to make the particular sale here under review. Appellant, in her testimony, admitted that she had specifically conferred authority upon her son to make similar sales in past years. One of these sales was consummated, as shown by the check introduced in evidence, a little less than a month before the sale in controversy. She only denied that he had authority to make the particular sale in controversy. The appellee, who was a party to many of these transactions and cognizant of others, had the right to conclude that Carter Murphy had the authority to make the sale in controversy. *Robinson & Son* v. *Geyer & Adams,* 107 Ark. 322; *Oak Leaf Mill Co.* v. *Cooper,* 103 Ark. 79; *Three States Lumber Co.* v. *Moore,* 132 Ark. 371; *People's Life Ins. Co.* v. *Kohn,* 100 Ark. 240; *Chalmers & Son* v. *Bowen,* 112 Ark. 68; *Railway* v. *Bennett,* 53 Ark. 208; Mechem on Agency, §§ 282-283. The trial court was guided by the principles announced in the above authorities in the giving of instructions and the admission of testimony. There was no error in the ruling of the court in giving the instruction on the measure of damages. *Arkansas Short Leaf Lumber Co.* v. *McIntirff,* 134 Ark. 284; *Westbrook Grain & Commission Co.* v. *Johnson,* 134 Ark. 300.

The provisions of the contract with reference to the price of cotton showed that the parties contemplated that, if the cotton were delivered in two lots as it was picked.

appellant should receive for the first lot 46 cents per pound and for the second 45 cents per pound; or, if the entire 200 bales were delivered in one lot, she should receive 45½ cents per pound, or the average price for the entire 200 bales. It is the duty of the court to construe the contract, if possible, so as to effectuate the intention of the parties. 13 C. J. 539; 2 Williston on Contracts, 1202 (Sec. 620). The court was correct in refusing to grant appellant's prayer asking that the contract be declared void for uncertainty. There is no reversible error in the record, and the judgment is therefore affirmed.

DISSENTING OPINION.

McCULLOCH, C. J. The conclusion reached by the majority that the contract for sale of the cotton discloses on its face the agency of Carter Murphy for appellant is, it seems to me, an erroneous construction of the contract. Of course, there is abundant testimony tending to show that it was intended by appellee and Murphy as a sale of the cotton by Murphy as agent for appellant. But, when we look alone to the face of the contract, it seems to me clear that it was not one for sale by the agent. On the contrary, its clear import is to show a sale by Murphy himself. The words "200 bales of Mrs. Moore's staple cotton" is merely descriptive of the subject-matter of the contract, and the use of those words does not imply that the sale was being made by Murphy as agent for appellant. It was, on its face, in other words, the individual contract of Murphy, and not the contract of Murphy as agent for appellant. That being true, there was no question of apparent or implied agency involved in the case, for, since appellee accepted the contract showing on its face that Murphy was acting for himself, it can not be heard to say that it dealt with him upon the faith of the apparent agency for appellant. *Arkadelphia Milling Co.* v. *Campbell,* 141 Ark. 25; *Cream City Glass Co.* v. *Friedlander,* 84 Wis. 53; 2 C. J. 682.

It seems to me that there is no ambiguity in the contract, but, even if the language of the contract be treated

as ambiguous with respect to the question whether it was the individual contract of Murphy or the contract of Murphy as agent for appellant, still appellee can not assert a claim against appellant on the basis of implied or apparent agency, for, in the absence of an express contract showing that appellant was to be bound as principal, appellee is not entitled to assert liability of appellant on the ground that he was induced to contract upon the purported agency of Murphy. The trial court, therefore, erred in submitting to the jury the question of implied agency or the apparent scope of the agent's authority.

I am also of the opinion that there is no evidence at all to justify a submission of the question of actual agency. Of course, an agency can not be established by the declaration of the person who assumes to act as such agent, nor can it be presumed from the fact that the person did so assume to act as agent. That has been decided so many times that it is unnecessary to cite authority on the subject.

All that we have in the case that might be said to have a tendency to establish the authority of Murphy to sell appellant's cotton was the fact that Murphy had in many instances made sales of cotton for appellant. It is settled doctrine that where an agency is once established it is presumed to continue as long as the agent assumes to act in that capacity without notice from the principal to the contrary. But that rule should not be applied under the facts in this case, for the acts of agency on the part of Murphy were too far apart and too remote from this particular act to raise the presumption of unbroken continuation of the agency. All that was proved in this respect is that from year to year Murphy made sales of cotton for appellant. She testified that he had no general authority to act for her, but that in many instances she authorized him to make sales of certain lots of cotton. This doctrine of presumption of continuation of agency ought not to be applied to acts

extending from year to year, like selling the annual products of a farm. It seems to me to be a dangerous doctrine to say that when a farmer employs a cotton dealer to sell his crop of cotton during a given year, or from year to year, it raises a presumption of continued agency during succeeding years. Neither is there any proof of ratification by appellant of the unauthorized sales made by Murphy. Appellant herself testified that in each instance when sales were made she gave express authority to her son, Carter Murphy, for that purpose, and there is no other testimony to contradict her statement. But, if her testimony be entirely disregarded, there is no other testimony tending to show that Murphy, in the previous sales of cotton made by him for his mother, acted without authority. The doctrine of ratification only applies where there is a previous unauthorized act. And where such ratification repeatedly occurs it may warrant the inference of continued agency.

Stress is laid upon the fact that appellant saw a copy of appellee's letter to Murphy, but according to the undisputed evidence the copy she saw was not signed by Murphy, and she stated that she did not know that the latter had signed the contract, and understood that this letter was merely a proposal from appellee to purchase the cotton. This did not constitute a ratification or adoption of the contract, unless she was informed that Murphy had accepted it by signing the contract. She was not called on to act in any way or to repudiate the act of her son until she received information that he had undertaken to bind her to a contract of sale.

I am therefore unable to discover any evidence in this case sufficient to justify the finding that appellant either authorized the sale or ratified it or that she committed any act which would warrant any one dealing with Murphy to assume that he was her implied or apparent agent. Murphy was not clothed with any *indicia* of authority. The cotton was not sold by sample, as is customary in sales of cotton, for at the time this contract

was executed none of appellant's crop of cotton had been gathered. This was a sale in advance of the harvesting of the crop, and all that appellee has to rely on is to show that Murphy had sold his mother's cotton raised during the previous years. I think this is not sufficient to establish agency.

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## MEEKS v. ARKANSAS LIGHT & POWER COMPANY.

Opinion delivered January 31, 1921.

1. CORPORATIONS—REORGANIZATION—LIABILITY.—Where one corporation is merely a reorganization or continuation of another corporation, the former is liable on the contracts of the latter .
2. CORPORATIONS—REORGANIZATION—LIABILITY.—Where a new corporation has expressly or by reasonable implication assumed the debts of an old corporation, an action may be maintained against it for those debts.
3. CORPORATIONS—LIABILITY OF STOCKHOLDERS.—A complaint will not lie against stockholders of a defunct corporation on its contract, without alleging either that defendants had expressly assumed the debts of the company or that any of its assets had gone into their hands.
4. PLEADING—MOTION TO DISMISS AS EQUIVALENT TO DEMURRER.—A motion to dismiss a complaint as not stating a cause of action is tantamount to a general demurrer.
5. TRIAL — MOTION TO DISMISS — EFFECT.—Where a complaint in equity states a good cause of action at law, a motion to dismiss should be treated as a motion to transfer to law.

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

*Joiner & Harris*, for appellant.

1. The court erred in dismissing the complaint. The complaint stated an equitable cause of action. The Arkansas Power Company, with whom appellant made the contract which was breached, had gone out of existence, and appellant was seeking to follow the assets into the hands of the stockholders and the hands of the new corporation, its successor, which assumed the debts and liabilities of the old corporation. The debts existing at

the time of its dissolution are not extinguished thereby and in equity may be collected out of the assets of the defunct corporation in the hands of the shareholders or any person receiving same except an innocent purchaser without notice. 186 S. W. 627; 127 Ark. 590; 105 *Id.* 421; Kirby's Digest, § 958.

2. The case should have been transferred to the law court, as the complaint stated a legal cause of action. Kirby's Digest, § 5991. Failure to proceed in the proper court is no ground of dismissal, but the cause should have been transferred to the proper court. 81 Ark. 51; 71 *Id.* 484; 87 *Id.* 211; 107 *Id.* 185; Kirby's Digest, § 5991; 19 R. C. L. 5991; 107 Ark. 71; 223 S. W. 35.

*McKay & Smith* and *Hamilton Moses,* for appellees.

1. Plaintiff should have brought suit against the Arkansas Light & Power Company in a court of law and not in a court of equity. Where one corporation takes over the holdings of another corporation, it may, under certain circumstances, become liable for the debts of the first corporation. Whether or not the circumstances are such as to make it liable for such debts is a question for a jury in a law court. 107 Ark. 119; 112 *Id.* 260.

2. The demurrer should have been sustained, as the complaint does not state a cause of action against Gus Kohn and Harvey Couch. It fails to show that either of them contracted to assume any of the debts of the Arkansas Power Company under its dissolution and fails to state any facts whatever to constitute a cause of action against these defendants. The complaint should have been dismissed as to Kohn and Couch, and the complaint against the Arkansas Light & Power Company should have been brought at law in the circuit court. 107 Ark. 119; 112 *Id.* 260.

3. If no motion is made to transfer, it is the duty of the court to dismiss for want of jurisdiction. 27 Ark. 591; 28 *Id.* 458; 35 *Id.* 583; 37 *Id.* 164; 88 *Id.* 1; 107 *Id.* 185.

4. Defendant was entitled to judgment on the facts. 85 Ark. 101. Equity cases are tried on appeal *de novo*. 23 Ark. 341; 96 *Id.* 434; 111 *Id.* 263. If the court therefore erred in dismissing the complaint for want of jurisdiction, it is the duty of this court to try the case on the evidence which is part of the transcript here. Plaintiff voluntarily invoked the aid of a court of equity and can not complain of want of jurisdiction and this court must treat this as an equity case and review the evidence *de novo*. 14 Ark. 104; 119 *Id.* 386; 105 *Id.* 669; 106 *Id.* 123; 132 *Id.* 145. In chancery cases this court will review the case on evidence, even if the lower court had no jurisdiction. 29 Ark. 472. The evidence here fails to show any contract for any definite period of time. Where one is employed to be paid so much per month, the employment is merely at will and for so long as the employee shall work, the stated amount being merely indicative of the rate at which the employee is to be paid for the time he may work. 15 Ark. 444; 35 *Id.* 156; 68 *Id.* 526. Such a contract is terminable by either party at will. 110 Ark. 144. Under the evidence and the law the findings are correct.

WOOD, J. This is an action instituted in the chancery court of Columbia County by the appellant against the appellees. The appellant alleged that the Arkansas Light & Power Company was originally incorporated as the Arkansas Power Company, of which Gus Kohn and Harvey Couch were stockholders, and that it was reincorporated and was doing business under the name of the Arkansas Light & Power Company, and Couch and Kohn were stockholders of the latter company; that on or about the 15th of June, 1914, E. B. Meeks entered into a contract of hire with the Arkansas Power Company for the remainder of the year 1914 at a salary of $80 per month, which contract was not in writing; that the company broke the contract by discharging him without cause, to his damage in the sum of $320, for which he prayed judgment.

The Arkansas Light & Power Company answered, denying all the material allegations of the complaint. Kohn and Couch entered a general demurrer to the complaint. On the 26th of April, 1920, the appellees moved to dismiss the complaint on the ground that the facts stated therein did not constitute a cause of action over which the court had jurisdiction. The court, over the objection of appellant, sustained the motion and entered a judgment dismissing the complaint, to which appellant duly excepted and prayed for and was granted an appeal to the Supreme Court. The appellant then asked that the case be transferred to the circuit court, which request or motion the court denied.

Two questions are presented: (1) Does the complaint state a cause of action in equity? Where one corporation is merely a reorganization or continuation of another corporation, the former is liable on the contracts of the latter. That is, where the circumstances are such as to warrant the conclusion that the former is not a separate and distinct corporation, but merely a continuation of the latter, and hence the same person in law, and where the new corporation has in express terms or by reasonable implication assumed the debts of the old corporation an action may be maintained against the new corporation for those debts. *Spear Mining Co.* v. *Shinn,* 93 Ark. 346; *Good* v. *Ferguson & Wheeler,* 107 Ark. 119; *Ferguson & Wheeler* v. *Good,* 112 Ark. 260. The complaint did not state a cause of action against the appellees in equity. It does not allege that the appellees, Kohn and Couch, expressly assumed the debts of the Arkansas Power Company, nor that any of the assets of the defunct corporation had gone into their hands. See *Arlington Hotel Co.* v. *Rector,* 124 Ark. 90; *Shafford* v. *Lesser & Co.,* 127 Ark. 590; *Alf. Bennett Lumber Co.* v. *Walnut Lake Cypress Co.,* 105 Ark. 421.

(2) Did the court err in dismissing the cause for want of jurisdiction? The motion to dismiss on the ground that the facts set forth in the complaint did not

state a cause of action was but tantamount to a general demurrer. *McAlister* v. *Graham,* 206 S. W. 393; *Yancey* v. *Boyce,* 1916 A. & E. Ann. Cas. 558. The record shows that the final judgment was entered on this motion dismissing the appellant's complaint. This ruling of the court was error. Since the complaint stated a cause of action at law, the same should not have been dismissed. Regardless of the name of the pleading, the court should have treated it as a motion to transfer to the law court, and should have transferred the cause to that court, instead of dismissing the same. Section 1041 C. & M. Digest; *Daniel* v. *Garner,* 71 Ark. 484; *Wood* v. *Stewart,* 81 Ark. 41; *Rowe* v. *Allison,* 87 Ark. 211; *Smith* v. *Pinnell,* 107 Ark. 185; see also *Lawler* v. *Lawler,* 107 Ark. 71.

For the error indicated, the judgment is reversed with directions to the chancery court to enter an order transferring the cause to the law court.

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WHITMORE v. SCOGGIN.

Opinion delivered January 31, 1921.

1. JUDGMENT—RES JUDICATA.—The dismissal of a suit in equity to compel specific performance of a contract will not bar an action at law to recover damages for breach of such contract; the issues in the two actions being different.
2. JUDGMENT—RES JUDICATA.—Dismissal of a suit in equity for the purpose of allowing plaintiff to bring an action at law was not an adjudication which would preclude the latter action.
3. SALES—CONSTRUCTION OF CONTRACT.—Under an agreement by the plaintiff to let defendant have his car for $675 and to take $2,500 worth of life insurance at the rate price of $80.21, and in case defendant "calls for the car before I get the policy the said $675 paid to plaintiff shall be demand," *held* that plaintiff was bound to sell and defendant to buy the car for $675; and, if no insurance was issued through no fault of the plaintiff, defendant would be liable for any damages sustained by reason of the failure or refusal of defendant to take the car.

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

*W. C. Rodgers,* for appellant.

1. The plea of *res judicata* is conclusive against plaintiff, Scoggin. 122 Ark. 262, 265; *Ib.* 278-80; 117 *Id.* 481-2; 30 *Id.* 457; 64 *Id.* 213-15 69 *Id.* 271-80. See, also, 76 Ark. 273; 78 *Id.* 501; 122 Ark. 278; 117 *Id.* 482; 30 *Id.* 453-7; 64 *Id.* 213; 69 *Id.* 271; 76 *Id.* 273; 78 *Id.* 501.

2. The decision of the chancery court necessarily operated as a bar to any subsequent investigation or determination of any equitable issues raised or should have been raised, for the law favors the ending of a controversy. Under the evidence plaintiff had no lien on the car. 76 Ark. 423-6; 79 *Id.* 185, 194. A judgment is conclusive not only of the questions raised and actually determined but upon all matters which might have been litigated. 105 Ark. 485-93; 94 U. S. 351-2. It was manifestly error to overrule the pleas of *res judicata.*

3. The ruling of the court that the only thing Scroggin had to do in order to place Whitmore in a position which would compel him to buy this car was to file a mere formal application for $2,500 life insurance. This ruling would make it easy for all sorts of fraud and imposition; and a man is not permitted to profit by his own wrong or fraud, a thing not permitted and odious in law and equity. 110 Ark. 335; *Ib.* 413; 122 *Id.* 266, 276; 123 *Id.* 463-6; 135 *Id.* 353-5.

If the contract does not bind Scroggin to take $2,500 insurance, there was no consideration for the agreement to buy the car; at least none to buy it at the price named in the contract, and there was no other. So the minds of the parties never met on any other price than $675, and this was in connection with the agreement to take the $2,500 insurance.

4. The court erred in its instructions, as there was no delivery of the policy. 103 Mass. 78. A policy of life insurance is not effectual until the premium is paid. 69 Ky. 450. It is not claimed that the premium was paid, and the tender was not kept good. 85 Ark. 30-2; 90 *Id.* 206-9. The court gave Scoggin the fullest benefit of the

contract without even requiring him to tender $80.21 which the contract calls for. The court even refused to permit defendant to show what commission he got for insurance which he solicited and was approved, in addition to refusing to permit him to show any incidental benefit the business would be to him. This was clearly error.

*J. S. Butt,* for appellee.

The plea of *res judicata* is entirely untenable because (1) the chancery court case was not a final adjudication of the merits of the case there pending and no bar. The court had the right to dismiss the case without prejudice to plaintiff, which was done, and its action is sustained by 69 Ark. 431; (2) the dismissal of the chancery case did not bar plaintiff from further action, as it was a suit between different parties and did not adjudicate this case. Whitmore could not place it beyond our power to take the policy and then with impunity breach his contract to buy the car at the price named in the contract. Such is not the law, and we are entitled to damages for breach of the contract. 92 Ark. 111. The case was properly submitted on correct instructions, and the amount awarded as damages represented the difference between the price at which Whitmore contracted to buy the car and the *uncontradicted* testimony as to its value at the time of the breach, and the judgment should be affirmed.

WOOD, J. The appellee brought this action against the appellant to recover damages for an alleged violation of the following contract:

"This agreement made between William E. Scoggin and Wm. Whitmore, the party of the first part agrees to let the said Wm. Whitmore have his car for $675 and to take $2,500 worth of life insurance at the rate price $80.21 and in case Wm. Whitmore calls for the car before I get a policy the said $675 paid to William Scoggin in cash will be demand. (Signed) W. E. Scoggin.

"Wm. Whitmore."

The appellee alleged that the appellant contracted to purchase from the appellee a certain car at the price named in the contract above set forth; that appellee had always been willing to perform his part of the contract by delivering the car to appellant, but that appellant refused to accept and pay for the car, although the same was duly tendered him, to the appellee's damage in the sum of $675, for which he asked judgment. The appellant, in his answer, did not deny the execution of the contract set forth in the complaint, but he did deny that it was a contract to purchase the car at the price named, or any other price, and denied all the other allegations of the complaint. He alleged that he was a soliciting agent of the Lincoln Reserve Life Insurance Company at the time the alleged contract was executed; that the agreement contemplated that the appellee was to take out and pay for a policy of insurance in the above company in the sum of $2,500, the premium for which was $80.21, of which premium appellant was to receive 60 per cent. compensation as soliciting agent; that this commission was the sole inducement on the part of the appellant in agreeing to purchase the car; that appellant had done all he could do in the furtherance of the issuance of the policy, but that the company had refused to issue the same. The appellant also set up the plea of *res judicata,* in which he alleged substantially that in the year 1919 the appellee filed a bill in equity to compel the appellant and the insurance company to deliver to the appellee a policy in the sum of $1,500, which the insurance company had previously issued, the company having refused to issue a policy for $2,500 as mentioned in the contract set forth in the complaint in the present suit. He alleged in the complaint in equity that he had no remedy at law for the enforcement of his rights against the appellant and the insurance company, and he prayed that the appellant and the insurance company be ordered to deliver the policy and that the court declare a lien on the car mentioned in the contract for the sum of

$675, and that the car be sold to satisfy whatever judgment the appellee might recover in that action. He set out also the answer that was filed by the appellant in the chancery cause, in which appellant denied that he had purchased the car as alleged, but admitted that he entered into the writing set forth in the bill and set up that the appellee had agreed to take out a policy in the insurance company in the sum of $2,500, of which the premium was $80.21; that the company refused to issue the policy for that sum, but did issue a policy in the sum of $1,500 of which the premium was $53 only; that the policy was forwarded to the appellant for delivery, but could not be delivered because the appellee had been exposed to an infectious disease; that the policy issued was canceled, the same not having been delivered in sixty days under the rules of the company, and that it was therefore physically impossible for the appellant to deliver to the appellee the policy of insurance mentioned in the contract.

The appellee, in his own behalf, testified to the contract, and over the objection of appellant introduced the same as evidence, and also over the objection of appellant stated, that at the time the contract was executed he signed an application for insurance for $2,500 named in the contract; that appellant wrote the application and carried the appellee to the doctor for examination; that the insurance company issued a policy in the sum of $1,500 on the application, which appellant showed the appellee, but appellant did not deliver the same to the appellee, although appellee was willing to take the policy and told the appellant that the car was at his service; that appellant refused to take the car, stating that he had ninety days to decide what he wanted to do about the policy. The appellant had no other understanding with the appellee about the car or the insurance except what was in the written contract. Appellant refused to take the car, and appellee drove the same under his shed at home and had not used it since. Appellee had been

ready and willing to take the policy and deliver to appellant the car at any time.

Over the objection of appellant, testimony was introduced on behalf of appellee to the effect that at the time the appellee offered appellant the car in controversy it was worth the sum of $400. The appellant testified that the appellee never took out a policy in the company which appellant represented. The appellee applied for insurance in the sum of $2,500, but that the company only issued him a policy for $1,500, which policy was not delivered to the appellee because the influenza was raging in the locality where appellee lived at that time. Appellant tried to get the company to issue a policy in the sum of $2,500, but it would not do so. The appellant offered to prove that he would have received a financial benefit from every policy which he solicited and delivered. He also offered to show that the rules of the company forbade the delivery of the policy in the present case and offered to read the rule of the company, all of which testimony the court would not permit to go to the jury, to which ruling the appellant duly excepted. Appellant further testified that he did his best to have a policy for $2,500 issued to the appellee, but that the company would not issue it because the appellee was an impaired risk. Appellant would have received a commission of 50 per cent. of the premium on this insurance. The court refused to permit the appellant to show that he would have received other financial benefits from this business, and also refused to permit appellant to testify that he would not have executed the contract but for the benefit he expected to derive from the insurance. To which rulings the appellant duly excepted.

The court overruled appellant's plea of *res judicata,* to which ruling appellant duly excepted. The court instructed the jury in substance that the contract, which is the foundation of the action, was a contract on the part of the appellee to sell, and on the part of the appellant to purchase, the car in question at the price of $675; and

that, although the contract bound appellee to take $2,500 worth of life insurance in the company represented by the appellant, nevertheless, if the failure to acquire this insurance was not through any fault of the appellee, but was brought about by the insurance company or the appellant, the appellant would be liable to the appellee for any damages that the latter sustained by reason of the failure or refusal of appellant to take the car. The appellant duly excepted to the ruling of the court in granting instructions submitting the issue on the above theory and presented prayers for instructions which told the jury that if the failure of the appellee to obtain insurance was brought about by reason of the refusal of the insurance company to issue and deliver the insurance policy mentioned in the contract and that such refusal was without the fault of the appellant, then the latter was not liable. The court refused these prayers, and appellant duly excepted. The jury returned a verdict in favor of the appellee in the sum of $250. From the judgment in appellee's favor for that sum is this appeal.

1. Appellant's plea of *res judicata* is not well taken for the reason that the issues raised by the pleadings in the chancery record were not the same as in the present record. The cause in the chancery court sought the specific performance of the alleged contract on the part of the appellant to deliver to the appellee the policy of insurance mentioned in the contract, and to compel the appellant to take and pay for the car mentioned in the contract. The insurance company was made a party to that suit. Here entirely a different cause af action is set up. Furthermore, the judgment of the chancery court in that case was but tantamount to permission to the appellee to dismiss the cause pending in the chancery court. Considering the language of the court's order as a whole, its manifest purpose was to allow the plaintiff to dismiss his cause and if he so elected to pursue his remedy in another court. It was clearly not the intention of the chancery court to adjudicate and fore-

close the assertion of any rights that appellee might have growing out of a breach of the contract. See *St. L. S. W. Ry. Co.* v. *White Sewing Machine Co.*, 69 Ark. 431.

2. The court, in its instructions, correctly construed the contract and correctly submitted the issue to the jury as to whether or not there had been a breach of the same, and also correctly instructed the jury on the measure of damage. See *Kirchman* v. *Tuffli Bros. P. I. & C. Co.*, 92 Ark. 111. We find that there was no error in the admission of testimony. There was evidence to sustain the verdict. The judgment must therefore be affirmed.

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PRESCOTT & WHITE'S FERRY ROAD IMPROVEMENT DISTRICT *v.* FRANKS.

Opinion delivered January 31, 1921.

HIGHWAYS—DISAPPROVAL OF PLANS BY COUNTY COURT—WHEN NOT ARBITRARY.—Evidence that the county court's refusal to approve plans for the improvement of a highway, authorized by Acts 1920, No. 118, § 6, was based on the fact that the cost of the proposed improvement would be burdensome and prohibitive *held* to show that the court's disapproval of the plans was not arbitrary.

Appeal from Nevada Circuit Court; *C. W. Smith*, Judge on exchange; affirmed.

*C. C. Hamby* and *R. P. Hamby*, for appellant.

1. The action of the county court and the circuit court was arbitrary. The allegation that the lands were too remote and inaccessible to be benefited is unsupported by the proof. Legislative determination that property will not be benefited will not be inquired into unless it can be shown that such determination is so arbitrary as to amount to confiscation. 139 Ark. 341; 216 S. W. 690; 218 *Id.* 375; 113 Ark. 193; 123 *Id.* 327.

2. The plans provide for 550 feet of wooden bridges, but this is no reason why the plans should be disapproved; the commissioners' demurrer should have been

sustained. The county court can not set aside the judgment of the commissioners and engineers and the action of the State Highway Commission unless it clearly appears that their judgment is manifestly wrong. 218 S. W. 385.

3. The overlapping of districts does not render the cost greater than benefits received. Lands may be placed in more than one district. 139 Ark. 524, 341; *Ib.* 153, 168. The objection is premature. 140 Ark. 115; 216 S. W. 690. The objection of property owners to improvement was demurrable and demurrer properly sustained. The assessment of benefits was not unequal and unjust. The Legislature may fix the annual maximum levy of benefits. 139 Ark. 525. Uniformity of taxation as provided in our Constitution refers only to general taxes and not to special assessments for local improvements. 56 Ark. 354; 86 *Id.* 109; 96 *Id.* 410; 87 *Id.* 8. No assessments having been made, the question is raised prematurely. 219 S. W. 755; 216 *Id.* 690; 138 *Id.* 341.

The act is not void because it conflicts with jurisdiction of county court. This is well settled and needs no citations. The act was properly passed, as the journals show, and this was the best evidence. 220 S. W. 57; 139 Ark. 595; 44 *Id.* 536; 40 *Id.* 200; 51 *Id.* 559.

The court erred in refusing the commissioners' declarations of law and finding of facts. Appeals can be taken from the judgment of the county court declining to approve plans. 140 Ark. 168. The action of the circuit court in disapproving the plans should be reversed.

*J. O. A. Bush,* for appellee.

The action of the county court and circuit court was not arbitrary. The matters set up in the answer as a defense are fully sustained by the evidence. The county judge was not willing to approve the plans, and his reasons are ample and sufficient and not arbitrary. The circuit court sustained his action, and no error is shown, but the judgment is clearly sustained by the law and evidence.

HART, J. This is an appeal by the commissioners of a road improvement district from the judgment of the circuit court affirming the action of the county court in disapproving the plans and specifications filed by the commissioners for the construction of the proposed improvement.

The judgment is sought to be reversed on the ground that the action of the county court and the circuit court was arbitrary.

The special session of the Arkansas Legislature held in 1920 passed an act to create the Prescott and White's Ferry Road Improvement District in Nevada County, Arkansas. The bill is No. 118 of the unpublished Acts of 1920, and was approved February 11, 1920. Boundaries of the district were designated in the act, and the road to be improved was described.

Section 5 of the act makes it the duty of the commissioners to improve the road by grading, draining, and surfacing it in such manner, and with such materials, as the commissioners shall deem best for the interest of the district, with full power to construct bridges, culverts, and necessary appurtenances to the road.

The section further provides that the several parts of the road may be surfaced with such different materials as the commissioners shall see fit. It also provides for changes in the route of the road, to be approved by the county court and laid out by it as county roads are laid out.

Section 6 provides that the commissioners shall file their plans, when completed, with the county clerk of Nevada County. The section further provides that, if the county court shall approve the plans, as filed, it shall enter an order to that effect, which shall have the force of a judgment. It also provides that, if the county court shall disapprove the plans, it shall enter an order to that effect, and appeals from such order may be taken by the commissioners to the circuit court to be there tried *de novo* before the circuit court sitting as a jury.

Thus it will be seen that the commissioners are given great discretion as to the kind and character of the improvement to be made in the road. They have full power to grade, construct, and surface the road with such materials as they shall deem best for the interest of the district, and also to construct the necessary bridges and culverts. Their action, in this respect, however, is subject to the approval of the county court.

The county judge was a witness in the circuit court. According to his testimony, after the commissioners had filed their plans and specifications with him, he made an estimate of the proposed cost of the improvement, and found it to be so great that it would be very burdensome to the people interested, and would be prohibitive. The commissioners did not disagree with him that the cost of the road was prohibitive.

The plans and specifications showed wooden bridges, and one of them was 550 feet long. The county judge thought that this was another objection to making the improvement, because it would be better, in the long run, to have steel and concrete bridges and culverts. Another reason for disapproving the plans and specifications was, that the proposed road was near another county road which would have to be kept up by the same property owners.

The county judge, by virtue of his office, was necessarily familiar with the public roads of his county. According to his testimony, he knew and appreciated the necessity of improving the public roads and the ability of the property owners to pay for the same. He had the plans and specifications before him, and, when everything was considered, he deemed it to be to the best interest of the people not to carry out the proposed improvement.

The circuit court accepted his testimony as true, and acted upon it in trying the case *de novo*. The testimony is of such a substantial character as to form a basis for the action of the circuit court in affirming the judgment of the county court, and it can not therefore be said, in

view of all the surrounding facts and circumstances, that the ruling of the circuit court was arbitrary, and without substantial evidence to support it.

It follows that the judgment will be affirmed.

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## LLOYD v. THORNTON.

Opinion delivered January 3, 1921.

TAXATION—PRESUMPTION OF REDEMPTION FROM PAYMENT OF TAXES.—Where land was sold to the State in 1882 under the overdue tax act, and from and including that year and up to 1919 the lands were assessed to and taxes thereon paid by plaintiffs and other privies, who owned the land at the time of sale, it will be presumed that the lands were redeemed, notwithstanding the records of the land office do not show such redemption.

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

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellants on the 24th day of November, 1919, to quiet their title to 120 acres of land in Clark County, Arkansas. The title of both parties is deraigned from the State, which obtained title from the United States under the Swamp Land Grant. A patent was issued by the State to forty acres of the lands to one of the grantors of appellees on the 13th day of July, 1882, and a patent to the grantors of appellees was issued by the State to the remaining eighty acres on the 3d day of December, 1881. The statement of facts shows that the lands had been on the tax books, from and including the year 1882, to the time of the institution of the present suit, and that appellees and their grantors have paid the State, county, school, and road district taxes on said lands for all said years.

The State claimed the title under, and by virtue of, overdue tax proceedings begun on the 19th day of April, 1882, whereby the lands in question were condemned to be sold for the unpaid taxes for the year 1876. A decree was entered of record in said overdue tax proceedings, on 28th

day of July, 1882, and the lands were sold to the State for taxes, penalties and costs, and on the 2d day of October, 1882, and on the same day appellant purchased the lands from the State, receiving a deed from the Commissioner. The records of the State Land Office do not show that the lands involved were redeemed from the overdue tax sale.

The chancellor found the issues in favor of appellees, who were the plaintiffs in the court below, and a decree was entered accordingly.

The defendants are the appellants in this court.

*W. A. Leach,* for appellants.

1. It is conceded that the lands in controversy were embraced in the "overdue tax suit" in Clark County and were sold to the State. The validity and regularity of this proceeding is unquestioned, and its effect was to vest a good and valid title to the lands after the period of redemption had expired. There are but two ways pointed out by the law by which the State could have been divested of this title, that is by redemption in the time and manner provided by the "overdue tax act" or some subsequent act, or sale by the State. It is not contended that the lands were actually redeemed, nor is it contended that the State sold these lands prior to the deed to appellants.

Appellees rely solely on the doctrine of estoppel to divest the State of whatever title it acquired under the sale under the "overdue tax act."

The State is not estopped by the unauthorized acts of her agents or officers. 12 Ark. 421; 27 *Id.* 242; 39 *Id.* 580; 135 *Id.* 353; 93 *Id.* 495. The State is bound and will be estopped by the conduct of her officers acting within the express scope of their authority. 135 Ark. 353. But if the act did not fall clearly within the express authority of the State she would not be estopped. 66 Ark. 48. The grounds upon which estoppel is here sought are twofold: (1) The action of State Land Commissioner in expressing an opinion as to the validity of a certain forfeiture; (2) the action of the State's taxing officers in

levying and collecting taxes on the lands in controversy. The State is not estopped by the opinion of the Land Commissioner. The office of Land Commissioner was created by statute, and his duties clearly defined. His duties are purely ministerial, and giving opinions upon matters of law is not one of his duties or powers, and the State is not estopped nor bound by the unauthorized acts of her officers. 39 Ark. 580; 42 *Id.* 118; 55 *Id.* 398; 93 *Id.* 495. The unauthorized acts of the tax officers in placing the lands on the tax books and collecting taxes does not estop the State. 135 Ark. 353-366. The presumption is that public officers do their duty. Lands granted to the State under the "swamp land grant" do not become taxable until a sale by the State. Under the act of 1887 "overdue tax lands" were subject to redemption, and a presumption of sale does not arise from the fact that taxing officers levied and collected taxes. The presumption of a grant against the sovereign is like laches, and no fast and hard rule can be laid down that will govern. Each case must depend upon the facts of the particular case. 135 Ark. 232, 353, 364. The State is not estopped. 140 U. S. 464. The doctrine of estoppel having no application here and the alleged presumption of redemption being overcome by positive proof, the judgment is wrong and should be reversed.

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

1. This case is on "all fours" with *Wallace* v. *Hill,* 135 Ark. 353, and that case controls, and it was properly decided.

2. The case of *Martin* v. *Barbour,* 34 Fed. Rep. 701, is especially applicable here. See, also, 139 Ark. 333.

3. The doctrine of estoppel now extends even to the State, where an officer or agent of the State has misled a party to his injury. 114 Ark. 62; 135 *Id.* 232; 135 *Id.* 353; 140 U. S. 646. The State is estopped by the state's officers in placing the lands upon the tax books during the period allowed for redemption, and the con-

tinued possesion of the lands and the payment of taxes for thirty-five years thereby effecting a constructive redemption. The State is clearly estopped.

4. The lands were not subject to taxation for the year 1876. There is no error.

HART, J. In the case of *Wallace* v. *Hill,* 135 Ark. 353, the court held that where land was sold to the State, under an overdue tax sale, and where for thirty-four years thereafter the State, through its county officers, assessed, levied, and collected taxes on said land in the name of the original owner and his successors, it will be presumed that said land had been redeemed from the Commissioner of State Lands by the original owner.

This principle of law controls the case at bar. The overdue tax sale was had in the year 1882, and the lands were sold to the State for the taxes, penalties and costs. The record shows that, from and including that year, up until the time of the institution of the present suit in 1919, all the taxes due on said lands were paid by the appellees and their grantors. The lands were assessed in the names of the grantors of appellees, who owned them at the time they were sold under the overdue tax proceedings. The then owners paid the taxes, and the lands continued to be assessed in their names, and the taxes were paid by them until they sold the lands to appellees. Since that time the lands have been assessed in the names of appellees, and they have paid the taxes.

The persons who owned the lands at the time the overdue tax sale was had were entitled to redeem the lands from that sale. The right to redeem was a substantial right which the owners could not be deprived of. If the lands had been redeemed, it was the duty of the proper officers to place the lands back on the tax books in the names of the owners and thereafter to assess and collect taxes thereon. The fact that the owners had the right to redeem, and that the lands were placed back on the tax books in the owners' names, coupled with the

further fact that the owners thereafter paid the taxes, raises the presumption that the lands were redeemed, notwithstanding that the records of the Land Office do not show such redemption.

It is contended that the present case is differentiated from that of *Wallace* v. *Hill, supra,* because the record herein recites that the records of the State Land Office do not show that the lands involved in this suit were redeemed from the overdue tax sale. This is a negative showing which we do not regard as of any force whatever. Of course, if the record at the Land Office affirmatively showed that the lands had been redeemed, that would end the matter. No such showing appears on the records, and it is because of the absence of such showing that the presumption can arise at all. The presumption is in favor of the landowner, whom the record shows had performed his full duty to the State with regard to the payment of taxes assessed against his lands. If, in fact, the owner exercised his right of redemption in apt time, it would be inequitable to deprive him of his title simply because the Commissioner of State Lands failed to discharge his duty and to make his records show that the lands had been redeemed. It is in accord with the principles of equity to hold that the action of officers of the State in placing the land on the tax books in the name of the owner during the time he had a right to redeem and the assessment and collection of taxes from him thereafter for a long period of years is sufficient to raise a presumption that he did redeem from the overdue tax sale.

The records show that the appellees bought the lands in 1905 from the heirs of the original grantee. The attorney who made the abstract of title wrote to the State Land Commissioner with regard to the overdue tax sale. The Land Commissioner wrote back that the forfeiture was erroneous because the lands were not subject to taxation for the year 1876. The records further show that the title at that time was in the State. Of course

the State could not be estopped by the statement of the Land Commissioner to the effect that the overdue tax sale was erroneous, but the inquiry does show that the appellees, and their grantors, acted in good faith in the matter. It does not, in the least, tend to lessen the presumption that the lands had been redeemed by the owners in apt time under the overdue tax sale. It will be remembered that the inquiry was made by the abstracter representing the heirs of the original owners of the lands at the time the overdue tax proceedings were had. Hence it could not be said that the inquiry constituted any evidence of a declaration or admission on the part of the original owner that they had not redeemed from the overdue tax sale. The appellants took their deed for the lands in the same condition in which the State held them and subject to the same equities and defenses. Hence the court below was right in dismissing their cross-complaint to quiet title in themselves, and the decree was right in quieting title in the appellees.

The case of *Chicago Land & Timber Company* v. *Dorris,* 139 Ark. 333, has no application here. As pointed out in the opinion in that case, the record did not show who owned the lands at the time of the overdue tax sale, or that the lands were placed back on the tax book in the name of such owner within the period of the right of redemption. Hence there was nothing in that case, as in the present one, from which to raise a presumption that the owner of the lands did redeem them from the overdue tax sale.

Therefore the decree will be affirmed.

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## ELLISON v. OLIVER.

Opinion delivered January 31, 1921.

1. STATES—CONTRACT FOR PUBLIC PRINTING—APPROVAL.—The requirement of Constitution 1874, article 19, § 15, that public printing shall be performed under contract awarded to the lowest possible bidder subject to approval by the Governor, Auditor and Treasurer is mandatory.

2. CONSTITUTIONAL LAW—CONSTRUCTION BY SILENCE OF COURT.—The construction of a provision of the Constitution is a matter of too much public importance to be concluded by the mere omission of the court to pass upon a question in a given action unless the decision of the case necessarily involves a construction of such provision.
3. STATES—BOARD FOR LETTING CONTRACTS.—Under Constitution, article 19, § 15, requiring State printing contracts to be approved by the Governor, Auditor and Treasurer, the Legislature could not make such officers a board for the letting of such contracts, as the Constitution impliedly requires the approval of contracts by them to be separate from the act of letting them.
4. STATES—APPROVAL OF PUBLIC CONTRACTS.—The "approval" of public contracts by the Governor, Auditor and Treasurer means the approval by each of the above officers separately, and not as a board, so that the approval of two of the three officers is not sufficient.
5. CONSTITUTIONAL LAW—FUNCTION OF COURTS.—In construing a provision of the Constitution, the courts have nothing to do with its wisdom or expediency.
6. EVIDENCE—PRESUMPTION THAT OFFICERS WILL PERFORM DUTIES.—The courts will not presume that either the Governor, Auditor or Treasurer, in performing their duties under Constitution 1874, article 19, § 15, will wilfully or capriciously withhold his approval from a public contract, but will presume that each officer will perform the duty imposed upon him by the Constitution without regard to any supposed public or private advantage to himself.
7. CONSTITUTIONAL LAW — CONSTRUCTION OF UNAMBIGUOUS LANGUAGE.—Where the language used in a constitutional provision is plain and unambiguous, the court can not seek other aids of interpretation.
8. STATES—APPROVAL OF PRINTING CONTRACT.—Under Constitution, article 19, § 15, requiring printing contracts to be approved by the Governor, Auditor and Treasurer, a contract approved by the Governor, Secretary of State and Treasurer, but not by the Auditor, is void.
9. STATES—APPROPRIATION FOR ADDITIONAL WORK.—Under Constitution, article 5, § 29, prohibiting appropriations for a longer period than two years, and article 16, § 12, requiring payments only in accordance with appropriations, Acts 1919, page 186, appropriating a sum for reprinting the Supreme Court Reports can not be construed as an appropriation to carry out a contract for printing such reports entered into under Acts 1917, vol. 2, p. 1217, and no payments can be made under the act of 1919 without letting a new contract.

10. STATES—LETTING OF PUBLIC CONTRACTS.—Under Acts 1919, page 186, appropriating a sum for reprinting the Supreme Court Reports, a contract which was not let to the lowest bidder, as required by Constitution, article 19, § 15, was void.

11. STATES—CONTRACTOR ACTING IN GOOD FAITH UNDER VOID CONTRACT.—The fact that a contractor printed books for the State in good faith believing that his contract was valid and that the work was done to the State's advantage, would not authorize the courts to deny injunction against the enforcement of an invalid contract.

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

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellees to restrain them from proceeding further in carrying out an alleged contract for the reprinting and binding of certain Supreme Court Reports.

The facts are as follows: Appellants are citizens and taxpayers of the State of Arkansas. The Legislature of 1917 passed act 226 providing for the reprinting and sale of certain Arkansas Supreme Court Reports. Pursuant to the act the Governor, the Auditor and the Secretary of State advertised for bids for the printing and binding of certain volumes of the Supreme Court Reports, and C. C. Calvert submitted a written proposal to do the work. This bid was accepted, and the Governor, Secretary of State, and the Auditor of State, purporting to be the board of commissioners to let public contracts, entered into a written contract with the Calvert-McBride Printing Company of Fort Smith, Ark., for printing and binding 500 copies of certain volumes of the Arkansas Supreme Court Reports. The contract was signed by the Governor, as president of the board, and by the Auditor of State and the Secretary of State. The minutes of the board approving the contract were written up and signed by the Governor, Secretary of State, and the Auditor of State. The printing company entered upon the work and printed reports until the appropriation, amounting to $40,000, was exhausted in payment of the work. The Legislature of 1919 passed act 257 entitled,

"An Act to Appropriate Money for the Reprinting of Certain Supreme Court Reports." No new contract for the printing of the reports was let, and the Calvert-McBride Printing Company continued to do the work under the contract made on the 2d day of November, 1917, above referred to, and the act of 1919 was treated by the board and by the printing company as an appropriation to carry on the work under the contract executed on November 2, 1917. The printing company in good faith continued the work of reprinting the Supreme Court Reports and a large part of the appropriation made by the Legislature in 1919, was expended in paying for the same. The State Treasurer did not approve the contract made in 1917, nor was he asked to do so.

The chancellor was of the opinion that the contract between the Board of Commissioners and the Calvert-McBride Company, dated November 2, 1917, was a valid and binding contract and covered the reprinting of all the Supreme Court Reports involved in this controversy which were out of print, and that act 257 passed by the Legislature of 1919, was in effect an appropriation bill to pay the Calvert-McBride Printing Company for work done under the terms of the contract dated November 2, 1917, and that therefore a new letting was unnecessary under the last mentioned act.

A decree was entered accordingly, and the case is here on appeal.

*E. G. Shofner,* for appellants.

1. The chancellor erred in holding that act 257 of 1919 was a mere appropriation bill to pay the printing company for work done under its contract awarded under the act of 1917. The board did not advertise for bids and let a contract in the constitutional way. The act of 1919 can only be made a simple appropriation bill by judicial construction, and there is no room for construction of a statute unambiguous in its language. 56 Ark. 110; 47 *Id.* 404. Statutes should be construed according to their natural and obvious language. 110 Ark.

99. If the statute is plain and unambiguous, there is no room for construction, and resort to extrinsic facts is not permitted. 11 Ark. 44; 104 *Id.* 583; 93 *Id.* 42. If it was the intention of act 257, § 2, to adopt the terms of the contract let in 1917, it is void. 111 Ark. 571. If that was not the intention, then the machinery provided in act 226 of 1917 must govern, and the action of the board in proceeding without competitive bids is void.

2. The court erred in holding, in effect, that the act of 1917 authorized the board to let the contract for an amount of printing beyond the appropriation made and that this authority was legal. If the act of the board is to be upheld, their authority must be found in act 226 of 1919, and it must be firmly grounded upon the Constitution and general laws. Article 5, § 28, Constitution; article 16, § 12, Constitution; Kirby's Digest, §§ 3403, 3415-18; 120 Ark. 80; 42 *Id.* 243. If the act did not give the board authority to contract beyond the appropriation made for the purpose, a new contract must be made under the act of 1919; and the board is without authority to give the work to any printer without advertising for bids. 40 Ark. 251; 54 *Id.* 645; 111 *Id.* 571.

3. The court erred in holding that the contract let to Calvert-McBride Company November 2, 1917, covers any amount of printing beyond the appropriation made. Having entered into a contract for printing *all* the books out of print, the board left themselves without the right to select volumes. 42 Ark. 243. The reservation was not of the right to designate *the order in which the books should be printed,* but an absolute reservation of the right to designate the volumes that should be printed at all, or in any event. In the contract there is the right to terminate the contract at any time by the board. In view of the law, constitutional and statutory, the board reserved the right to shut off work whenever the printing company had executed enough work to absorb the appropriation and therefore to let a contract for reprinting $40,000 worth of books and no more. If the contract did cover all

of the books out of print, regardless of the amount, and the board's authority to let the contract was legal, then the Legislature itself was without power to enact a law which would deprive it of the benefit of the contract. Even the Legislature could not do this. 42 Ark. 243. Unless both parties are bound, neither is. 4 Ark. 251.

4. The chancellor erred in holding that the contract of November 2, 1917, was a valid contract, and in refusing to go into an accounting under it. Art. 19, § 15, Const.; Kirby's Digest, § 6408. The contract in controversy was not approved by the Treasurer in his official capacity. The reprinting of these reports was such State printing as was covered by the Constitution and statute above quoted. 111 Ark. 571. Although our Supreme Court has not passed on the question presented, there are numerous decisions construing provisions identical with article 19, section 15, Constitution. See 56 Pac. 818; 57 *Id.* 449. These cases are peculiarly applicable here. The contract was never properly approved, and it was not effective after December 1, 1919. The Treasurer never approved it.

5. The chancellor erred in refusing to order an immediate accounting and in refusing to rescind the contract. The chancellor could and should have rescinded the contract and ordered an accounting. 40 Ark. 251.

The chancellor should have held the act of the printing board in employing the Calvert-McBride Company without advertising for bids under the act of 1919 to be illegal and restrained further payments and ordered an accounting.

*Coleman, Robinson & House,* for appellees.

Act 257 of 1919 was intended as a continuation of the appropriation of the act of March 18, 1917. There is no legal objection to the Legislature appropriating money for carrying out any contract in which the State is interested and making additional appropriations from time to time as the emergency exists. The matter is entirely in the Legislature's hands.

As to whether or not the board could have advertised for bids under the Acts of 1919 and been restrained by the contractor is entirely beside the question, as all parties have accepted the construction placed upon the act by the board and have been proceeding thereunder, and there is no merit in the contention that under the act of 1919 the Calvert-McBride Company expected to do the work for all time to come, as that is a matter entirely within legislative discretion.

Article 19, section 15, Constitution, was complied with, and the contract was properly approved. The cases in 57 Pac. 449 and 56 Pac. 818, have no application. See 127 N. W. 1079-81, 149 Iowa 76; 100 Pac. 1114-16; 23 Okla. 489; 96 Pac. 731; 37 Mont. 408.

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

1. Sections 6408 of Kirby's Dig., is a reproduction of section 5363 of Mansfield's Digest, and the contract was approved by the Governor, Secretary of State and Auditor.

2. There was no error in refusing to order an immediate accounting. Appellants have not been injured, as the case is still in court subject to final adjudication. The contentions of appellants are purely technical. State officers and the printing company have each acted in good faith, and the State has received a good contract and is receiving good work at a price which is a saving to the State.

HART, J. (after stating the facts). The decree of the chancery court is sought to be reversed on the ground that the contract of the date of November 2, 1917, for reprinting certain volumes of the Arkansas Supreme Court Reports is a valid and binding contract and that the act supplementary thereto, passed by the Legislature in 1919, was, in effect, an appropriation bill to pay the Calvert-McBride Printing Company for work done by it under the original contract. The correctness of the

holding of the chancellor depends upon the construction to be given article 19, section 15, of the Constitution of 1874, providing for the letting of contracts for public printing, the act of the Legislature passed for the purpose of executing this provision of the Constitution and the act of 1917, together with the act of 1919, supplementary thereto, providing for the letting of the printing of certain volumes of the Arkansas Supreme Court Reports.

Article 19, section 15, of the Constitution of 1874, reads as follows: "All stationery, printing, paper, fuel for the use of the General Assembly and other departments of government, shall be furnished, and the printing, binding and distributing of the laws, journals, department reports and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract to be given to the lowest responsible bidder, below such maximum price and under such regulations as shall be prescribed by law. No member or officer of any department of the government shall in any way be interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer."

The act of November 28, 1874, makes the Governor, Auditor and Treasurer of State, ex-officio commissioners to superintend the letting of the public contracts provided for in the section of the Constitution just referred to. That act also prescribed the regulations for letting such contracts.

In 1889 the act was amended to make the Governor, Secretary of State and Auditor ex-officio commissioners to superintend the letting of all public contracts for all the purposes set forth in article 19, section 15, of the Constitution of 1874, and the act further provides that they shall discharge their duties in the manner hereinafter prescribed. Crawford & Moses' Digest, §§ 9190 *et seq.*

The record in the instant case shows that the Governor, Auditor and Secretary of State advertised for bids and let the contract under consideration to the Calvert-McBride Printing Company in November, 1917. The record also shows that no advertisement for bids was made under the statute passed in 1919, and that no new contract was let for the work done under it. The money provided for in that appropriation was paid out by the board under the contract made in November, 1917. The Governor and Auditor signed the contract and also signed the minutes of the board's meeting at which the contract was let. The Treasurer did not approve the contract, nor was he called upon to do so. He had nothing whatever to do with making or approving it. At the outset it may be said that the provision of the Constitution with regard to letting the public printing and the regulations prescribed by the statute for letting such contracts is mandatory.

In *Woodruff* v. *Berry,* 40 Ark. 251, in discussing this question, the court said: "The end proposed in the constitutional provision requiring contracts to be let to the lowest bidder is public economy. And the means provided by the Legislature is an extended notice in the public journals so as to ensure publicity and secure competition. The established policy of the State upon this subject is that public contracts are to be let upon public notice, and to be open to competition upon proposals and are to be made with the lowest bidder who can give due security. The entire authority of the board to let such contracts is conferred by statute, and the statute prescribes how only they can contract. Any other contract is unauthorized, in excess of the powers vested in the board and voidable at the election of the State."

Again in *Hodges* v. *Lawyers' Co-operative Pub. Co,.* 111 Ark. 571, the court held that the publication of the Arkansas Supreme Court Reports fell within the provisions of article 19, section 15, of the Constitution, and that that part of it requiring such contracts to be let to

the lowest bidder is mandatory. The section of the Constitution in question provides that all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer. Before this is done no contract is made. These officers might consider all the bids too high and refuse to have the work done at the prices bid, or for some other legal and sufficient reason might not approve the contract. The language used is plain and unambiguous, and it is apparent that the requirement that the contract shall be approved by the designated officers is mandatory.

In *Woodruff* v. *Berry,* 40 Ark. 251, the contract was held invalid because the notice required by the statute was not given and because there was a combination among the bidders to stifle competition. The contract in that case was let by the Governor, Auditor and Treasurer, acting as a board of commissioners to superintend the letting of public contracts under the act of November 28, 1874, constituting these officers as such board. The opinion in that case is silent upon whether the officers designated by the Constitution to approve the contracts could, under the statute, be made a board for the letting of such contracts.

The silence of the court on the question in that case can not be said to be a recognition on the part of the court that the Legislature had the power to constitute the Governor, Auditor and Treasurer a board to superintend the letting of printing contracts for the State. The construction of a provision of the Constitution is a matter of too much public importance to be decided by the mere omission of the court to pass upon a question in a given action unless the decision of the case necessarily involves a construction of the provision of the Constitution in the respect named.

As we have already seen, the decision of the court in the case just referred to proceeded upon other grounds, and we do not consider that the question now presented was decided in that case.

It is contended that, inasmuch as all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer, this necessarily gives the Legislature the power to provide a board to superintend the letting of printing contracts composed of all these officers. For example, it is said that, if the Legislature should name a board composed of the Governor, Auditor and Treasurer, the letting of a contract by said board would necessarily constitute an approval of such contract by these officers. A majority of the court, however, is opposed to this view. We believe that the language used by the framers of the Constitution contains an implied prohibition against giving these officers the power to let contracts for the public printing. The authority conferred is that all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer. This necessarily implies that the letting of the contracts shall be performed by another officer or officers. All of us are of the opinion that the present statute, conferring the power upon the Governor, Auditor and Secretary of State to let the contracts for the public printing, is unconstitutional. A majority of the court is of that opinion, as above stated, because there is an implied prohibition against placing the Governor, Auditor or Treasurer upon a board to superintend the letting of the contracts which the Constitution requires shall be made subject to their approval. Thus successive steps are directed to be taken in the execution of such contracts, and nowhere does the Constitution provide that either of the steps required to be taken shall be conclusive. Each step is intended as a distinct and successive safeguard to protect the State against collusion and extortion. In this way the interest of the public is better safeguarded, and there is a double check against imposition and extravagance.

It is also contended that the Governor, Auditor and Treasurer act collectively or as a body in approving the contracts, and that the action of a majority is sufficient.

To sustain this contention, reliance is placed upon the common-law rule laid down in 22 R. C. L., p. 456, and 29 Cyc., p. 1434, and authorities cited to the effect that where the execution of a power of a public nature is conferred upon two or more persons it may be exercised by a majority of those intrusted with it. In most of the adjudicated cases upon the subject that have been called to our attention, it is evident, from the act to be done, that the power must be executed jointly and not separately. For example: in case of school directors, appraisers, arbitrators, commissioners to make contracts to erect public buildings, and also cases where three or more State officers are empowered to appoint another officer, the nature of the act to be performed in each case requires the joint action, or a concert of action on the part of the officers intrusted with the power.

So here, if the framers of the Constitution had given the Governor, Auditor and Treasurer the power to make or let contracts for the public printing, the nature of the act to be performed would have required them to act jointly. The framers of the Constitution, however, intended that contracts for the public printing should be let by another officer or officers, but that they should be subject to the approval of the Governor, Auditor and Treasurer. The word "approval" means that the contracts should receive the official sanction of the officers named, and that this should be given separately. Because their approval is necessary under the Constitution, we must reach the conclusion that their action is designed to be a check upon the action of the board. Each of the officers named is fitted by reason of the duties of his office to pass judgment upon the action of the board. The contract when made can be passed from one to the other for his approval in order that he may give the public the benefit of his judgment and official sanction. It is in the nature of a veto power, and each of the officers can withhold his approval and thus veto the contract.

It is claimed that the wheels of government might be blocked unless the Governor, Auditor and Treasurer are required to act jointly and not separately in giving their approval. In the first place we have nothing to do with the wisdom or expediency of the provision. In the next place, it is no more to be supposed that one of these State officers would violate his oath of office by wilfully or capriciously withholding his approval than it would be to presume that two of them might get together and approve a contract let to a favored bidder. We will indulge in neither presumption, but will indulge in the presumption that each officer will perform the duty imposed upon him by the Constitution without regard to any supposed public or private advantage to himself.

The first rule of construction is that where the language used in a Constitution is plain and unambiguous, the court can not seek other aids of interpretation. Other State Constitutions contain provisions similar to our own with regard to public printing, except that the approval of the contracts is given to the Governor and Treasurer; still others leave the approval to the Governor alone. A majority of the court is of the opinion that the framers of the Constitution intended that the approval of contracts for public printing should receive the individual judgment of each of the officers named and that they act separately in giving or withholding their approval. Such is the holding of the Supreme Court of Montana in *State* v. *Hogan,* 56 Pac. 818, and *State* v. *Smith,* 57 Pac. 445. In that State the Constitution provided for the approval by the Governor and Treasurer, and it is contended that this called for an application of the rule that public authority conferred on two can not be exercised by one without the other's consent, because the number does not admit of a majority.

The court might have placed its decision on that ground, but it did not see fit to do so. It placed its decision squarely on the ground that the framers of the Con-

stitution intended that the Governor and Treasurer should act separately in giving, or withholding his approval of the contract. The court said that the Constitution did not require them to give any reasons for their action, and that, on account of the peculiar duties of their offices, each was presumed to be especially informed as to the condition of the State's finances, and that it was thought proper to give the State the benefit of his judgment by requiring such contracts to be approved by him.

The Treasurer was not called upon to approve the contract in question, and did not do so. Therefore, it necessarily follows that the contract was not executed in accordance with the provision of the Constitution regulating the letting and approval of such contracts, and for that reason is not a valid and binding contract upon the State.

The work done under the statute of 1919 would be invalid for another reason. The original statute, which was passed in 1917, provided for the letting of the contract to the lowest and best bidder after being duly advertised. Acts of Ark., 1917, vol. 2, p. 1217. The act of 1919 simply provides for the appropriation of $30,000 to be used and expended for the reprinting of such volumes of the original Arkansas Supreme Court Reports as are, or may shortly be, out of print. No provision is contained in the act for letting the contract to the lowest bidder. General Acts of 1919, p. 186. The work in question was done under the act passed in 1919. If for no other reason, the contract under consideration would be invalid because it was not let to the lowest bidder, as required by the provision of the Constitution above quoted and referred to.

It is insisted, however, by counsel for the defendants that this is merely an appropriation bill to pay the Calvert-McBride Printing Company for work done under the terms of the contract dated November 2, 1917, and that therefore a new letting was unnecessary. We can not agree with counsel in this contention. New volumes

of the Supreme Court Reports must necessarily be printed as new opinions are prepared and handed down. If the contention of counsel be sustained, it would follow that the Legislature could make one contract for the reprinting of the Supreme Court Reports and that every subsequent Legislature might appropriate money for the continuation of this work at the same price, regardless of changed conditions. It is obvious that such contention could not be sustained. Article 5, section 28, of the Constitution of 1874 provides, in effect, that no money shall be drawn from the treasury except in pursuance of specific appropriations made by law and that no appropriations shall be made for a longer period than two years. Article 16, section 12, of the Constitution provides that no money shall be paid out of the treasury until same shall have been appropriated by law, and then only in accordance with the appropriation.

The contract entered into in 1917 could only be for the amount named in that appropriation. The Legislature of 1919 had the power to continue the work, but a new contract must have been let in accordance with the Constitution and act of the Legislature regulating the same.

It follows that the Legislature of 1919 had no power to make an appropriation for continuing the work of reprinting the Arkansas Supreme Court Reports under a contract made in 1917.

It is claimed, however, that the present contract has been for the most part executed, and that, on account of the increase in the cost of printing, a substantial sum of money was saved to the State by continuing the work under the contract made in 1917. It is true the record shows that the contract under consideration was entered into and carried out in good faith by all parties concerned, and that they believed it was a valid and binding contract. This, however, does not constitute a reason for its enforcement by the courts. In *Woodruff* v. *Berry*,

40 Ark. 251, it was held, in effect, that individuals as well as courts must take notice of the extent of authority conferred by law upon persons acting in an official capacity. The court further said that the State is not responsible for the mistakes of her officers and agents, nor bound by their unlawful acts. Hence the fact that all parties concerned acted in good faith and for the best interests of the State is no defense to the present action. The fact that the Calvert-McBride Printing Company performed valuable services for the State in good faith upon a contract believed to have been legally entered into by its properly constituted officers could at most only create a moral obligation on the part of the State to pay for the services, which, because it can not be enforced in the courts, addresses itself to the legislative department of the State government.

It follows that the decree must be reversed and the cause will be remanded for further proceedings in accordance with law and not inconsistent with this opinion.

McCULLOCH, C. J., and SMITH, J., concurring.

SMITH, J. (concurring). I concur in the holding that the Treasurer could not be left off the board while the Governor and Auditor were made members thereof. Practically speaking, officers would be expected to approve a contract which they had let. So that, if the Governor and Auditor were made members of the board to let the contract, the Treasurer should also have been made a member, otherwise the two officers who assist in letting the contract might become committed to its approval before the matter was taken up with the Treasurer, as the Constitution evidently contemplated.

But I perceive no reason why the three State officers might not be authorized to let the contract as well as to approve it if they were all three put on the board. Whatever might be said of the policy of legislation of that character, I see no constitutional objection to it.

The Constitution contains no inhibition to that effect the only provision being that "no member or officer of

any department of the government shall in any manner be interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer."

The approval of the contract by these officers was the thing desired, and that would be obtained if they were made members of the board which lets the contract in the first instance. I think the case of *Woodruff* v. *Berry,* 40 Ark. 251, accords with this view.

I do not agree with the majority in the view that these State officers must separately and severally approve the contracts mentioned in this section 15. This is a very comprehensive section, and includes many matters of detail, as it covers all contracts for stationery, printing, paper, fuel, whether for the use of the General Assembly or the other departments of government, and the printing, binding and disbursing of the laws, journals, department reports, and all other printing and binding, and the repairing and furnishing of the halls and rooms used for the meeting of the General Assembly and its committees. The very extent and variety of the duties imposed on the three constitutional officers in regard to these contracts suggests alike the wisdom and necessity for conference and consultation, if the purpose of the Constitution is to be subserved.

Ordinarily, the purpose of conferring authority upon more than one person to perform an official duty is to secure the benefit of conference and consultation, and there is nothing in the language quoted to indicate a contrary intention here. Certainly the necessity and advantage of such action is as apparent here as in other cases where important contracts are to be made or important action taken.

The majority has held that these officers do not act collectively. They may meet together, or not, as they please. Each is given the veto power. The right of the majority to rule is destroyed. An obdurate officer may, by withholding his own approval, coerce the majority or

embarrass the public administration. A result so full of deplorable possibilities should not be brought about unless the writers of the Constitution have so expressly ordered.

Section 9755, C. & M. Digest, was the law in this State when the Constitution of 1874 was adopted. It reads as follows: "An authority conferred upon three or more persons may be exercised by a majority of them; and a majority of three or more persons may do any act directed to be performed by them."

The Constitution did not repeal all existing laws. It repealed only those which conflicted with its own provisions. Here is a statutory rule of construction which existed when the Constitution was adopted, and it is stlil the law. Is it not fair to assume that if the framers of the Constitution had intended that this statutory rule of construction should not apply to the language under consideration, they would, in some manner, have indicated that intent? As a matter of fact, the statute quoted was merely declaratory of the common law, as will later appear in this opinion.

The reasoning of the court in the case of *School District* v. *Bennett,* 52 Ark. 511, is applicable here. The court there construed the statute under which school directors make contracts for the employment of teachers, and Judge HEMINGWAY, speaking for the court, said: "Is it necessary that a contract, to be binding on the district, should be executed at a board meeting, at which all the directors are present, or of which the one absent had notice?

"We appreciate the practical importance of this question, but entertain no doubt as to its proper solution, either on reason or authority. The different members of a board, scattered in the pursuit of their several avocations, are not the board. Duties are cast upon boards composed of a number of persons, in order that they may be discharged with the efficiency and wisdom arising from a multitude of counsel. This purpose can not be

realized without a conference between the members of the board with reference to the matters intrusted to them before they take action thereon. After conference, the board will often escape unwise measures, to which each of the members acting separately would have committed themselves either from haste, immature consideration, the demands of private engagement or an unwillingness to shorten the allotted span of life under the entreaties of an importunate agent or teacher.

"The public select each member of the board of directors, and is entitled to his services; this it can not enjoy, if two members can bind it without receiving or even suffering the counsel of the other. Two could, if they differed with the third, overrule his judgment and act without regarding it; but he might by his knowledge and reason change the bent of their minds, and the opportunity must be given him.

"We conclude that two directors may bind the district by a contract made at a meeting at which the third was present, or of which he had notice; but no contract can be made except at a meeting, and no meeting can be held unless all are present, or unless the absent member had notice."

In my opinion, the wisdom of conference and consultation on the part of these State officers is no more certain than is their duty to meet and confer under the authorities. And when they have thus met and considered their duties, the conclusion of the majority should prevail. The reason for this rule is the same now as it was when the rule was established at the common law. This reason, as stated by the Supreme Court of Nebraska in the case of *State* v. *Bemis,* 64 N. W. 338, is that the public interest shall not be prejudiced by the caprice or neglect of a single member of a public body. A substantially similar statement of the reason for the rule appears in the quotation from Coke on Littleton, which I copy later into this opinion.

In the case of *First National Bank of North Bennington* v. *Town of Mount Tabor* (52 Vt. 87), 36 Am. Rep. 734, the Supreme Court of Vermont construed a statute of that State which authorized a town to issue bonds upon the written assignment of a majority of the taxpayers, certified by three specified commissioners. Two of the commissioners signed the certificates, but the third refused to concur. *Held,* that the certificate was properly certified. The opinion in the case evinces much learning and research. The learned judge who wrote the opinion quotes from Lord Coke (Co. Litt. 181 b) as follows:

" 'Secondly, there is a diversitie between authorities created by the partie for private causes and authoritie created by law for execution of justice. * * * If the sherife upon a *capias* directed to him make a warrant to foure or three joyntly or severally to arrest the defendant, two of them may arrest him, because it is for the execution of justice, which is *pro bono publico,* and therefore shall be more favourably expounded, than when it is onely for private; and so hath it beene adjudged. *Jura publica ex privato promiscue decidi non debent.*' "

The opinion then proceeds to say: "Following and applying this principle, the decisions down through the English reports, though not numerous upon this point, are clear that when an act is to be done by several which is matter of public concern, all must meet and confer, and the majority may then decide."

The American cases on the subject are very numerous, and appear to have followed the English rule with unbroken unanimity.

The case of *Bartley* v. *Meserve,* 36 L. R. A. 746, is one in which the Supreme Court of Nebraska went exhaustively into the subject, as is reflected by the opinion in that case. Norval, J., speaking for the court, said: "The rule is well settled that where authority is committed to three or more persons to perform a public duty or trust, if they all meet for the purpose of executing it. a majority will decide. The authorities all so hold, and

the Attorney General has cited no case, nor after diligent search have we been able to find a single one, which conflicts therewith."

The writer of this opinion has continued that investigation with some diligence and with equal lack of success in finding a conflicting authority.

In Sedgwick on Statutory and Constitutional Law, page 331, it is said: "In regard to the number requisite to constitute a *quorum* of the members of a public body, or the number requisite to do business, it has long been settled that, where a statute constitutes a board of commissioners or other officers to decide any matter, as to open books, to receive subscriptions, and distribute the stock of a railroad company, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may then decide."

A similar statement of the law is found in sections 105 and 106 of Throop on Public Officers. Likewise, in Lewis' Sutherland, Statutory Construction, vol. 2 (2 ed.), § 562. See, also, Cooley, Constitutional Limitations (7 ed.), page 893; Mechem on Public Officers, § 572.

In the note to section 115 of the article on Public Officers, 22 R. C. L., p. 546, a number of annotated cases are cited, which collect a very large number of cases from many courts on the subject.

One of these cases is that of *Bartley* v. *Meserve, supra.* There a statute of the State of Nebraska required that bonds under the depository law should run to the people of the State of Nebraska and be approved "by the Governor, Secretary of State and Attorney General." It was pointed out that the statute did not constitute those three officers a general board for the approval of bonds of State depository banks, this being done for the purpose of distinguishing the statute from one which had been construed by the Supreme Court of that State in which certain officers had been expressly constituted a board. After recognizing the distinction between the two statutes, the court said that it did not follow that

the case was not controlled by the decision of the court concerning the manner of the discharge of duties by officers who were expressly constituted a board. There is an extensive review of the authorities, and the court said: "The principle deducible from the numerous authorities on the subject is that where three or more persons are intrusted by law with powers of a public character or nature, and, in the execution thereof, all of them are assembled, or have been duly notified of the time and place of meeting, the decision of the majority is binding, whether the statute authorizes a majority to act or is silent. Applying this rule to the facts before us, it is very evident that the approval of the Governor was not essential to the validity of the bonds of the depository banks, since he was present with the other two State officers when the bonds were approved."

If it be said that the Montana cases cited in the majority opinion support the conclusion there announced, then it may also be said that they stand alone. But, with all deference to the majority, I think those cases have been misinterpreted. In the first place, both cases involve a construction of the same contract, as appears from the second opinion. So that, in effect, they constitute one case and are, of course, by the same court. In that State there was a board to let printing contracts, subject to the approval of the Governor and Treasurer. The first case reported was a proceeding to mandamus the Secretary of State to furnish copy for the printing, it being alleged that a contract existed between the printing company, and the printing board whose business it was to let the printing contract. But in neither case was there any showing that either the Governor or Treasurer had approved the printing contract; and the first case was disposed of on the ground that there was no contract until these officers had approved the contract.

The second case, instead of being brought against the Secretary of State to compel him to furnish copy for the printing, was brought against the Governor and the

Treasurer to compel them to approve the contract, neither of whom had done so. The insistence was "that the provision of the Constitution, *supra*, requiring approval by the Governor and Treasurer, and of the statute passed in pursuance of the Constitution, imposes a mere ministerial duty upon those officers, and that their refusal to approve the contract is capricious and arbitrary and therefore subject to review by this court." The point at issue was the extent of the jurisdiction of the courts by mandamus to control action of the executive departments of the government. There was a learned discussion of that subject, which concluded with the statement that the action of a State executive may be controlled in a purely ministerial act which does not involve executive judgment and discretion, but not in one which does require such discretion.

The court then proceeded to discuss the question whether the approval of the contract was ministerial only, and, as opposing the view that it was, states the opportunities of these two officers to pass on the questions involved with advantages to the State and to the public, by virtue of the information obtained in their respective offices. The opinion does not state how they shall discharge their duties. The statement upon that subject is: "The Constitution does not define the extent to which they must go in the investigation of the action of the board, nor does it require that they must act together or state any reason for their action."

But, aside from all this, the Montana cases can not be authority on the question here discussed, for the reason that only two officers constitute the board in that State to approve public contracts, and there could be no action but by both members. If both agree at all, the agreement is unanimous. This is a mere matter of arithmetic.

It may be said in passing that the statute construed in the Montana cases made the Governor a member of the board which let the contract, and the statute was not

held unconstitutional on that account, although it was referred to as unfortunate, for the reason that "it put him (the Governor) in a position where he can refuse to approve the action of a majority of the board of which he is a party and thus put his veto upon proceedings in which he takes part. Nevertheless, his duty as a member of this board in relation to these contracts is statutory, while his duty in approving or disapproving the action of the board is constitutional; and we are of the opinion that under the provision of the Constitution it was designed that he and the Treasurer should do more than approve, in a ministerial way, the action of the board in letting the contract."

Believing that the decision of the majority on the subjects discussed in this opinion is highly unfortunate as a matter of policy, unsound in principle, and contrary to all of the authorities on the subject, I dissent from the holding that no conference on the part of these officers was contemplated and that three separate and several vetoes may be exercised and also from the holding that there are constitutional objections to making these officers members of a board to let the contracts.

McCULLOCH, C. J., concurs in the views here expressed.

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## ROSE v. MAAS BROTHERS.

Opinion delivered January 31, 1921.

1. CUSTOMS AND USAGES—CONTRACTS.—It must be presumed that parties to a sale of cotton for October delivery contracted with reference to an established custom of the trade that the seller had until the 31st day of October to make delivery.
2. SALES—INSTRUCTION AS TO REPUDIATION OF CONTRACT.—In an action by the buyers for failure to deliver cotton purchased, an instruction that if, before or at the time of the delivery of the memorandum of sale, the seller stated that the agreement was not binding, then the verdict should be for the defendant, was properly refused, as the statement of the seller did not necessarily repudiate the contract if there was an intent to consummate it and delivery was made for that purpose.

3. SALES—DELIVERY OF MEMORANDUM TO THIRD PERSON.—Delivery of a memorandum of a contract of sale by the seller to a third person was sufficient if that delivery was made for the benefit of both parties.

4. SALES—GRADE OF COTTON.—An agreement to deliver cotton of a certain grade is not complied with by the seller delivering cotton grown by him but not of the grade specified.

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

*Taylor & Jones,* for appellant; *Rowell & Alexander,* of counsel.

1. The court erred in refusing to give instruction No. 1 for defendant.

2. It was also error to refuse No. 4 for defendant.

3. Also error to refuse to give No. 7 for defendnat.

4. It was error to admit the testimony of E. B. Bloom, and to permit Bloom to answer certain questions.

The plaintiff alleged, and the proof showed, that at the time the contract is alleged to have been entered into, Maas and Rose entered into oral negotiations in which Maas was undertaking to buy from Rose cotton grown by Rose on his plantation near Lake Farm, Arkansas. After the oral negotiations had reached a certain point a written memorandum of agreement was made and signed by both parties. It was written by E. B. Bloom, cashier of the Citizens' Bank of Pine Bluff, in the directors' room of the bank. A contract was made for delivery of the cotton which was binding on both parties, and it was error to refuse the instructions asked by Rose. The contract or memorandum was not binding on Rose unless delivered, and no delivery is shown. There is no testimony to show that Bloom was the agent of Maas, either general or special. The testimony shows that Bloom was more likely the agent of Rose.

A delivery of a written contract is essential to constitute a binding obligation, and a written memorandum executed to avoid the statute of frauds must be delivered before the statute will become inoperative. 51 Ark. 485;

102 *Id.* 377. See, also, 89 Ark. 191; 128 *Id.* 605. It can not be said that the memorandum was an *escrow,* and, it being admitted that the paper was not delivered to Maas and the evidence failing to show that it was delivered to Bloom as the agent of Maas, there was no delivery to any one so as to make it a binding obligation or take it out of the statute of frauds. See 134 Ark. 284. The failure to give instructions 1 and 4 are reversible errors.

*Coleman & Gantt,* for appellee.

1. The memorandum shows for itself that the contention of appellant is not correct. It specifies the grade and staple of the cotton to be delivered; and if a dispute had arisen as to whether the cotton delivered was of the required class, it would have presented only a question of fact easily determined. Even if it be true that appellant was under a misconception as to the binding effect of the writing he signed, that did not avoid the contract. 223 S. W. 564. The writing would be sufficient if not signed by appellee at all. 137 Ark. 414.

2. If delivery was essential, there was certainly a sufficient delivery. 77 Ark. 89; 140 *Id.* 579; 97 *Id.* 283; 132 *Id.* 469; 8 R. C. L. 282, 291; 10 Penn. St. 285; 51 Am. Dec. 478; 140 Mo. 309; 67 Am. Dec. 261; 8 *Id.* 447. According to the weight of authority, the delivery of a memorandum in writing evidencing a sale of goods is not essential. L. R. 1 C. P. 1; 2 M. & W. 653; 42 Am. Rep. 343; 26 S. W. 539; 58 S. E. 444; 138 Am. St. Rep. 30; 91 N. E. 509; 88 Pac. 525; 91 N. W. 467; 184 Fed. 419; 25 R. C. L. 675; 3 Ann. Cases 405; 1 Williston on Cont., § 579.

3. There is no error in the instructions given, and No. 7 requested by defendant was erroneous and not the law. The terms of a written contract can not be varied by parol testimony. 140 Ark. 182; 218 S. W. 380; 139 Ark. 53; 136 *Id.* 507. The evidence fully sustains the judgment, as the value of the cotton, and appellee's damage were fully proved.

SMITH, J. Appellees, who were the plaintiffs below, are engaged in the business of buying and selling cotton in the city of Pine Bluff under the name of Maas Brothers, and appellant, Rose, who was the defendant below, is a planter engaged in growing and selling cotton and other farm products. On or about October 15, 1919, S. L. Maas, of Maas Brothers, discussed with Rose the purchase of one hundred bales of cotton of an average weight of 500 pounds each which Rose represented had been grown by him on his plantation near Lake Farm, about half of which cotton had then been picked and ginned. After apparently coming to an understanding the parties met in the directors' room of the Citizens' Bank in Pine Bluff, where the details of the contract were again discussed in the presence of Mr. Bloom, a vice-president of the bank. Rose was a customer of the bank and conducted all his business through it, and desired that Bloom should know what he was doing with his cotton. After the details had apparently been agreed upon, Bloom, at the suggestion of one or the other or of both parties, drew up a contract to cover the transaction. That writing read as follows:

"Pine Bluff, Ark., Oct. 15, 1919.

"Mr. A. D. Rose,
Pine Bluff, Ark.

"Dear Sir:

"This will confirm our purchase today for 100—one hundred bales of cotton October, 1919, delivery at 45c per pound, delivered at Pine Bluff, Ark. Fifteen bales 1 1-16 balance 85 bales strict to good middling 1 1-8 to full 1 1-8.

Yours truly,

"Accepted. "Maas Bros.
"A. D. Rose."

Rose read and signed the contract and, after doing so, stated that the contract was not valid because it lacked mutuality, inasmuch as it only bound him to sell without binding Maas Brothers to buy. In this he was,

of course, mistaken, as the contract described the cotton sold, the time and place of delivery, the grade and staple, and the price, and confirms the purchase of it that day made from Rose by Maas Brothers.

The testimony is undisputed that Rose did make the statement, after signing the contract, that it lacked mutuality; but the testimony is conflicting as to what thereafter occurred. The testimony of Rose would have supported a finding by the jury that the minds of the parties had never fully met, and that he left the place of conference under the impression that no contract had been made, although he admits that the writing was left in the possession of Bloom with directions to keep.

The testimony of Bloom and Maas support a contrary finding, as, according to their version of the matter, the minds of the parties fully met on all the essential details, and, notwithstanding the objection made by Rose, after signing the contract Rose himself either gave the contract to Bloom to keep for both parties or consented to that action, and Bloom did file it away as the written evidence of the contract which the parties had made. About a week or ten days later Rose requested Bloom to let him see the contract, and cut his signature from it. Bloom told Rose that he was representing both parties and holding the agreement for both of them, and, at his request, Rose put his signature back on the contract.

It was shown that the term "October delivery," appearing in the contract, had a well-defined meaning in the cotton business, and meant that the seller should have until the 31st of that month in which to make the delivery. And it was also shown that it was generally understood in the cotton trade that the standard weight for a bale of cotton is 500 pounds. It must be presumed, of course, that the parties contracted with reference to these established customs of the trade.

Cotton of the kind specified in the contract advanced rapidly in price from about that time until it had reached

—when delivery was due—a price of 60 cents a pound. Maas made demand—before delivery became due—for the delivery of the cotton; but this was refused by Rose. Whereupon this suit was brought to recover the difference between the contract price and the market price. There was a trial and judgment for Maas Brothers, from which is this appeal.

The court, at the request of the respective parties, gave a number of instructions which, in effect, submitted to the jury the question whether the parties had fully agreed on the terms of the contract, and had left the writing with Bloom to evidence that agreement.

The court refused an instruction numbered 1, asked by Rose, which told the jury that if, before or at the time of the delivery of the memorandum to Bloom, Rose stated, in the presence of Maas, "that the agreement was not binding and did not constitute a contract, then your verdict will be for the defendant." This instruction was properly refused. The statement of Rose did not necessarily repudiate the contract if there was an intent to consummate it, and if it was delivered to Bloom for that purpose. The jury might have concluded that, notwithstanding this statement, Rose delivered the writing to Bloom or consented to its delivery to Bloom for the purpose of completing the contract—and there was testimony to support that finding. But the instruction, had it been given, would have withdrawn that question from the jury, and it was therefore properly refused.

An instruction numbered 4, requested by Rose, was also refused. This instruction reads as follows:

"4. If you believe from the evidence in this case that at the time the memorandum of agreement was executed in the Citizens' Bank, that no delivery of the memorandum was made to the plaintiff, then the plaintiff is not entitled to recover in this case. The mere leaving of the memorandum with Mr. M. E. Bloom without instructions as to whom it should be delivered, or the purpose for

which it should be held by him, will not constitute delivery."

This instruction was properly refused, as it made delivery of the memorandum to the plaintiff essential; whereas delivery to Bloom would have sufficed if that delivery had been made for the benefit of both parties. The instruction told the jury, however, that leaving the memorandum with Bloom would not constitute delivery unless Bloom was given instructions as to the purpose for which he should hold it and the person to whom he should deliver it.

The jury might have found that directions to Bloom were not necessary as he had heard the entire discussion and wrote the agreement.

It is insisted that no contract was made because the minds of the parties had never fully met on the essential details of the sale. But, if the parties signed the writing set out above for the purpose of executing a contract, there could be no question of the meeting of the minds of the parties, as the writing itself constitutes a complete and enforceable contract, but that question was fully covered by instruction numbered 1, given at the request of Maas Brothers, and instructions numbered 2 and 3, given at the request of Rose. Instruction numbered 2 told the jury there must be a meeting of the minds of the parties with reference to every essential element of the contract, and if the minds of the parties had not so met to find for the defendant.

Instruction numbered 3 told the jury that, as the execution of the contract was denied, the burden of proof was on plaintiffs to prove, by a preponderance of the testimony, that a contract was entered into, and the terms of that contract definitely and mutually understood by both parties, and that plaintiffs could not recover until they had discharged that burden.

An instruction numbered 7, reuested by Rose, was also refused by the court. This instruction would, if given, have told the jury, if damages were assessed,

to take into account the cotton grown by Rose, rather than cotton of the grade and staple described in the memorandum; the instruction being based upon the assumption that the contract had been made with reference to specific cotton. This instruction was properly refused for several reasons. First, Maas demanded the cotton grown by Rose under this contract; and Rose refused to make delivery. The testimony does not show that the first 100 bales to be ginned, with reference to which it is said the parties contracted, did not meet the requirements of the contract. Rose testified in regard to the sale of this cotton, which was sold along with a lot of 153 bales, in which he admitted there was some low-grade cotton. But, besides this, Rose contracted to deliver cotton of specific grade and staple, and that contract could have been complied with by delivering cotton of that grade and staple whether grown on his farm or elsewhere. It was not made a stipulation in the contract that the cotton should come from his farm. *Soudan Plantation Co.* v. *Stevenson,* 83 Ark. 163.

It was his duty, therefore, to deliver cotton of the contract grade and quality, whether it came from his farm or elsewhere, and the instruction on the measure of damages so declared the law.

Other assignments of error are presented; but we think they do not require discussion.

No prejudicial error appears, and the judgment will, therefore, be affirmed.

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LAMEW v. TOWNSEND.

Opinion delivered January 31, 1921.

1. LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR.—A tenancy from year to year may be created either by express agreement or by a lease for one or more years and the holding over of a tenant and payment of an annual rental after the first year without a new contract.

2. LANDLORD AND TENANT—LEASE—TERMINATION.—Under a lease for one year with option to continue from time to time as long as conditions are satisfactory to both parties, the continuance of the lease after the first year was conditioned upon its being mutually satisfactory, though neither party had a right to act arbitrarily or capriciously, and each was entitled to reasonable notice from the other of intent to terminate.

3. LANDLORD AND TENANT—REASONABLE NOTICE TO TERMINATE LEASE.—What is a reasonable notice to terminate a tenancy from year to year depends upon the custom of the country and the circumstances of the particular case, and is a question for the jury.

4. LANDLORD AND TENANT—NOTICE TO TERMINATE LEASE.—Notice to terminate a lease from year to year pursuant to a lease giving such right after the first year should have been given by the landlord before the end of the year; otherwise the law will presume an intention to extend the lease for the remainder of the new year.

5. LANDLORD AND TENANT—NOTICE TO QUIT.—Where a lease for a year contained an option to continue subject to the approval of both parties, and the landlord gave notice during the second year to terminate the tenancy at the end of that year, notice to quit need not be served on the tenant by the landlord until after the beginning of the third year, as the landlord had a right to assume that the tenant would not hold over if he had previously given notice that the lease would terminate at the end of the second year.

Appeal from Lawrence Circuit Court, Eastern District; *D. H. Coleman,* Judge; reversed.

*W. A. Cunningham,* for appellant.

1. The contract created a tenancy from year to year; and, if it did not, a tenancy of that kind resulted from the holding over by the tenant and the payment of rent from year to year without a new contract. 1 Taylor on Landl. & Ten., p. 39; 61 Ark. 377.

2. Unless a different length of time is fixed by the contract or by statute, a tenancy from year to year can not be determined except by notice given at least six months before the end of the current year. Taylor on Landl. & Ten., p. 90; 65 Ark. 474; 70 *Id.* 351. No proper notice to quit was given, and it was error to instruct a verdict, as the court will give the evidence its strongest

probative force in favor of appellant. This is too well established to need a citation of authorities.

*Smith & Gibson* and *A. S. Irby,* for appellee.

1. The cases cited by appellant are not applicable, and the contention that the written contract referred to is a contract from year to year, and therefore appellant was entitled to six months' notice to vacate is not sustained by authority. The court below construed the contract to mean a tenancy at will, but it was a contract for lease of lands at will. 40 How. Pr. 401 (N. Y.); 11 Gratt. (Va.) 527; 10 Tex. 137; 4 Litt. (Ky.) 232; 14 Am. Dec. 122.

2. There was no question of fact for a jury, and it was not error to direct a verdict, as there was no evidence for a jury to pass upon. Appellee contends (1) that if appellant undertakes to hold, as he did under the written contract, it was merely a tenancy at will, and she had a right to evict him under three days' notice in writing; (2) that if the written contract was abrogated or set aside in the fall of 1917, under appellant's own testimony he could not claim possession of the place for more than one year at a time. There was nothing to submit to a jury, and the testimony shows it was a contract from year to year and there was nothing for a jury to pass upon. It was a contract for a tenancy at will, and the court below so properly held.

SMITH, J. This is an action in unlawful detainer, and the decision of the case turns upon the construction of the following contract:

"RENT CONTRACT.

"This contract, entered into this day by and between Belle Townsend, party of the first part, and W. L. Lamew, party of the second part, witnesseth:

"The party of the first part has this day let and leased to the party of the second part for the period of one year, with the option to continue from time to time as long as conditions are satisfactory to both parties hereto, the farm known as the Lamew place, containing

234.50 acres, more or less (in Lawrence County, Arkansas), at a yearly rental of one-fourth of all cotton and one-third of all corn grown and to be grown on the said place during the pendency of this lease, cotton to be delivered at gin, and corn in crib on the farm. The party of the second part agrees to farm the place in a farmer-like manner, and turn over to the party of the first part one-fourth of all cotton grown on the place and one-third of all corn grown on said land, cotton to be delivered at gin and corn in crib on farm.

"Should party of the second part fail to work his crop in a good and farmer-like manner at any time, party of the first part reserves the right to enter and take possession of said crop and work it and deduct same from second party's share of said crop.

"Signed, September 21, 1916.

"Belle Townsend,
"By Roy Townsend."

The court below construed the contract as creating a tenancy at will and directed a verdict in favor of the landlord.

It appears that a portion of this land was taken away from Lamew in 1918, and another portion in 1919; but Lamew testified that this was not done in abrogation of the contract, but was a mere release of a portion of the land from the contract, and that the part retained by him was worked upon the terms and conditions specified in the contract. According to appellee, the contract was abrogated in the fall of 1917; but, as this testimony conflicts with that of Lamew, we must accept his version of the matter, inasmuch as a verdict was directed against him.

Appellant insists that the contract created a tenancy from year to year, and that if it did not do so a tenancy of that character resulted from the holding over of the tenant and payment of rent from year to year without a new contract.

A tenancy from year to year may be created either by an express agreement, or by a lease for one or more

years and the holding over by the tenant and the payment of an annual rental after the first year without a new contract. *Belding* v. *Texas Produce Co.,* 61 Ark. 377.

In the case of *Waterman* v. *LeSage,* 142 Wis. 97, Judge Timlin, speaking for the Supreme Court of that State, said that, independent of statute, the weight of judicial authority appeared to be that, when a tenant, after the expiration of the term fixed by the lease at one year or less, continues to occupy the leased premises without any new contract, this may, at the election of the landlord, be considered a renewal of the prior lease for a like period and upon like terms. But he also said that the matter rests in contract, and that the landlord and tenant may agree that the holding over shall be on different terms, or for a different period, and that the agreement may be proved like any other parol agreement.

So here the effect of this contract and the actions of the parties under it would have been to create a tenancy from year to year if there had been no language in the contract to indicate a contrary purpose. But we must give some effect to the provision of the contract that it is "to continue from time to time so long as conditions are satisfactory to both parties hereto."

Evidently the parties contemplated that the tenancy might continue for more than a year; but the continuance was conditional—the condition being that it remained mutually satisfactory. So long as the contract continued in force, its terms governed as to the respective shares of the crops which each party should have, and the place of division, and the manner of the cultivation of the land. The parties had the right to make that kind of contract, and it is our duty to give it effect. The dissatisfaction contracted against might have arisen within less than six months of the end of the year; and, even though these differences had previously arisen, they might become so accentuated when the crop was being harvested that one or the other of the parties might

desire to terminate the tenancy. They had mutually reserved the right to do so. In fact, this would appear to be the very contingency against which they have contracted. If the difference arose in the first half of the year, there would be time for the common-law notice of six months of the intention to terminate the tenancy, and the language quoted would be surplusage, as the right to terminate could be exercised, whether cause for dissatisfaction had arisen or not. But the language quoted gave that right whether the dissatisfaction arose in the first half or the last half of the year.

Of course, neither party had the right to act arbitrarily or capriciously, and each party was entitled to reasonable notice from the other of an intent to terminate the contract. As to what is reasonable notice depends upon the customs of the country and the circumstances of the particular case. It is a question of fact for the jury. And this notice of dissatisfaction should have been given before the end of the year, otherwise the law will presume a mutual intention to extend the contract for the remainder of the new year into which their operations had extended. *Hayes* v. *Goldman,* 71 Ark. 251. This is true because the contract contemplated a continuance until there was notice to the contrary. *Bluthenthal* v. *Atkinson,* 93 Ark. 252.

The notice to quit need not have been served until after the beginning of the year, as the tenant would have had the right to complete the year's occupancy, and the landlord would have had the right to assume that the tenant would not hold over if he had previously given the tenant notice that the tenancy had ceased to be satisfactory. The notice to quit was served January 5, 1920, and this service was in time if the tenant had previously been given the notice to which he was entitled that the landlord desired to terminate the tenancy.

Lamew says, however, that the first notice which he had that the tenancy had ceased to be satisfactory and would be terminated was the notice to quit; and if this is true, the landlord has failed to give the notice required.

This question of fact should have been submitted to the jury, and for the error in not doing so the judgment will be reversed and the cause remanded.

McCULLOCH, C. J. (concurring). I think that the holding over by the tenant after the expiration of the first year expressed in the written contract created a tenancy "from year to year," and that notice for six months prior to the end of the year was essential to terminate the tenancy. Holding over under the particular contract involved in this case created a typical tenancy from year to year. The original contract did not bind the parties to a renting for more than one year, and at the end of that period the contract terminated itself at the will of either party without notice. It may be true, as stated in the opinion of the majority, that the language of the contract evinces an intention to continue the tenancy beyond the term of one year specified therein, but the language is ineffectual to constitute an agreement to so extend it. It is not obligatory on the part of either the landlord or the tenant to extend the term beyond one year. It then took some further action on the part of the landlord and tenant to extend the term. Usually in such cases the mere holding over by the tenant beyond the stipulated term constitutes a tenancy at will, and acceptance of rent by the landlord is necessary to create a tenancy from term to term; but under some circumstances acquiescence by mere silence on the part of the landlord would create a tenancy from term to term. The holding over of farm lands and preparations for the planting of a crop would doubtless be circumstances which would justify any court in holding that a tenancy from term to term had been created if no objection was made by the landlord, even without accepting rent.

The law on this subject is fully treated by Mr. Underhill in his work on Landlord and Tenant (vol. 1, §§ 92, 97). Many cases are cited in support of the law there announced. The text contains the following statement which is controlling, I think, in the present case: "Lease

of land for one year, with a privilege of continuing the same from year to year, so long as both parties agree, creates a tenancy from year to year."

In the Wisconsin cases cited in the opinion of the majority (*Waterman* v. *LeSage,* 142 Wis. 97), the court said: "But the weight of judicial authority seems to be that, independent of statute, when the tenant, after the expiration of a term fixed by the lease at one year or less, continues to occupy the leased premises without any new contract, this may, at the election of the landlord, be considered a renewal of the prior lease for a like period and upon like terms."

I fail to see how the instant case can be distinguished from the very numerous cases on this subject because there is an unenforceable agreement in the contract to continue the tenancy for a longer period than one year. There is no conflict in the authorities to the effect that in a tenancy from year to year notice for six months preceding the end of the year is essential to a termination of the tenancy. Underhill on Landlord and Tenant, § 112.

I agree to a reversal of the case, but I think the court bases the reversal on erroneous grounds, and that the majority are inconsistent in holding that a tenancy from year to year was not created, but that reasonable notice was essential to terminate the tenancy. If there was no tenancy from year to year, then the term ended at the end of each year, and either party had the right, without notice, to decline a further extension. If there was no tenancy from year to year, then the judgment ought to be affirmed. However, my conclusion is that there was a tenancy from year to year, and that the notice of six months was necessary in order to terminate it.

OSCEOLA v. HAYNIE.

Opinion delivered January 31, 1921.

1. ESTOPPEL—ACQUIESCENCE.—One who expressly consented that a city jail might be erected in the street adjoining her property was estopped to complain of such erection; but one who saw the building in course of erection and made no protest was not estopped where the city did not rely on his silence; much less would an adjacent property owner be estopped who did not know of the erection of the building.
2. MUNICIPAL CORPORATIONS—DIVERSION OF STREET TO OTHER USE.—Under Crawford & Moses' Digest, §§ 7570, 7607, it is a city's duty to keep the streets open, and it can not divert a street to uses and purposes foreign to that for which it was dedicated.
3. MUNICIPAL CORPORATIONS — INJUNCTION AGAINST NUISANCE IN STREET.—Owners of property specially damaged by erection of a jail in the street are entitled to an injunction to remove the nuisance.

Appeal from Mississippi Chancery Court, Osceola District; *Archer Wheatley,* Chancellor; affirmed.

*W. J. Driver,* for appellants.

The injury complained of should have been brought in the law court. It was a suit growing out of alleged injury and damages to plaintiff's property by constructing a building sought to be declared a nuisance. The rule applicable to the issues here is clearly stated in 29 Cyc. 1210. This rule is approved in 73 Neb. 798; 191 Ill. 605; 12 Peters 91. The parties suing are estopped. They invited the location of the building and had notice and they failed to speak, object or interfere until the building was erected, which was incapable of removal and great expense incurred, and the parties are estopped by their acts and silence. Cases *supra,* and 51 Ark. 235. Upon the pleadings and evidence it was the duty of the chancellor to dismiss the complaint.

*J. T. Coston,* for appellees.

The obstruction of the street was a public nuisance and a plain violation of the law, and the chancellor was right in his views and decision, as a plain case was made

for the abatement of a public nuisance. 2 Pomeroy, § 805; 37 N. E. 220; 66 S. W. 11.

SMITH, J. The plaintiffs in this suit—three in number—together owned all the lots in block 16 in Townsite Addition to the city of Osceola, and, in their complaint, alleged that the city had erected in Ford Avenue, which is one of the streets bounding said block, a building to be used as a jail and by the fire department, thereby creating a nuisance. The prayer of the complaint was that the city be required to remove the building, and from a decree granting the relief prayed is this appeal.

The answer admitted the erection of the building in the street, but denied that it interfered with the proper and free use thereof, and it was alleged that plaintiffs were estopped by their conduct from prosecuting this suit.

Witnesses for the plaintiffs testified that the plaintiff's property was greatly damaged by the erection of the building, and estimates of the damage varied from ten to fifty per cent. of the original value of the property.

The city made no attempt to show that the building in the street had not depreciated the value of the property, but offered testimony to the effect that Mrs. Bowen, one of the plaintiffs, was asked about the building before its construction was begun, and that she gave her consent to its erection. As to one of the other plaintiffs, testimony was offered to the effect that he was advised of the city's plans, and made no objection.

If it be conceded that Mrs. Bowen had, by her assent, estopped herself from subsequently complaining, it can not be said that this is true of the other plaintiffs. The testimony does show that C. C. Bowen, one of the plaintiffs, saw the building every day while it was being erected. But there is no testimony that the city council was influenced by his conduct. The construction of the building was begun without consulting him; and it is not shown that the third plaintiff who did not reside in the

city even knew of its construction, and this plaintiff owned the lot adjacent to the city building.

In the case of *Packet Co.* v. *Sorrels,* 50 Ark. 473, it was said that authorities of a town or city can not lawfully appropriate or divert a street to uses and purposes foreign to that for which it was dedicated; and that it is not within the power of the Legislature to authorize its appropriation to private use nor to public purposes except in the manner in which private property can be taken for the use of the public under the right of eminent domain. The city had no right to close the street. Upon the contrary, it was the duty of the city to keep the street open. C. & M. Digest, §§ 7570 and 7607; *Little Rock* v. *Jeuryens,* 133 Ark. 126.

The plaintiffs here have shown a damage in addition to that sustained by the public. Their property has been damaged in value, and under numerous decisions of this court they are entitled to an injunction to remove the nuisance. *Dickinson* v. *Ark. City Imp. Co.,* 77 Ark. 570; *Matthews* v. *Bloodworth,* 111 Ark. 549; *Wellborn* v. *Davies,* 40 Ark. 83; *Packet Co.* v. *Sorrels,* 50 Ark. 474; *Texarkana* v. *Leach,* 66 Ark. 42; *Davies* v. *Epstein,* 77 Ark. 227; *Stoutemeyer* v. *Sharp,* 89 Ark. 177; *Draper* v. *Mackey,* 35 Ark. 497.

The decree of the court below is therefore affirmed.

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BANK OF PANGBURN *v.* TATE.

Opinion delivered January 31, 1921.

1. ATTACHMENT—WRIT ISSUED WITHOUT SERVICE.—An order sustaining the attachment of an equitable interest in land, made without either personal or constructive service upon the defendant, was void.
2. ATTACHMENT — ADDITIONAL WRITS — NECESSITY OF SERVICE.—Constructive service in an action in which an attachment was levied on personal property could not be made the basis of service in a subsequent attachment proceeding against realty, as additional writs can not be issued and property seized thereunder sold without new service.

3. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Parties can not treat an issue as joined by the pleadings and, after trying it out, raise the question for the first time on appeal that the pleadings did not present the issue joined.

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

*Brundidge & Neelly,* for appellant.

The claims of appellant were prior to and paramount to that of the intervener, W. D. Tate, because (1) the agreed statement of facts shows that a writ of attachment was issued on December 19, 1919, and levied January 1, 1920, upon Pierce's equity in the property, while appellee's transcript from the justice of the peace court was not filed in the clerk's office until afterward and was never entered on the judgment docket of the circuit court. Appellant's attachment was the prior and paramount lien. 38 Ark. 421; 40 Ark. 129.

*Miller & Yingling* and *W. D. Davenport,* for appellee.

1. The appellant has no right to complain against the decree. He is trying to collaterally attack the judgment of appellee in the justice of the peace court. This can not be done by anyone except the defendant, Pierce. 47 Ark. 31; 63 *Id.* 157; 62 *Id.* 171.

2. Appellee's lien became complete from the time the writ of attachment was levied upon the equity of the defendant. Appellant had notice of this lien December 8, 1919. Here the sale of the lot had already been made, and no sale of the lot is asked. 83 Ark. 419, does not sustain appellant. The statute does not provide that the lien once acquired by the issue and levy of attachment shall be destroyed unless the case is at once docketed on the common-law docket, but simply provides that before the clerk shall have authority to issue an order for the sale of the land under the attachment the cause must be docketed and must show that it is an attachment. This is a proper construction of the statute, as it conforms to art. 7, § 40, Constitution of 1874.

3. The attachment by appellee of the lot was regular, has the sanction of the law and is not void. An attachment affidavit can be amended, and this was done by the new affidavit. 37 Ark. 560. These sections are conclusive of the right of appellee to have the second attachment issued and levied. Appellee, in all things, complied with our statutes. Section 465 is as mandatory as § 6383, and both provide a simple method to reach both real and personal property. The decree is correct.

HUMPHREYS, J. This appeal involves the priority of liens growing out of writs of attachment levied upon the equitable interest of J. W. Pierce in lot four, block two, Skillern's addition to Pangburn, Arkansas. Appellant enforced a vendor's lien note, in the sum of $450, which he had purchased, against said property, on the 28th day of February, 1920. After paying the indebtedness and costs, there remained in the hands of the commissioner $265.82.

Prior to the institution of the foreclosure suit, appellant had instituted a suit against J. W. Pierce in the White Circuit Court for $1,500 and obtained a writ of attachment, on the 19th day of December, 1919, which was levied upon the equity of J. W. Pierce in said real estate on January 1, 1920. Based upon this proceeding, appellant filed an intervention in the foreclosure suit for the surplus remaining in the commissioner's hands.

Prior to the institution of either suit, appellee brought an attachment proceeding against J. W. Pierce before a magistrate in said county. A warning order was issued in the proceeding against J. W. Pierce, who was a nonresident, and the attachment was levied by the constable of the township upon personal property belonging to the said J. W. Pierce. Pierce made default, the attachment was sustained, and the personal property condemned and sold under an order of court to satisfy appellee's claim, but only sold for sufficient to pay $173.40 thereon, leaving a balance due appellee of $165.58. On October 28, 1919, after the sale of the personal property, appellee filed another affidavit and pro-

cured the issuance of a writ of attachment on October 30, 1919, which was levied upon the equity of J. W. Pierce in said real estate on December 1, 1919, without publishing an additional warning order. On the return of the writ showing a levy upon the equity of Pierce in said real estate, the attachment was sustained, a transcript of the judgment sustaining the attachment was lodged in the office of the clerk and entered in the lien record of certified judgments, mechanics' liens, etc., but was not docketed on the law docket of the circuit court. Based upon this proceeding, appellee filed an intervention in the foreclosure suit for the surplus aforesaid.

The question of the priority of the judgment-liens was submitted to the court on the interventions of appellant and appellee, together with an agreed statement of facts, in substance heretofore detailed.

The court found that appellee's attachment lien was paramount to that of appellant and decreed that the surplus, or so much thereof as might be necessary, be applied to the payment of the debt due by J. W. Pierce to appellee. From that decree an appeal has been duly prosecuted to this court.

The issuance and levy of appellee's attachment upon the equitable interest of J. W. Pierce in said real estate was prior in point of time to that of appellant's; but it was void for the reason that it was issued and sustained without personal or constructive service upon Pierce. The attachment proceeding in the justice of the peace court by appellee against J. W. Pierce, which was levied upon certain personal property, became a finality with the condemnation and sale of said property. The constructive service obtained in that suit could not be made the basis of service in the subsequent attachment proceeding against the real estate. Writs of attachment can be issued in succession during the pendency of an action and ancillary to it. Additional writs can not be issued and the property seized thereunder condemned without new service, because such a proceeding is clearly in the nature of a new suit. Otherwise, innumerable

seizures and sales of property might be effected without notice, personal or constructive, to defendants in attachment proceedings.

It is contended, however, that no reply was filed to the intervention of appellee. The intervention filed by the respective parties were treated as presenting the issue as to the priority of liens. It is recited in the agreed statement of facts that, "This suit is for the purpose of determining whether the intervener, Tate, is entitled to the surplus aforesaid or whether the Bank of Pangburn is entitled to same." Parties can not treat an issue as joined by the pleadings, and, after trying it out, raise the question for the first time on appeal that the pleadings did not present the issue tried.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

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PEOPLE'S SAVINGS BANK v. McINTURFF.

Opinion delivered January 31, 1921.

1. EVIDENCE—INSTRUMENT INSUFFICIENT AS WILL.—A typewritten instrument designated as a will but not witnessed as required by law, which is not admissible in evidence as a will, because not properly executed, nor as a release, because made without consideration, may be admitted to corroborate other evidence that a note and mortgage to decedent had been settled, as it was a declaration against interest, and it is immaterial that the declaration was not made to the debtor.
2. WITNESSES—STATEMENTS OF INTESTATE.—Crawford & Moses' Digest, § 4144, prohibiting a party from testifying as to transactions with or statements of an intestate unless called by the opposite party, has no application to an agent or attorney of a party.
3. MORTGAGES—DECREE SUSTAINED BY EVIDENCE.—A decree, holding that a certain mortgage had been paid *held* sustained by the testimony.

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

*Abner McGehee,* for appellant.

The paper designated as a will was not admissible in evidence because not probated nor subject to probate. Kirby's Digest, §§ 8028-30. Nor could it be probated in Tennessee. 4 Shannon's Code of Tenn., p. 3759. It was typewritten and without subscribing witnesses. The burden was on appellee, and she has failed to sustain her case, and the facts and circumstances and the contradictory statements are so suspicious as to make the authenticity of the will doubtful.

The statement of J. H. Carmichael was not admissible in evidence, and the decree below is not sustained by the weight of the evidence. Appellee's evidence is not worthy of belief. The decree should be reversed with directions to enter a decree in favor of appellant.

*Carmichael & Brooks,* for appellee.

1. The paper headed "will" was admissible in evidence. It was a declaration against interest, as a written declaration of the intestate and as a circumstance to corroborate the other evidence to the effect that the note and mortgage for $4,000 had been settled. Greeleaf on Ev., p. 215, § 147; 115 Ark. 538; 98 *Id.* 340.

2. The decree of the chancellor is sustained by the great weight of the testimony. 130 Ark. 465.

HUMPHREYS, J. This suit was commenced on April 12, 1919, by the New York Life Insurance Company, in the Pulaski Chancery Court, in which appellant and appellee were made parties defendant. The allegation contained in the bill was that it owed $3,873.32 on two policies of insurance issued on the life of Lewey D. Able, now deceased, which was claimed by both appellant and appellee, and asked that they be required to answer and establish their respective claims to the fund.

Appellee answered, claiming the fund by virtue of assignments of the policies.

Appellant answered, claiming the fund on account of an indebtedness due from appellee to the estate of Lewey D. Able; that, on April 4, 1918, Lewey D. Able

had filed a suit for said indebtedness against appellee in the chancery court of said county, which was still pending and to which no answer had been filed. The suit was for $4,000, evidenced by note and mortgage, and was a foreclosure proceeding. The suit bore No. 22584, and was revived in the name of appellant, as administrator for Lewey D. Able, deceased, and consolidated with the present case, which bore No. 24041. By way of amendment, appellant alleged an additional indebtedness of appellee to the estate of Lewey D. Able in the sum of $2,919.28, on account of failure of consideration for certain lands which had been conveyed by appellee to the said Lewey D. Able.

Appellee filed answer, denying any indebtedness whatever to the estate of Lewey D. Able, deceased, and pleaded a settlement in full of all transactions between them prior to the death of the said Lewey D. Able.

The cause was submitted to the court upon the pleadings, evidence and exhibits, from which the court found for appellee against appellant, and decreed that the money deposited in court by the New York Life Insurance Company be paid to appellee, from which decree an appeal has been duly prosecuted to this court.

The validity of the assignments of the insurance policies to appellee was not attacked. No attempt was made to establish the alleged indebtedness of $2,919.28 in favor of the estate of Lewey D. Able against appellee. The sole issue, therefore, presented for determination on appeal is whether appellee is indebted to the estate of Lewey D. Able, deceased, on account of the $4,000 note and mortgage, upon which suit was pending against appellee by Lewey D. Able at the time of his death.

The suit was instituted by A. J. Newman for Lewey D. Able against appellee on April 4, 1918. At that time, Mr. Newman had the original note and mortgage. At the time Mr. Newman testified in the instant case, he had the mortgage but did not have the note. He had an unsigned copy of the note, which he found, after the death of Lewey D. Able, amongst his papers. Appellee

never denied to A. J. Newman that she was indebted to Lewey D. Able, but said that she had no money with which to pay it. After Able's death, which occurred on December 19, 1918, appellee requested A. J. Newman to dismiss the suit, asking at the time whether Mr. Able owed him anything. He said, "Yes; $50." She replied, if he dismissed the suit he wouldn't lose his fee. The cause was continued along without answer being filed, with some sort of understanding between them that appellee should pay off a lien against the property before proceeding further with the suit. J. H. Carmichael had been employed by appellee to enter a defense in the suit for her. He did not file an answer, because Lewey D. Able, in conversation with him about the middle of July, 1918, told him that there had been a settlement between appellee and himself, and that she did not owe him anything; that he would instruct A. J. Newman to dismiss the suit. For many years, Lewey D. Able and appellee were associated together in business. Appellee had invested Lewey D. Able's money in Saline, Pulaski and other places. Lewey D. Able had made his home with appellee and her parents for a number of years. On or about December 30, 1919, appellee called at the office of Banks & Harrelson, in Memphis, in search of papers belonging to Lewey D. Able, which she heard had been deposited with them. During a conversation with W. H. Harrelson, he recalled that, more than a year before, Lewey D. Able had left some papers with him. He had not heard of Able's death. The papers had been in his exclusive custody during the time. At the request of appellee, he expressed these papers to J. H. Carmichael in Little Rock. Among them was what purported to be a will. It was written in type and signed by Lewey D. Able. Its date was August 11, 1918, which was Sunday. There were no subscribing witnesses to the paper. It is as follows:

"WILL.

"I make this my last will:

"I appoint Edith W. McInturff my executrix without bond, and want her to handle and dispose of my

property, being guided by what I have told her for many years, as follows:

"I have disposed of all my real property by transfers to my brothers and sisters, or their heirs, as I want them to have it, and these deeds are in trust and will be turned over to them at a time I have arranged for. Edith W. McInturff has nothing to do with the handling of my real estate.

"Two paid-up life insurance policies in the New York Life Insurance Company have been assigned to Edith W. McInturff, several years ago, and these she is entitled to, as she paid for them by furnishing me money to make certain investments ten years ago.

"I owe none of my relatives anything, and I cancel any and all debts, notes or mortgages that may be due me at the time of my death by any of my relatives, or by Edith W. McInturff. I have had a home on her place and with her parents for the past eighteen years.

"Above all, I want the closing of my affairs to be with as little confusion and trouble as possible. I have left full instructions with my executrix as to how I want my remains disposed of and matters closed.

"Should my executrix die before the closing of my estate, then I would ask that some trust company be appointed to take her place.

"Made at Memphis, Tennessee, on this August 11, 1918.

(Signed) "Lewey D. Able.

"The following persons witness my signature."

The record contains statements made by appellee in reference to the information she received concerning the whereabouts of these papers which are out of the ordinary and somewhat unreasonable, but none of them are sufficient from which to find that the paper designated as a will is not genuine.

Appellant insists that the paper designated as a will was not admissible in evidence because not probated or subject to probate. Not being in proper form and subject to probate, appellant is correct in the contention that

it can not be admitted in evidence as a will. While testators may release or remit debts by will, the debt in question can not be held to be released under its terms, for the reason that the instrument is not a will. Neither is it sufficient within itself as a contract to release the debt, because it was executed without consideration. We think, however, the will admissible in evidence as a written declaration by the intestate, Lewey D. Able, as a circumstance tending to corroborate the other evidence in the case to the effect that the note and mortgage of $4,000 had been settled. The declaration was against the interest of Lewey D. Able, upon that ground, was admissible. Greenleaf on Evidence, vol. 1, § 147, page 232 (16 ed.). We find nothing in the rule requiring that the declarations must have been made to the debtor in order to be admissible, as suggested by learned counsel for appellant.

It is also insisted by appellant that the statement of J. H. Carmichael, to the effect that Lewey D. Able told him that appellee had settled the indebtedness made the basis of the foreclosure suit, which he had been employed to defend, and that he would inform A. J. Newman to dismiss the suit, was not admissible, because, at the time made, J. H. Carmichael was acting for appellee and the business related to a transaction with the deceased, Lewey D. Able. The only reason a declaration or admission made by the deceased to a party to the suit, pertaining to a transaction between them, is not admissible is because the statute bars the admission of such testimony. The prohibition does not extend to the agent or representative of the interested party. Crawford & Moses' Digest, § 4144; *Nolen* v. *Harden,* 43 Ark. 307; *McRae* v. *Holcomb,* 46 Ark. 306; *Brown* v. *Brown,* 134 Ark. 380.

The last contention of appellant is that the decree of the chancery court is not sustained by the weight of the evidence. J. H. Carmichael testified positively that the deceased informed him that appellee had settled the indebtedness evidenced by the note and mortgage of $4,000, upon which suit had been brought by A. J. New-

man, and that he would instruct his attorney, A. J. Newman, to dismiss the suit. His evidence is corroborated to some extent by that of A. J. Newman, who testified in substance that the suit had been held up on account of some kind of settlement pending between the parties and the further circumstance that no steps were taken in the case during the lifetime of Lewey D. Able. His evidence is also corroborated by the declaration of the deceased, Lewey D. Able, contained in the paper purporting to be a will. There is practically no evidence in the record tending to show otherwise, so the decree of the chancery court is in accordance with the weight of the evidence.

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

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MILLER RUBBER COMPANY v. KING.

Opinion delivered January 31, 1921.

1. SALES—RIGHT TO CANCEL ORDERS.—Although a contract between an automobile tire concern and a local dealer provided that the former might refuse credit at its option, this would not justify it in declining to ship tires where it had accepted an order and agreed to ship them.
2. TRIAL—QUESTION FOR JURY.—Where the evidence on an issue was conflicting, it was not error to refuse to direct a verdict for the plaintiff.
3. SALES—BREACH OF CONTRACT—INSTRUCTION.—In an action by the seller of automobile tires to recover a balance due, in which the buyer filed a counterclaim asking for damages for failure to fill an accepted order for tires, instructions embodying the idea that the seller could arbitrarily refuse to ship an order after accepting it *held* properly refused.
4. TRIAL—INSTRUCTIONS CONSIDERED AS A WHOLE.—If the various instructions separately present every phase of the law applicable to the case as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others.
5. SALES—LOSS OF PROFITS—INSTRUCTION.—In an action for a balance due on a sale of tires, wherein the buyer counterclaimed damages for failure to ship tires ordered, an instruction that the

buyer could not recover any loss of profits as damages was properly refused, the evidence showing that the buyer had an established business with a ready sale for such products.

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

*Richard M. Mann,* for appellant.

1. The court erred in refusing to give appellants peremptory instruction on the counterclaim of appellee. The appellant clearly had the right to decline to ship this order of May 5, and it was error to refuse appellant's instruction No. 4.

2. The court erred in giving defendant's instruction No. 1. It was peremptory and excluded two issues, (1) the right to fix the credit limit, and (2) the refusal of payment by appellee of his past due account, which was submitted in appellant's instruction No. 6. Instructions which exclude or ignore issues are erroneous. 82 Ark. 424; 95 *Id.* 108; 108 *Id.* 171; 77 *Id.* 201. For the same reasons it was error to give appellee's instructions 2, 3 and 4.

3. The court erred in refusing papellant's request for instruction 3. It should have been given. 113 Ark. 556.

4. The court should have given appellant's instructions Nos. 4 and 5.

5. The verdict is contrary to the law and the evidence.

*Rose, Hemingway, Cantrell & Loughborough,* for appellee.

1. There is no error in the instructions. 100 Ark. 107-119. See, also, 74 Ark. 377; 87 *Id.* 396; 88 *Id.* 433; 93 *Id.* 573.

2. Only general objections were made to each of the instructions, and counsel did not ask for a modification. 93 Ark. 564.

3. There was no error in refusing No. 3. 69 Ark. 219; 111 *Id.* 474-484. There is no error. The verdict on the counterclaim is amply supported by the evidence.

HUMPHREYS, J. Appellant instituted suit against appellees in the Pulaski Circuit Court to recover $936.32, an alleged balance due for automobile tires sold by it to E. M. King, Jr., the payment of which was guaranteed by E. M. King, Sr.

Appellee E. M. King, Jr., filed answer, admitting the indebtedness, but, by way of counterclaim, pleaded damages in the sum of $721.77 on account of the failure of appellant to ship him automobile tires ordered on the 5th day of May, 1919, under the terms of the contract entered into by and between appellant and him on the 30th day of September, 1918, for which he was entitled to a credit, leaving a balance of $214.55 due appellant. He tendered that amount.

Appellant filed a reply to the counterclaim, denying any obligation on its part to ship the tires ordered by said appellee on May 5, 1919, or that said appellee was damaged in the sum of $721.77, or in any sum by reason of its failure to make the shipment of tires.

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

The contract made the basis of the suit provided for the sale by appellant to appellee E. M. King, Jr., of Miller pneumatic automobile tires on the basis of trade discounts from current Miller consumers' lists. The second paragraph of the contract is as follows:

"Terms of payment are 5 per cent., 10 days, net, 30 days; it being understood, however, that party of the first part may refuse such terms at its option, if, in its opinion, the financial responsibility of the party of the second part is impaired, or, for any other reason such action is deemed advisable."

It was also provided in the contract that either party might terminate it at any time upon thirty days' notice. Pursuant to the right to terminate the contract, appellant gave appellee E. M. King, Jr., notice on the 10th day of May, 1919, that it would cancel the contract on June 10 thereafter. On May 5 antedating the notice, said appellee made an order through appellant's Memphis house by 'phone for a shipment of tires amounting to $1,824.73, according to the evidence of said appellee, and $2,100, according to the evidence of appellant. According to the evidence of appellee, appellant accepted and agreed to fill the order, and no refusal was made to ship under the terms specified in the contract nor on account of it being in excess of any credit limit or on account of any failure to pay amounts due on orders previously made. According to the evidence of appellant, Mr. Elkins, its manager, took the order down and told said appellee that he would see about it; that some days later he informed said appellee that if he would pay his past due account of $2,441.97 the order would be filled; that, on May 12, said appellee made payment and reduced the account, together with rebates to which he was entitled, to $936.32; that he did not pay the entire account, and, for that reason, the order made on May 5 was not shipped. When the contract was entered into and for some months thereafter, Mr. King's territory was under the appellant's Oklahoma branch house, but, in February, 1919, it was transferred to appellant's Memphis branch house. During the fall of 1918, appellant placed a credit limit of $500 upon said appellee. Appellee thereafter executed to appellant a guarantee, signed by E. M. King, Sr., by which he guaranteed the payment of any account to appellant not exceeding $3,000. Appellant's testimony tends to show that appellant fixed said appellee's credit limit at $2,500, but the evidence fails to disclose that any notice of the credit limit was given to, or understood by, said appellee. During the period the credit limit was fixed at $500, the parties, in their transactions, did not adhere to it and the books show that the credit extended

on two occasions was about $3,000. The evidence on behalf of appellee tended to show that, had appellant shipped the tires ordered on May 5, 1919, he could have sold them at a profit of $721.77 in the course of his regular business and without incurring any additional expense.

Appellant insists that the court committed reversible error in refusing to give its peremptory instruction on appellee's counterclaim, on the ground that it had a right to fix a credit limit and refuse to ship an order in excess of such limit. We think section 2 of the contract, heretofore set out, invested the right in appellant to place a credit limit upon appellee for any reason deemed advisable, upon notice to appellee, before or at the time an order for tires was made; but it would, notwithstanding, be bound to ship an order which it accepted and agreed to ship under the original terms specified in the contract. The evidence of appellee tended to show that appellant accepted and agreed to fill the order on May 5, 1919, unconditionally. Appellant's evidence tended to show the contrary. Thus an issue was presented for determination by the jury, and it was not error to refuse to give appellant's peremptory request. Appellee requested and the court gave instruction No. 2, which correctly stated the law upon this issue. The instruction is as follows:

"You are instructed that, under that portion of the contract relating to terms of payment, plaintiff could not refuse to sell and ship automobile tires to the defendant during the term of the contract, but it only authorized plaintiff to refuse the terms of payment set forth in the contract and suggest other terms of payment, and, until plaintiff specifically refused the terms of payment set forth in the contract, defendant was justified in considering those terms of payment still in force and acting accordingly."

Appellants made two requests, 4 and 5, touching upon the same issue, which were refused. They are as follows:

"(4) The plaintiff in this case had the right to fix a reasonable credit limit to be extended to the defendant, and if you find in this case that such credit limit was fixed by the plaintiff at $2,500 and that the order which was made by the defendant exceeded this credit limit, the plaintiff was not required to ship the order, and your verdict will be for the plaintiff on the issue.

"(5) If you find in this case that a guarantee agreement was made by E. M. King, Sr., father of the defendant, limiting the amount of the guaranty to $3,000, and that the order placed by Mr. King, involved in this case, plus the amount he owed at the time, exceeded the sum of $3,000, the plaintiff was not required to ship it, and your verdict will be for the defendant."

These instructions were properly refused because erroneous in embodying the idea that appellant could arbitrarily refuse to ship the order after accepting it under the terms specified in the contract.

It is next insisted that the court erred in giving said appellee's instructions 1, 2, 3 and 4, because they excluded, first, appellant's right to fix a credit limit; second, the right to refuse to make the shipment because said appellee had failed to pay his past due account.

(1) As above stated, the evidence did not warrant the submission of appellant's theory that it had the arbitrary right to fix a credit limit, without notice to appellee, and refuse to ship an order after having accepted and agreed to fill it under the terms specified in the contract.

(2) It is true the instructions objected to did not include appellant's theory that it had a right to refuse to ship goods until said appellee should pay his past due account; but that theory of appellant's was incorporated in a separate instruction asked by it, which is as follows:

"(6) If you find in this case that the Miller Rubber Company seasonably offered to the defendant, E. M. King, Jr., to ship the order of May 5 if he would pay his past due account, and the Miller Rubber Company would have shipped the order to the defendant had he

paid his account, and he refused or failed to do so, the defendant can not recover and your verdict will be for the plaintiff, Miller Rubber Company, on the counterclaim."

When that instruction is read in connection with the other instructions, it can not be said that appellant's theory in that regard was excluded from the jury. This court is committed to the doctrine that "if the various instructions separately present every phase of the law applicable to the case as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others." *St. L., I. M. & S. Ry. Co.* v. *Baker,* 67 Ark. 531; *St. L. S. W. Ry. Co.* v. *Graham,* 83 Ark. 61; *St. L., I. M. & S. Ry. Co.* v. *Rogers,* 93 Ark. 564; *St. L., I. M. & S. Ry. Co.* v. *Brown,* 100 Ark. 107.

Appellant insists that the court erred in refusing to give appellant's instruction No. 3, which is as follows: "The defendant in this case claims that the plaintiff failed to ship him the order for tires and tubes, and that, by reason of the failure on the part of the plaintiff to ship this order, he sustained damage in the loss of profits he would have made on the resale of these tires and tubes in his business. The court instructs you that the defendant can not recover any loss of profits as damages, where such profits, if any, are remotely connected with the alleged breach of contract or where they are speculative, resting only upon conjectural evidence or the opinion of parties or witnesses." Appellant argues the necessity for this instruction on the ground that the evidence of said appellee with reference to the profits was conjectural and only the expression of an individual opinion. The evidence shows that said appellee had an establishing business, and that there was at the time of making the order a ready sale for automobile tires of the character ordered, at current prices. Our interpretation of the evidence is that the profits to be made upon the order were in no sense speculative, but could be, and were, estimated with reasonable certainty.

The last contention is that the jury awarded said appellee, upon his cross-bill, gross profits, instead of deducting the necessary expense therefrom for selling the tires at retail. There was evidence tending to show that appellee was in a situation to sell the tires without any extra expense. The court instructed the jury to deduct from the gross profit the necessary expense of selling the tires at retail. The question, then, of expense was submitted to the jury, and it found against appellant on the issue.

No error appearing, the judgment is affirmed.

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BAUM v. INGRAHAM.

Opinion delivered February 7, 1921.

APPEAL AND ERROR—CONCLUSIVENESS OF FORMER APPEAL.—Where on a former appeal it was erroneously adjudged that the appellee was entitled to recover betterments on land assigned to him by the decree, such error can not be cured on a second appeal.

Appeal from Sebastian Chancery Court, Fort Smith District; *C. R. Barry*, Special Chancellor; affirmed.

*T. P. Winchester,* for appellants.

1. When Baum, Sr., died, the lots in controversy were unimproved. When his widow conveyed her dower to Ingraham, they were unimproved. When dower is admeasured in this proceeding, the lots are improved, and dower must be assigned as they were when the right was consummated when the husband died. If this position is well taken, then—

2. The lots (as unimproved) should have been sold, free of dower, and dower assigned out of the proceeds. It is not questioned that the price paid by Ingraham for the naked lots—$2,100—was the fair value at the time he bought; and,

3. The statute provides for such procedure (Kirby's Digest, § 2707), and the order in this case follows the statute. The facts make this procedure the only one that can be followed without great prejudice to the heirs.

4. The result of the procedure here works injustice to the heirs, such as to merit the condemnation of the court.

Costs of improvements put upon land by the widow before the assignment of dower can not be charged against the heirs. 19 C. J. 532, § 206. See, also, 34 Am. St. 236; 46 Am. Dec. 56; 90 Ky. 593.

When defendant acquired his one-third interest in the lots and at the same time acquired the dower interest, the dower interest was merged into the larger estate, and he had only a dower interest in the undivided two-thirds belonging to plaintiffs. It was at his own risk that he improved the property before he had the dower interest assigned. As against the heir, the widow takes dower in the condition the land is when the assignment is made but as against an alienee of the husband as of the date of the alienation. As against the heir where she delayed demanding dower until the heir improved the property, she can not claim dower in the value as enhanced by the heir's improvements. 47 Md. 359; 42 Miss. 747; 27 W. Va. 750; 5 Johns. Ch'y 497 (N. Y.). The defendant is entitled to dower in the undivided two-thirds in the plaintiff's interest only, and the court erred in its decree.

*Pryor & Miles,* for appeellee.

This is the third appeal in this case. 131 Ark. 101; 141 *Id.* 243. This court reversed the cause the last time because the dower interest held by appellee was not accurately determined, and the court directed that the dower be assigned and a resale had. This was done, and the only question now is whether the holder of the dower interest is to have dower assigned as of the date of the assignment or as of the date of the death of the original holder of the estate. In other words, shall dower be assigned with the improvements or without. The rule as laid down in 66 Ark. 251, has no application here. Washburn, Real Property (6 ed.), § 476; 19 Fed. Cases No. II, 356; 3 Mason 347; 27 W. Va. 750. See, also, 23 Ill. 585; 34 Conn. 488; 86 Ky. 198; 9 Mass. 218. Dower was

properly assigned with reference to the land as it stood at the time of the assignment, and there is no error.

McCULLOCH, C. J. This is the third appearance here of this case, and the facts are fully stated in the former opinions. *Ingraham* v. *Baum,* 136 Ark. 101; *Baum* v. *Ingraham,* 141 Ark. 243. On the remand of the case after the last appeal, the chancery court decreed an assignment of the dower interest to appellee, Lee H. Ingraham, who had purchased it from the widow of William Baum. A certain portion of the real estate containing one of the houses erected by appellee was assigned to him as the dower interest of the widow. The court then ordered a sale of the property by a commissioner, for the purpose of satisfying the lien of appellee for betterments and for a division of the proceeds. Pursuant to that order a sale was made by the commissioner and reported to the court, and the court proceeded to distribute the funds, paying first appellee's claim for betterments.

The present appeal challenges the correctness of the court's ruling in the distribution of the proceeds of sale. The contention is that appellee was not entitled to reimbursement for the expense of building a house on the part of the land which was assigned to him as the widow's dower. The argument is that, since appellee obtained this particular portion of the property in the assignment of dower, he is not entitled to reimbursement for the cost of the improvements thereon. The determination of this question settles the point of the complaint of appellants as to the distribution of the proceeds of the sale. The difficulty with the contention of appellants now is that this question has been settled against them by the first decree of the chancery court which was before us on the first appeal. In that decree the court ascertained the amount of betterments to be allowed to appellee and decreed the same to be a lien on the real estate in controversy. There was an appeal to this court by both parties to the controversy, but the present appellants only challenged the correctness of the decree as to the value of the

betterments. Our attention was not then called to the question of the right of appellee to recover for betterments on such part of the property as might be assigned to him as the widow's dower. The effect of the decree of the chancery court was, however, to determine the rights of the parties with respect to appellee's recovery of the value of betterments, and it is too late now to go back to that question, which was then finally adjudicated. However objectionable that feature of the decree may appear to be, it is too late now for the chancery court or this court to give relief against this. The last decree distributing the funds in accordance with the prior adjudication by the court must therefore be affirmed, and it is so ordered.

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## CURETON v. FARMERS' STATE BANK.

Opinion delivered February 7, 1921.

1. BANKS AND BANKING — DEPOSITOR DELIVERING CHECK TO WRONG PERSON.—Where a depositor delivered checks to the designated payee's brother, mistaking him for the payee and intending that such brother should receive the proceeds of the checks, he can not recover from the bank which cashed the checks on the ground that it cashed the checks on indorsement in the payee's name forged by his brother.
2. ESTOPPEL—ACTS MAKING INJURY POSSIBLE.—If neither the depositor nor the bank was negligent in such case, the loss sustained was that of the depositor, since, as between two innocent parties, the loss must fall on him whose act contributed most to produce it.
3. BILLS AND NOTES—DELIVERY OF CHECK WITHOUT INDORSEMENT.—Delivery of a check without indorsement to a purchaser for value without notice to the purchaser of the fraud practiced on the depositor in procuring the check *held* sufficient to transfer title to the purchaser.

Appeal from Faulkner Circuit Court; *Geo. W. Clark,* Judge; affirmed.

*P. H. Prince,* for appellant.

The court erred in its findings. There was no negligence on the part of plaintiff, Cureton. The court over-

looked the gross negligence of those parties trading for these negotiable bills of exchange made payable to order of A. J. Carman. The bank and these others should have had the negro to identify himself. A bank must use due diligence to ascertain whether the payee's indorsement is genuine. If the indorsement is forged and the bank pays the check, the bank is liable to the depositor. 56 So. Rep. 868, 63 N. J. Law. 578. Bailee, at his peril, is bound to know to whom he delivers; he must use due diligence. 3 Am. & E. Enc. Law (2 ed.) 754. All plaintiff did was to execute the checks to order of A. J. Carman, and, being negotiable, parties taking the checks were bound at their peril to have the party identified before accepting and paying the checks. 98 Ark. 294; 104 *Id.* 550; 105 *Id.* 152; 89 *Id.* 349; 103 *Id.* 326. The general rule is, no man can get title to personal property from one who has no title; the only exception is a *bona fide* purchaser who is protected where the owner has conferred power upon the seller the apparent right of property as owner. 128 Ark. 600-3; 62 *Id.* 84; 42 *Id.* 475.

Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative against the party against whom it is sought to enforce such right. Act No. 81, Acts 1913, p. 278, § 23. If the instrument is payable to bearer, it is negotiable by delivery; if to order, it is negotiable by indorsement of the holder, completed by delivery. *Ib.*, § 30, p. 279. The title of a person who negotiates an instrument is defective within the meaning of the act when he obtains the instrument by fraud. *Ib.*, § 55, p. 284. A check is a bill of exchange drawn on a bank and a negotiable instrument. *Ib.*, p. 316, § 90. Where personal property is procured from the owner by a felonious act or by fraudulent pretense, the ownership is not changed, and he may recover without tendering the consideration received. 92 Ark. 509; 95 *Id.* 131; 77 *Id.* 279. No title passed to Carman from plaintiff, as they were feloniously obtained and no title passed and he could not trade, sell

or have the checks cashed by the bank or the other parties. 49 Ark. 40. The bank is responsible and must pay plaintiff the money negligently and wrongfully paid out. The findings and judgment are erroneous.

*George F. Hartje* and *R. W. Robins,* for appellees.

1. The purpose of identification is to insure payment of the checks to the real payee, and if that is accomplished the want of identification is immaterial. The question then is whether the imposter is the real payee or at least whether appellant is not estopped to deny that he is such payee. It was clearly the intention of appellant to make these checks to the person standing before him, and if appellees, before cashing the checks, had made proper inquiry whether the person presenting them was the person to whom they were intended to be paid, the answer would have been in the affirmative. Of course, appellant was deceived as to the name of the person he was dealing with, but he dealt with and intended to deal with the visible man who stood before him, identified by sight and hearing, and although he was mistaken, he was the person intended by him as the payee, and in fact the genuine indorsement of the person to whom the loan was made and for whom the checks were intended. 7 Ind. App. 322; 33 N. E. 247; 34 *Id.* 608; 141 Mass. 231; 55 Am. Rep. 471; 4 N. E. 619; 109 Atl. 296.

2. The indorsement by impostor was not a forgery. To make it a forgery, there must be a design to pass as genuine a writing which is not. 111 Cal. 274, 43 Pac. 901; 31 L. R. A. 831; 64 Ill. App. 225; 109 Atl. 296.

3. The impostor did not have to indorse check to convey title. Heiligers was a purchaser for value and without notice of the fraud. A delivery of the check for value with the intent to part with the title is sufficient. 91 Ark. 485; 36 *Id.* 501; 69 *Id.* 62; 97 N. E. 395; 38 L. R. A. (N. S.) 1111; 61 N. E. 596; 109 Atl. 296; 46 Atl. 420; 79 Am. St. 717. These cases govern this case. As the transaction began with appellant, Cureton, it was his duty to ascertain the identity of the party. Failing to do

this, he became the victim of a fraud. Where one of two innocent parties must suffer, the one whose act caused the loss should bear the consequences. It would be unreasonable and unjust to permit appellant to escape the natural consequences of his own neglect or mistake and the court was correct.

WOOD, J. On January 30, 1919, H. V. Carmon obtained a loan from H. E. Cureton. H. V. Carmon, in the name of A. J. Carmon, executed a chattel mortgage to secure the loan. Cureton drew checks payable to A. J. Carmon on the Farmers' State Bank of Conway, Arkansas, where he had on deposit more than the sum of $300. There were six different checks for different amounts, amounting in the aggregate to $265. These checks were delivered by Cureton to H. V. Carmon, believing that he was delivering the same to A. J. Carmon. H. V. Carmon forged the name of A. J. Carmon on five of the checks and traded the same to merchants in Conway. One of the checks for $80 was cashed by one Sam Heiligers without endorsement. The checks were presented to the Farmers' State Bank by the various indorsees and were paid by the bank out of the funds on deposit to the credit of Cureton. A. J. Carmon never received the checks, nor were they delivered by Cureton to a third party with directions to deliver the same to A. J. Carmon. Neither the bank nor the various parties who presented the checks, made any effort to have H. V. Carmon identified as A. J. Carmon.

The appellant brought this action against the Farmers' State Bank to recover from it the sum of $265, the aggregate amount of the various checks, alleging that the bank had negligently failed to have the checks indorsed by A. J. Carmon and had failed to pay the checks to his order. At the instance of the bank, the various parties who presented the checks to the bank for payment, and to whom it paid the money, were made parties defendant. The defense of the bank was that it paid the checks to the person to whom Cureton delivered the same and to the person he intended should receive the proceeds of the

checks. The cause was tried by the circuit court sitting as a jury, and the above are the facts upon which a judgment was rendered in favor of the bank, from which is this appeal.

1. The appellant himself testified that he intended that the man with whom he made the contract and to whom he delivered the checks should get the money, but he believed that that man was A. J. Carmon. The court, therefore, was correct in finding the facts to be that "at the time of the delivery of the checks the plaintiff intended that the man to whom he delivered the checks should have the proceeds." Upon these facts the court was correct in declaring the law to be that the appellant must "stand the loss occasioned by his negligence in failing to have the person properly identified with whom he was dealing." Whether the loss was occasioned through the appellant's negligence, or through mistake on his part, without negligence, caused by the deception practiced upon him by H. V. Carmon, the result is the same. Appellant, by delivering the checks in the first instance to H. V. Carmon, enabled him to practice the subsequent frauds which resulted in the loss of which the appellant complains. The appellee bank, having on general deposit funds to the credit of the appellant, at its peril would have been bound to ascertain that the signature to these checks was the genuine signature of appellant, and if the signature of appellant had been forged, though never so clever the deception, the appellee bank would have been liable. But there is no testimony in the record to show that the appellee bank was familiar with, or that it had any means of ascertaining that the indorsement of the name of A. J. Carmon on the checks was a forgery. The checks were not forgeries. *People* v. *Bendit,* 111 Cal. 274, 52 Am. St. Rep. 186; *Montgomery Garage Co.* v. *Manufacturers' Liability Ins. Co.,* 109 Atl. 296. The checks were drawn by the appellant and delivered to H. V. Carmon, who, it is true, was impersonating his brother, A. J. Carmon. H. V. Carmon was the payee of the checks under the name of A. J. Carmon, and he, un-

der such assumed name, indorsed them and received the proceeds. It is wholly improbable, not to say impossible, that appellant would have suffered the loss of which he complains, had he not drawn these checks and delivered the same to H. V. Carmon. The evidence shows that the appellant knew that one of the Carmons was a rascal. H. V. Carmon represented to appellant that the rascal was his brother, A. J. Carmon, and, inasmuch as the brothers favored, appellant accepted such representations without further inquiry. It is manifest from these facts that, but for the negligence, or, to say the least, the mistake of the appellant himself in drawing and delivering the checks to H. V. Carmon, the loss would not have occurred.

This court, in *O. J. Lewis Mercantile Co.* v. *Harris,* 101 Ark. 4-7, announced the well-established doctrine that "the holder of commercial paper, payable to order, must trace his title through a genuine indorsement, and that the drawee of a draft, payable to order, who pays upon a forged or unauthorized indorsement, does so at his peril." See also *Koen* v. *Miller,* 105 Ark. 152. But, as is said in *Land Title & Trust Co.* v. *Northwestern National Bank,* 196 Pa. 230, 79 Am. St. Rep. 717, "this doctrine is confined to cases in which the depositor has done nothing to increase the risk of the bank. It should not apply when the check is issued to one whom the drawer intends to designate as the payee: First, because in such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely increased risk, as it follows that a check thus fraudulently obtained will be fraudulently used. The bank is deprived of the protection afforded by the fact that a *bona fide* holder of a check will exercise care to preserve it from loss or theft, which are the ordinary risks. There is thrown upon the bank the risk of antecedent fraud practiced upon the drawer of the check, of which it has neither knowledge, nor means of knowledge; secondly, because in such a case the intention with which the drawer issued the check has been carried out. The

person has been paid to whom he intended payment should be made; there has been no mistake of fact, except the mistake which he made when he issued the check, and the loss is due, not to the bank's error in failing to carry out his intention, but primarily to his own error into which he was led by the deception previously practiced upon him." *McHenry* v. *Old Citizens' National Bank,* 97 N. E. 395, 38 L. R. A. (N. S.), 1111; *Meridian National Bank* v. *First National Bank,* 7 Ind. App. 322; *Robertson* v. *Coleman,* 141 Mass. 231. If it be conceded that the appellant was guilty of no negligence in delivering the checks to H. V. Carmon and that appellee bank and the appellant were both innocent in the transaction, which must result in financial loss to one or the other of them, then the case under the facts would come clearly within that principle of natural justice and equity which requires that as between two innocent parties the loss must fall upon that one whose acts contributed most to produce it. See *Stout v. Benoist,* 39 Mo. 277, 90 Am. Dec. 466, and cases there cited.

2. One check for $80 was purchased by appellee, Sam Heiligers, from H. V. Carmon, to whom appellant had delivered the check, and same was delivered to Heiligers by H. V. Carmon without indorsement. Heiligers indorsed the same and presented it to the bank and it was paid. As before stated, the checks themselves were not forgeries, and the man to whom appellant delivered the checks transferred one of the checks to appellee, Heiligers, who received the money for the same from the bank. Heiligers was an innocent purchaser, having paid his money for the check which appellant drew and without notice of the fraud that had been practiced upon the appellant. The delivery of the check to him by H. V. Carmon, under these circumstances, was sufficient to transfer the title to Heiligers. *Heartman* v. *Franks,* 36 Ark. 500; *Lanigan* v. *North,* 69 Ark. 62; *Malory* v. *State,* 91 Ark. 485. See, also, *McHenry* v. *Old Citizens National Bank, supra,* and other cases above cited.

The judgment is correct, and it is affirmed.

## MERCHANTS' BANK OF KANSAS CITY, MO., v. PINE BLUFF PRODUCE & PROVISION COMPANY.

Opinion delivered February 7, 1921.

BILLS AND NOTES—LIABILITY OF PURCHASER OF DRAFT WITH BILL OF LADING ATTACHED.—A bank which purchased from the seller of a carload of produce a draft for the purchase price with bill of lading attached did not thereby become substituted to the seller's liability for defects in the quality of the produce.

Appeal from Jefferson Circuit Court; *W. B. Sorrels*, Judge; reversed.

STATEMENT OF FACTS.

On February 9, 1920, the Pine Bluff Produce & Provision Company, a domestic corporation, brought this suit in the circuit court against the Michael-Swanson-Brady Produce Company, a foreign corporation, as defendant, and the Citizens' Bank of Pine Bluff, as garnishee. The basis of the suit is, that on the 26th day of January, 1920, the defendant shipped to the plaintiff from Kansas City, Kansas, to Pine Bluff, Arkansas, a mixed car of produce on shipper's order bill of lading. A draft for the sum of $1,574.16, representing the price of the merchandise, was drawn by the defendant on the plaintiff, to which was attached a bill of lading for the car of merchandise. The draft was paid by the plaintiff. The contract of sale gave the plaintiff the right of inspection, and upon the arrival of the car at Pine Bluff on the 3d day of February, 1920, an inspection of the merchandise was made. It was ascertained that a portion of the produce was rotten and otherwise in a damaged condition.

On January 27, 1920, the defendant, Michael-Swanson-Brady Produce Company deposited the draft for the sum of $1,574.16 with the Merchants' Bank of Kansas City, Mo., with the bill of lading for the car of produce attached. The draft with the bill of lading attached was duly assigned to the bank, and the bank gave the produce company credit for the amount of the draft. The produce company received credit for the amount of the draft and checked the amount out of the bank.

The bank was also made a defendant to the present suit. The court below, sitting as a jury, found in favor of the plaintiff, the Pine Bluff Produce & Provision Company, and rendered judgment against the defendant, Merchants' Bank of Kansas City, Mo., for $200, which was shown by the evidence to be the amount of damage suffered by the plaintiff by reason of the rotten condition of the produce when received at Pine Bluff.

The Merchants' Bank of Kansas City, Mo., has duly appealed to this court.

*A. R. Cooper,* for appellant.

The relation of vendor and vendee did not exist in this transaction; the relation is that of debtor and creditor. 107 Ark. 601; 156 S. W. 187; 196 U. S. 280-5. This doctrine was approved in 101 Ark. 206, 142 S. W. 178. The declaration of law asked by appellant should have been given and the demurrer sustained.

*Harry T. Wooldridge,* for appellee.

The appellant bank, by taking the draft in the regular course of business and giving Michael-Swanson-Brady Produce Company credit therefor became the owner of the produce and was liable for any inferiority in quality or quantity of the goods described in the bill of lading. The bank stepped into the shoes of the shipper or depositor when it became the owner of the draft and bill of lading and was bound to carry out the contract of the shipper as reflected by the bill of lading. 126 Ark. 366, 375. See, also, 105 U. S. 7; 77 Ark. 482; 87 *Id.* 26. By statute and our decisions a transferee of a bill of lading becomes the owner of the goods. 91 U. S. 98; 19 Tex. Civ. App. 246; 46 S. W. 48; 32 So. Rep. 287; 49 L. R. A. 679; 126 N. C. 176; 144 Ala. 562; 39 So. Rep. 129; 1 L. R. A. (N. S.) 242. The ruling of these cases should be followed as there is no error.

HART, J. (after stating the facts). The theory of the plaintiff, which was adopted by the lower court, is, that when the Merchants' Bank of Kansas City, Mo., pur-

chased the draft drawn by the seller on the purchaser with bill of lading attached, the bank became the owner of the car of merchandise and responsible for the performance of the contract of the seller for the sale of the car of produce and was liable in damages for any loss suffered by the purchaser on account of the produce being rotten, or otherwise damaged.

There are cases sustaining the contention of the plaintiff, but they are opposed to the weight of authority and to the reasoning of this court in previous cases bearing on the question.

In *Brown* v. *Yukon Nat. Bank,* 138 Ark. 210, the contest was between the bank, to whom the consignor of the goods had assigned the draft with bill of lading attached, and the purchasers who had paid the draft in the hands of a local bank for collection. The purchasers garnished the funds in the hands of the local bank for an amount alleged to be due them by reason of a breach of contract on the part of the seller of the produce. The bank, to whom the draft with the bill of lading attached had been assigned, did not know of any claim of the buyer against the seller for breach of the contract. The court held that where a draft is indorsed to and deposited with a bank and the amount credited to the holder's account, the bank becomes the absolute owner of the draft and entitled to the proceeds in the hands of a garnishee. To the same effect is the decision in *Cox Wholesale Grocery Co.* v. *National Bank of Pittsburg, Kansas,* 107 Ark. 601.

While the cases just referred to do not control the present case, it is apparent that the holding would have been otherwise if the court had taken the position that an assignee for value of a draft with bill of lading attached made to shipper's order succeeded to the situation of the shipper, and was bound to carry out his contract, and the court would not have held that the bank, which had discounted the draft in good faith, without knowing that the buyer had any claim against the shipper for breach of contract, could recover.

We think it is an erroneous position to assume that a bank, in discounting a draft for the purchase price of goods with bill of lading attached, takes over the original contract of sale, and becomes substituted to all the liabilities of the original drawer of the draft to the purchaser. It has been well said that such a holding would not only violate well-settled rules of law governing commercial paper, but would also tend to decrease the immense volume of business which is carried on by shippers of cotton, stock, grain, and other commodities by restricting that freedom with which banks advance money to the drawers of such drafts with bills of lading attached. If banks could be made liable in damages on account of defects in the quality or quantity of the property covered by the bill of lading, a serious impediment would be placed in the way of shippers who need a part or all of the price of the commodities sold before their arrival in the market to which they are consigned.

The question has received the careful consideration of annotators, and in several case notes numerous decisions are cited to the effect that a bank which discounts a draft with bill of lading attached is not, in the absence of bad faith, answerable to the drawee for the performance of the consignor's contract. In each of the cases cited the court has held that the drawee of a draft with bill of lading attached can not, in case the consignor does not comply with the contract, garnish the proceeds of the draft in the hands of the collecting bank to make good his loss on account of the inferiority of the consignment. *Hawkins* v. *Alfalfa Products Co.* (Ky.), 44 L. R. A. (N. S.) 600; *General Mercantile Co.* v. *Oklahoma State Bank* (Kan.), 33 L. R. A. (N. S.) 954; *Mason* v. *Nelson* (N. C.), 18 L. R. A. (N. S.) 1221 and note; *Lewis* v. *Small & Company and Mechanics National Bank of Knoxville* (Tenn.), 6 L. R. A. (N. S.) 887; case note to *Haas* v. *Citizens' Bank,* 1 L. R. A. (N. S.) 242; case note to *Finch* v. *Gregg* (N. C.), 49 L. R. A. (N. S.) 679, and 4 R. C. L., § 36, p. 34.

The bank gave value for the draft with the bill of lading attached in the present case, and there is nothing in the record to show bad faith on its part in the transaction.

It follows that the judgment must be reversed, and the cause will be remanded for a new trial.

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## JOHNSON v. BERG.

Opinion delivered February 7, 1921.

1. EVIDENCE—HEARSAY EVIDENCE AS TO FACT SHOWN BY ABSTRACT BOOKS.—Testimony by the owner of a set of abstract books as to the date of a certain deed as shown by the abstract books is hearsay where witness did not keep the books himself and could not testify that the entries therein were correct.
2. EXECUTION—CORRECTION OF DEED TO CONFORM TO FACTS.—In an action to recover land purchased at execution sale, where defendant claimed that the sale was void because made after the return day of the execution, but the return showed that the sale was made on the return day, evidence that the deed as recorded recited a sale three days after the return day, but that it had been corrected to show a sale on the return day, was immaterial, as it merely tended to prove that the deed was corrected to conform to the facts.

Appeal from Clay Circuit Court, Western District; *R. H. Dudley,* Judge; affirmed.

STATEMENT OF FACTS.

This is the second appeal in this case. Clara Berg sued W. A. Johnson in the circuit court to recover a tract of land in Clay County, Arkansas. On motion of the defendant the cause was transferred to the chancery court, and a final decree was entered in favor of the defendant, Johnson.

Upon appeal, this court reversed the decree on the ground that the case was improperly transferred to the chancery court. One of the grounds relied upon to sustain the transfer to equity was that there was a defect in the sheriff's deed under the execution sale under which the plaintiff, Clara Berg, claimed. The alleged

defect in the sheriff's deed was that the deed showed that the execution sale was made after the return day of the writ, and that the defendant was entitled to have a reformation of the deed so as to show the true date of the sale. The court said that the contention was not well taken because no issue that the execution sale was void on account of being made after the return day of the writ was made in the answer and that there was no prayer for equitable relief. The cause was remanded to the circuit court. See *Berg* v. *Johnson,* 139 Ark. 243.

Upon the remand of the case it was transferred to the circuit court and there tried before a jury. The original execution upon which the sale of the land was made was introduced in evidence, and the return shows that the land was sold on Thursday, June 21, 1877, after being duly advertised. The advertisement showed that the land was to be sold on Thursday, June 21, 1877. The deed by the sheriff under the execution sale recites that the land was sold on the 21st day of June, 1877.

Counsel for the defendant offered to introduce the deposition of D. Hopson to the effect that he had a set of abstract books for Clay County, Arkansas; that his abstract books showed the sheriff's deed at the execution sale to the land in controversy; and that they show that the sale took place on the 24th day of June, 1877. D. Hopson stated in his deposition that he did not remember whether or not he or some person in his employ copied the deed from the record for his abstract books.

The defendant also offered to introduce C. L. Daniel as a witness. He said that Daniel would testify that he had made his own abstract books insofar as the land in question is concerned; that, if there had been any change in the date of the deed as it appeared on the deed record from the 24th of June, 1877, to the 21st of June, 1877, he would have noted such change on his abstract books; that said Daniel would further testify that in 1906 or 1907 he made a comparison of his abstract books with the deed record for the purpose of correcting any errors

that might appear in his abstract books; that, if the deed record at that time had showed a change in the date on the deed in question from the 24th of June, 1877, to the 21st of June, 1877, he would have noted such change on his abstract books; and that his abstract books did not show any such change.

The court excluded this evidence from the jury. After hearing all the evidence adduced in favor of the plaintiff, the case was submitted to the jury under proper instructions from the court, and a verdict was returned in favor of the plaintiff. The defendant has appealed.

*Oliver & Oliver,* for appellant.

1. The court erred in excluding the testimony of Daniel and Hopson. 35 Ark. 470-81; 34 *Id.* 534.

2. The holding of the court that the question of the date of the sale had been decided by the chancery court and was *res judicata* was erroneous. Black on Judgments, §§ 611-614; Freeman on Judgm. (4 ed.), § 257; 23 Cyc. 1309 (c); 18 Ark. 142.

The question of *res judicata* here was a defense and must be submitted to a jury on proper evidence. Extrinsic evidence was necessary to prove the finding of the court, and this made it a case for a jury. 21 Cyc. 1543 D. The contention of appellant is correct. When an execution sale takes place, the sheriff is required to execute to the purchaser a certificate of purchase, and at the expiration of the time for redemption he must on presentation of the certificate execute a deed in conformity to the certificate of purchase. If the certificate and deed showed that the sale took place June 24, 1877, plaintiff would not be permitted to show that the sale took place on a different day and plaintiff was not entitled to prove that the sale took place on the 21st of June. Such was the ruling on former appeal. 139 Ark. 243-7.

2. The instructions refused were correct, and it was error to refuse them.

*F. G. Taylor,* for appellee.

1. Every question here was settled on the former appeal. The only question raised by appellant now is whether the sheriff's deed under execution sale is competent evidence. This is *res judicata* and settled by the former appeal. This decision is conclusive. 86 Ark. 600; 55 *Id.* 609; 81 *Id.* 440. The return of a sheriff to a writ of execution is competent evidence and conclusive except for fraud or mistake. 14 Ark. 9; 29 *Id.* 307; 17 *Id.* 546.

2. The evidence of Hopson and Daniel was incompetent for any purpose. 65 Ark. 316; 93 *Id.* 191. The deed record was competent. 34 Cyc. 591-2; 10 Ark. 187. The deed record can not be impeached by parol or extrinsic evidence. 17 Cyc. 581 and note 67. The recitals in the deed are primary proof and binding and conclusive on appellant. 24 Am. & Eng. Enc. Law 62.

HART, J. (after stating the facts). Counsel for the defendant assign as error the ruling of the court in excluding the offered testimony of Daniel and Hopson from the jury.

In *Hightower* v. *Hamlin,* 27 Ark. 20, the court held that the sale of real estate under an execution after the return day is without authority and void.

Counsel for the defendant claim that the testimony of Daniel and Hopson tends to show that the execution sale under which the plaintiff claims was had after the return day of the writ of execution. The record shows that the execution was returnable on the 21st day of June, 1877. They insist that the excluded testimony tends to show that the execution sale took place on the 24th day of June, 1877, and that therefore the court committed prejudicial error in excluding the testimony from the jury.

The testimony does not tend to show that the execution sale in question was held on the 24th day of June, 1877. The testimony of Hopson was hearsay merely. He did not take the deed in question from the deed rec-

ord, and of course could not know whether or not the deed was correctly copied upon his abstract books. Daniel testified that he copied the deed in question from the deed record, and that if there had been any change from the 24th day of June, 1877, to the 21st day of June, 1877, he would have noted that fact upon his abstract books. The deed, as introduced in evidence, recites that the execution sale was had on the 21st day of June, 1877. Hence the testimony of Daniel, if accepted as true, would only show that at the time he examined the deed record, the record showed that the deed was executed on the 24th day of June, 1877, and after giving full effect to his testimony it could only be said that at a subsequent time the execution deed was corrected so as to show that the sale took place on the 21st day of June, 1877, instead of the 24th day of June, 1877.

The return of the sheriff, who made the sale, and his advertisement of the sale, both show that the sale took place on June 21, 1877, and the presumption is that the deed was corrected so as to show the facts. The excluded testimony of Daniel would amount to no more than to show the deed was corrected after he had examined the record in 1906 or 1907. His testimony would not show that the sale was made on that day. The defendant had the right to show that fact by witnesses who had knowledge of the facts, or of facts tending directly to establish the main fact, but he could not do so by showing a correction of the execution deed so as to recite that the sale was made on June 21st, instead of June 24th, since such testimony was not sufficient for that purpose.

No other testimony was offered by the defendant on this point, and since the excluded testimony was not sufficient to establish the fact that the sale was made on the 24th day of June, 1877, being a day after the return day of the writ, prejudicial error was not committed by the court in excluding from the jury the offered testimony.

No other assignment of error is relied upon for a reversal of the judgment, and it follows that the judgment must be affirmed.

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## HINES v. HELENA COTTON OIL COMPANY.

Opinion delivered February 7, 1921.

1. CARRIERS—DELAY IN SHIPMENT—BURDEN OF PROOF.—In an action for damage to a carload of cotton seed from delay, the burden was on defendant to show that a local freight train, which passed the station after the car in question was loaded and bill of lading was issued, could not carry it on that day, since its servants made up the train and knew whether the car could have been placed in the local freight train on that day.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Where a verdict is supported by evidence of a substantial character, it will not be set aside as against the evidence.
3. CARRIERS—DAMAGE BY DELAY IN SHIPMENT—EVIDENCE.—In an action against a railroad company for damages to cotton seed by unreasonable delay in shipment, evidence held to sustain a verdict for plaintiff.

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

*Troy Pace* and *Daggett & Daggett,* for appellant.

1. The evidence does not show any unreasonable delay in the shipment of the seed and does not show damage from delay in shipment, but the evidence does show that the damage or greater portion of it occurred not from delay in shipment but that the seed were in a deteriorating condition at the time of delivery and that the damage occurred as a natural consequence of their condition at time of shipment. The jury disregarded the undisputed evidence in finding for plaintiff, and the case should be reversed.

*Bevens & Mundt,* for appellees.

The evidence fully sustains the verdict and delay is amply proved, as well as the damage resulting therefrom. The proof is predominant and convincing.

HART, J. This was an action by appellee against appellant to recover damages for the alleged negligent delay of the shipment of a car of cotton seed from Vanndale, Arkansas, to Helena, Arkansas.

Appellee, who was the plaintiff in the court below, recovered judgment against the defendant, who is the appellant.

It is earnestly insisted by counsel for appellant that the judgment obtained against the railroad company, by appellee in the court below, should be reversed because the evidence does not show any unreasonable delay in the shipment of the cotton seed and because the evidence does not show that the damage to the seed resulted from delay in shipment.

On the first point, the testimony is, that a car was set on the house track at Vanndale, Arkansas, by appellant for loading the seed in question, on the 27th day of October, 1919, and that a bill of lading was issued for the car of seed about four o'clock p. m. on the 30th inst. At that time there was a tri-weekly train service for local freight trains and there was a southbound local freight train which left Vanndale on the 30th day of October, 1919, after the car of cotton seed in question was ready to be moved and after a bill of lading had been issued therefor. The usual time for carrying a car of freight from Vanndale to Helena was twenty-eight hours. The car of seed in question did not reach Helena until the 5th day of November, 1919. Counsel for appellant concede that, if the car of seed had left Vanndale in the local freight train on the night of October 30, 1919, it should have reached Helena in twenty-eight hours; but insist that the judgment should be reversed because there is no testimony tending to show that appellant could have placed the car of seed in its local freight train of that date. It was the duty of the railroad company to have carried the car of seed in question in its local freight train. Its servants made up the local freight train and operated it. Its servants knew

whether or not the car of seed was placed, or could have been placed, in the local freight train that left Vanndale after four o'clock p. m. on the 30th day of October, 1919. Therefore, the burden was upon the railroad company to establish the fact that the train was already made up, and that it could not carry the car of seed on that day, if such was the fact. It failed to meet the burden in this respect. It can not now complain of the absence of affirmative evidence on this point.

Again it is insisted by counsel for appellant that there is not sufficient legal evidence to show that the damage to the seed in question was caused by the unreasonable delay of appellant in carrying them from Vanndale to Helena.

Appellee showed the value of the seed at the point of shipment and their value in their damaged condition when they arrived at Helena. The loss shown was sufficient to support the verdict as to the amount, but counsel for appellant insist that the evidence was not sufficient to establish that the damage was caused by the delay in shipment.

It is true that appellant introduced evidence tending to show that the damage was not caused by the delay in shipment, but the evidence on this point adduced by appellee tended to contradict that of appellant, and, inasmuch as the jury was the judge of the credibility of the witnesses, it can not be said that the verdict was not supported by the evidence, if the evidence on the part of appellee was of a substantial character.

Appellee's agent, who bought the seed in question, and inspected them before they were loaded into the car, testified that his inspection showed that the seed cut 70 per cent. and that by this he meant that the seed were damaged 30 per cent. However, his further testimony shows that what he meant was that seed are bought on what is called a prime basis. When he stated that the seed in question were 30 per cent. damaged, he meant that they were 70 per cent. perfect, and that they were

bought on that basis; and not that the seed were inherently damaged. The seed were damaged when they were received at Helena, and the evidence adduced by appellee tended to show that the damage was caused by the delay in the carriage of the seed from the point of shipment to the point of delivery. The testimony on this point for appellee tended to show that the seed became heated on account of the delay in shipment, and that they thereby became materially damaged. Therefore, the evidence was sufficient to support the verdict.

No other assignment of error is urged for a reversal of the judgment, and it follows that the judgment must be affirmed.

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## LINTON v. ERIE OZARK MINING COMPANY.

Opinion delivered February 7, 1921.

1. MINES AND MINERALS—FAILURE TO PAY ROYALTY—FORFEITURE OF LEASE.—Under a mine lease providing that the lessee every three months should deposit 10 per cent. of the proceeds of sales of products of the mine in a bank to the credit of the lessor, the lessee was not excused for failure to make such deposit because the products of the mine were sold by the lessee to pay the wages of laborers who got out the ore, and on account of such failure the lessor had a right to forfeit the lease.
2. CORPORATIONS—FOREIGN CORPORATION—DOING BUSINESS IN STATE.—A foreign corporation owning a mine in the State was not doing business in the State where it had leased the mine.
3. CORPORATIONS—DOING BUSINESS IN STATE.—The institution and prosecution of an action by a foreign corporation within the State is not the doing of business therein.

Appeal from Marion Chancery Court; *B. F. McMahan,* Chancellor; affirmed.

STATEMENT OF FACTS.

This appeal involves the correctness of a decision of the chancery court holding that a mining lease should be forfeited because of the nonperformance of its terms by the lessee and his assignees.

On January 1, 1916, the Erie Ozark Mining Company, a foreign corporation, executed a mining lease to W. A. Childs on its mine situated on the property in controversy which was to continue for ten years. Under the terms of the lease the lessee was to operate the mine to a reasonable extent at all times and to pay as rent ten per cent. of the gross receipts from all ores and products taken from the mines.

It was further provided that the lessee should render to the lessor once every three months a statement of all the ores and products sold and upon the receipt of any sales, to deposit to the credit of the lessor in the Bank of Yellville, at Yellville, Arkansas, ten per cent. thereof.

It was provided that the failure on the part of the lessee to operate the mine should render the lease void. The lease was executed on the 1st day of January, 1916, and it provided that it should continue from that date until the 1st day of January, 1926. On the 29th day of January, 1916, W. A. Childs executed a sublease to said property to Charles Trease and E. H. Ross for a period of five years. They in turn assigned their sublease to the Unity Mining Company. The Unity Mining Company assigned its sublease to I. N. Linton.

Subsequently, on July 17, 1916, W. A. Childs brought in the circuit court, an action of unlawful detainer against I. N. Linton to recover possession of the mine on the ground of the forfeiture of the conditions of his lease. On August 30, 1916, the defendant filed his answer to the plaintiff's complaint. On January 24, 1917, the defendant, Linton, filed his motion to make the Erie Ozark Mining Company a party to the suit, which was done. On the same day, he filed a cross-complaint against W. A. Childs. Linton also moved to transfer the case to the chancery court and his motion was granted.

The Erie Ozark Mining Company filed its answer and cross-complaint in the chancery court. It asks that

the lease be declared forfeited for nonperformance of the terms thereof by the lessee and his assignees.

On the part of the Erie Ozark Mining Company, it was shown that on the 20th day of January, 1917, it had served upon W. A. Childs and his assignees a notice that the mine lease should be declared void on the ground that the lessee and his assignees had failed to comply with its terms.

The cashier of the Bank of Yellville testified that no royalties had been paid to the bank on the mine in question for the Erie Ozark Mining Company since the 1st day of March, 1916.

On the part of I. N. Linton it was shown that the mine machinery was badly out of repair and that the mine was shut down for a part of the time in order to make repairs; that the water rose in the mine to a considerable depth; that it was necessary to pump out the water after the repairs were made before the mine could be again operated; that the products of the mine were sold to pay the expenses of running it and that the sublessee was given by Childs a certain number of days in which to shut down the mine and make the repairs. The testimony also shows, however, that the mine was shut down for a longer period than was agreed upon between the parties.

On April 23, 1918, the court entered a decree, whereby, among other things, the cross-complaint of Linton against the Erie Ozark Mining Company was dismissed for want of equity, and the original mining lease executed by the Erie Ozark Mining Company to W. A. Childs and persons holding subleases under him were canceled. The court was of the opinion that Linton and his assignors had failed to comply with the terms and conditions of the original lease, and that the lease should be canceled on that account.

A decree was entered accordingly, and to reverse that decree Linton has prosecuted this appeal.

*Williams & Seawell,* for appellant.

1. Appellee is a foreign corporation and was doing business in this State and has no right to defend as against the cross-complaint of appellant and the original plaintiff, W. A. Childs. Appellee was doing business in this State, and the lease was made in this State, and all its requirements and covenants were to be performed wholly within this State. 2 Elliott on Cont., §§ 112, 1142; 90 Ark. 351; 89 N. E. 193; 124 N. W. 1042; 66 Ark. 464; 12 C. J., § 31; 13 *Id.,* § 31 and note 6. The place of delivery is the place of contract. 2 Elliott on Cont., § 1117. A lease does not take effect until delivered to the lessee. 2 Elliott on Cont., § 4538; 24 Cyc., p. 905 (e). The lease was an Arkansas contract. Appellee had not complied with the laws of the State. The burden was on appellee as it was made an issue by appellant's answer to the appellee's cross-complaint. 128 Ark. 211. Proof of compliance could only be made by the introduction of a certificate issued by the Secretary of State. 132 Ark. 108. The evidence of articles of incorporation did not establish the right to do business nor of its right to defend or prosecute in this action.

The purported receipt for a franchise tax for the year 1917 was not admissible. 1 Moore on Facts, § 563. The chancellor erred therefore in granting any affirmative relief to appellee in declaring a forfeiture, cancelling the lease, giving it judgment for costs and allowing its defense to the claim of appellant.

2. The findings of the court is against the evidence, and the burden was on appellee to establish a forfeiture such as would annul the lease. 51 Pa. St. 232; 1 Mor. Min. Rep. 32; 68 Ark. 284-8.

Failure to pay royalties and taxes is not made a cause or condition of forfeiture in the lease. The only cause or condition of forfeiture mentioned in the lease was "failure to operate the said mining property or the abandonment of same."

Where in a lease causes of forfeiture are specified, it is not to be inferred that there are other grounds of forfeiture. 6 Mor. Min. Rep. 305; 43 S. E. 128; 41 Ark. 532. A breach of the covenants of a lease, in the absence of a clause to that effect, does not work a forfeiture. A forfeiture are construed strictly, and the facts to support the condition which was to work a forfeiture of the promisor's rights on a failure to comply with the provisions of the contract which was to render it void. White on Mines & Mining Rem., § 245. Contracts which provide a forfeiture are construed strictly, and the facts to support a forfeiture ought to be clear and explicit. 6 Mor. Min. Rep. 284, 299. Nonpayment of royalty or rent under the terms of this lease would not be a cause for forfeiture. 41 Ark. 532. Nor the failure to pay taxes.

The proof is abundant that on and prior to July 17, 1916, appellant and his assignors were in good faith carrying on operations. The evidence is undisputed that, for several years prior to the exclusion of this lease, mining operations on this property had been abandoned. It is also shown that the developments that had been made were below the water level and required pumps to work the one properties. The mill had deteriorated, and many of its parts removed or destroyed. The evidence is sufficient to warrant a reversal of the decree against appellant. Appellee is a foreign corporation, and its only holdings was mining property, and there is nothing to show that it had complied with our State laws. The court held the acts of Childs in dispossessing Linton to have been wrongful and found that appellant was in good faith complying with his lease agreements. He was ousted by law. Why does not the same principle apply in this case as excuses nonperformance of annual labor on mining claims and prevents a forfeiture? These principles are derived from equitable considerations and have often been applied to prevent loss of inchoate rights in property. 109 N. W. 508; 2 Lindley on Mines (3 ed.), § 634; 113 U. S. 534. See, also, 187 Fed. 779. Childs

occupied a relation of trust to appellee. He was dealing with its property. The proof shows appellee was fully aware of the steps and proceedings pursued and establishes collusion or conspiracy. 81 Ark. 173; 11 C. J., p. 1220. We think the maxim *pendente lite nihil innovetur* should be applied to the peculiar equities of this case. 16 Ark. 168.

The evidence proves beyond doubt that the value of the unexpired lease was of the value of $5,000, and that appellant and those from whom he received title had expended $5,000 or $6,000 in good faith in making repairs, improvements and development work, which were necessary and permanent, and appellant ought to have judgment against appellee and Childs for at least $5,000.

*J. C. Floyd,* for appellee.

1. There is no equity in appellant's bill on cross-complaint. The material allegations and averments are all specifically denied, and there is no proof of fraud or collusion or conspiracy to defraud Linton. There is nothing in our law that would prevent a foreign corporation, although not having complied with the laws of our State, from making defense in an action of conspiracy and collusion, as charged in appellee's cross-complaint, and the lease contract from appellee to Childs complained of or its validity or invalidity is not involved or referred to in the cross-complaint or appellee's answer. The prohibition against the maintenance of actions unless the corporation has complied with statutory conditions is confined expressly or by implication to actions on contracts, and does not extend to actions for torts committed in the State or to other actions growing out of the invasion of rights of property. Cook on Corporations 789; 60 Ark. 325; 30 S. W. 350; 28 L. R. A. 82.

2. The evidence sustains the allegations of forfeiture by appellee, and there is no error in cancelling the lease contracts.

The material allegations of forfeiture in the appellee's cross-complaint are not specifically denied and are

therefore to be taken as true, and no proof is necessary. No evidence was offered to show that any work was done under the lease given to Childs or the sublease executed by Childs after Linton was dispossessed. Kirby's Digest, § 6137; 41 Ark. 17; 46 *Id.* 132; 25 S. W. 73; 60 Fed. 254. Appellant's argument is wholly untenable.

The record shows affirmatively that at the time of the execution of the lease to W. A. Childs, appellee was not doing any business in the State and had not for several years prior thereto. 19 Cyc., p. 1267; 67 Kan. 599; 73 Pac. 909; 67 S. W. 45; 84 *Id.* 810; 85 *Id.* 31; 13 *Id.* 43; 55 Ark. 163; 54 Ark. 566.

A foreign corporation, although not having complied with our laws authorizing it to do business, may still own and hold property in the State, including lands, and it may sue to quiet title against a tax deed. Cyc. Dig. Ark. Dec., vol. 2, p. 655; 150 S. W. 398; 55 Ark. 635; 185 S. W. 1055; 95 Ark. 6; 128 S. W. 348; 19 Cyc. 1246, 1267-8.

In a suit by a foreign corporation to enforce a contract for lease of lands it is not a defense that the corporation has done business in the State and has not complied with the act of April 4, 1887. 55 Ark. 625; 18 S. W. 1055, cited in 24 L. R. A. 289.

It does not appear that the contract in this case was made in this State or in the course of business in this State. See, also, 183 N. Y. 98; 45 L. R. A. 538; 176 Mo. 179; 238 U. S. 185; 227 *Id.* 218; 90 Ark. 73; 19 Cyc. 1267-8. Appellee was not doing business in this State. 55 Ark. 163; 18 S. W. 43; 60 Ark. 120; 29 S. W. 34; 63 Ark. 268; 38 S. W. 902; 69 *Id.* 572; 117 *Id.* 775.

HART, J. (after stating the facts). The principal issue raised by this appeal is as to the correctness of the decree of the chancery court canceling the original lease made by the Erie Ozark Mining Company to W. A. Childs and his assignees. It will be remembered that Linton took a sublease from the assignees of Childs to the original lease. By the terms of the lease it was provided that the mine should be worked to a reasonable ex-

tent continuously during the term of the lease and that the lessee should account to the lessor every three months for the products mined and deposit in the Bank of Yellville, ten per cent. of the amount of the sales thereof to the credit of the Erie Ozark Mining Company.

The cashier of the bank testified that nothing had been deposited with the bank for the Erie Ozark Mining Company since the 1st day of March, 1916. Linton seeks to excuse the nonperformance of the lease in this respect by saying that the products of the mine were sold to pay the wages of the laborers who got out the ore. This was no excuse for the nonperformance of the contract. By the terms of the lease it was the duty of the lessee and his assignees to pay the expenses of operating the mine and to account to the lessor for its rent or royalties once every three months. This was not done, and the lessor, under the terms of the lease, had a right to give notice that it declared the lease forfeited for nonperformance of its terms and conditions by the lessee and his assignees.

Again it is insisted that the lessee was excused from nonperformance because the mining machinery got out of repair, and it was necessary to close down the mine in order to repair the same. Permission was granted to his lessee by Childs to close down the mine for a given number of days, in order to repair the machinery. But the chancellor was justified in finding that the mine was closed down for a greater length of time than agreed upon, and that there was no valid excuse for so doing.

It is also contended that the decree should be reversed because appellee is a foreign corporation and was not authorized to do business in this State. Appellee leased its mine and was not doing business in this State. In *Buffalo Zinc & Copper Co.* v. *Crump,* 70 Ark. 525, it was held that the institution and prosecution of an action was not doing business in this State within the meaning of the statute.

It follows that the decree will be affirmed.

SIMMONS *v.* AMERICAN RAILWAY EXPRESS COMPANY.

Opinion delivered February 7, 1921.

1. CARRIERS—PENALTY FOR EXPRESS COMPANY'S FAILURE TO PAY DAMAGES.—Under Acts 1905, p. 659, §§ 1, 2, imposing a penalty for failure of an express company to pay damages for lost goods within 20 days after notice of the loss or damages has been given, an express company is not liable for the penalty where the amount demanded in the notice exceeded by five cents the amount recovered for the loss or damage; the doctrine of *de minimis* not being applicable.
2. CARRIERS—RECOVERY OF PENALTY.—Neither the right to recover the penalty nor the amount of the penalty recoverable under Acts 1905, p. 659, is dependent on the value of the shipment.
3. STATUTES—PENAL STATUTES STRICTLY CONSTRUED.—Penalty statutes are to be strictly construed, and no one can invoke the benefit of such a statute who does not bring himself strictly within its terms.

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

*W. J. Dungan,* for appellants.

The court erred in its findings, and the judgment should be reversed and judgment entered here for $235, the penalty and costs. The act is not void, but constitutional and valid. 90 Ark. 538; 207 U. S. 73; 204 *Id.* 311; 203 *Id.* 284; 205 *Id.* 60; 211 *Id.* 539; 8 Cyc. 1058-60. See, also, 89 Ark. 496; 94 *Id.* 394.

*J. F. Summers,* for appellee.

1. The act is void because contrary to section 1 of the Fourteenth Amendment to United States Constitution, but, if constitutional, the record does not warrant a recovery of the penalty. 94 U. S. 104; 207 *Id.* 73.

2. The notice provided in the act is too short, compelling a settlement without time or opportunity for proper investigation. 207 U. S. 73; 165 *Id.* 150; 20 L. R. A. (N. S.) 126. See, also, 19 S. W. 910.

3. The shipment being interstate, appellant can not recover the penalty. 226 U. S. 491; 222 *Id.* 370.

4. Notice was not given as required by the act. The act must be strictly complied with. 69 Ark. 584. Furthermore, appellant can not recover because the amount for which he obtained judgment is less than his alleged claim. 224 U. S. 352; 92 Ark. 84; 93 *Id.* 84. The decision is in accord with the law.

SMITH, J. This cause was tried in the court below on an agreed statement of facts, from which it appears that the suit is one to recover a penalty on account of the failure of the express company to deliver to appellants, the consignees, and plaintiffs below, a case of eggs of the value of $15.90.

The suit was brought before a justice of the peace, and the penalty claimed amounts to $220. It is recited in the agreed statement of facts that written notice was given the express company of the nondelivery of the eggs, and payment of $15.95 was demanded in the notice on that account. Before the rendition of judgment in the justice court the express company tendered into court $15.90, the admitted value of the shipment, and $6 to cover the costs to the date of tender. The circuit court, on appeal, rendered judgment for the sum thus tendered, and denied the consignees' right to recover the statutory penalty.

The suit was brought under act 250 of the Acts of 1905, page 659. Section 1 of this act provides that all express companies organized or doing business under the laws of this State shall settle within twenty days with the owner of the goods after notice has been given for the damage or loss of goods incurred in transit on the lines of the express companies. Section 2 provides that any express company which shall fail or refuse to pay for the damages or loss of goods within twenty days after notice is given "shall be liable in damages to the owner of the goods to the amount of damages sustained or lost, and also the sum of two dollars for each day that they fail and refuse to settle after the twenty days' notice has been given."

The constitutionality of this act is attacked on several grounds. In addition, it is insisted that the consignees did not bring themselves within its terms, inasmuch as the sum demanded in the notice to the company exceeded, by five cents, the sum to which they were entitled.

As the express company appears to be correct in its second contention, we need not pass upon its first. The excess demanded is a small sum; but the doctrine of *de minimis* does not apply. The right to recover the penalty is not dependent on the value of the shipment; nor is the amount which may be recovered as penalty dependant on value. The loss of, or damage to, a shipment subjects the express company to the penalty of the statute, whether the article damaged or lost is a case of eggs, or a dozen eggs. *B. & M. White Laundry Co.* v. *Charleston & W. Ry. Co.*, 18 A. & E. Ann. Cas. 690.

It is a rule of construction, of universal application, that these penalty statutes are to be strictly construed, and no one can invoke the benefit of such a statute who does not bring himself strictly within its terms.

The General Assembly of 1907, by act 61 (page 144), amended section 6774 of Kirby's Digest to provide that a railroad company shall be liable for double damages for failure to pay for stock killed within thirty days after notice so to do is served on the railroad company by the owner. This act was upheld by this court in the case of *St. L., I. M. & S. Ry. Co.* v. *Wynne,* 90 Ark. 538; but upon appeal to the Supreme Court of the United States (224 U. S. 352), our decision was interpreted as having held that it was not essential that the sum recovered should equal the sum demanded and, under this apprehension as to the effect of our decision, that court held the act unconstitutional. It is unimportant to inquire whether the Supreme Court of the United States misapprehended the effect of our decision or not, as its own decision was based upon a holding that the judgment recovered must equal the sum demanded, and that it amounted to a taking of property without the due proc-

ess of law to enforce a statute which authorized the imposition of a penalty where the judgment recovered did not equal the sum demanded.

The court, therefore, properly refused to allow the penalty, and the judgment to that effect is affirmed.

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## WAKENIGHT v. SPEAR & ROGERS.

Opinion delivered February 7, 1921.

1. CONTRACTS—RESTRAINT OF TRADE.—Contracts in partial restraint of trade with reference to a business or profession, where ancillary to the sale of the business or profession, and the good will thereof, are valid and enforceable to the extent reasonably necessary for the protection of the purchaser.
2. CONTRACTS—RESTRAINT OF TRADE.—An agreement in connection with the sale of a plumbing business not to engage in that business in the same town so long as the purchaser was engaged therein is sufficiently limited as to time and place to be valid.
3. CONTRACTS—PUBLIC INCONVENIENCE AS AFFECTING VALIDITY.—The fact that there was a shortage of plumbers in the town, so that the public would be greatly inconvenienced by the enforcement of an agreement not to engage in the plumbing business in the town does not prevent the enforcement of the agreement.

Appeal from White Chancery Court; *J. E. Martineau,* Chancellor; affirmed.

*Brundidge & Neelly,* for appellant.

Appellees have enjoyed all of the benefits under their contract of purchase which they were entitled to. Appellant remained out of business for more than three years, and then only re-entered business as a day laborer when the public demanded his services, and he in no way interfered with the business of appellees. The public interest demands a reversal of this cause under the testimony which is undisputed. Contracts in partial restraint of trade are objectionable and of doubtful propriety and ought not to prevail where it is shown that the public will be the sufferer by the enforcement thereof; private interests ought always to yield to a reasonable

demand for the public good. The court erred in granting the injunction. 6 R. C. L., § 196; 49 N. E. 1030.

*Miller & Yingling,* for appellees.

1. The contract was not intended to lessen competition or fix the price of commodities. The agreement was simply a sale of the good will of each of the parties to the other. It is true the public will suffer some inconvenience, but the agreement was not void as against public policy. The test as to whether a contract in restraint of trade is valid is whether the restraint is reasonably necessary to protect the party in whose favor it is made, with the exception stated in 13 C. J., § 420, p. 477, that the contract or covenant by which the restraint is imposed must be incidental to and in support of a sale by which the covenantee acquires some interest in the business needing protection. The rule applies to the case at bar. 74 Am. St. 241.

2. Contracts in partial restraint of trade only are generally upheld when the agreements are by the seller of property or business not to compete with the buyer in such a way as to derogate from the value or business sold. 13 C. J., § 411, p. 468.

A stipulation in a bill of sale of a business that the seller will not engage in a competing business within a limited territory for a limited period of time is not contary to public policy, but will be enforced. 1913 A, Ann. Cas., p. 281. Contracts in partial restraint of trade, if reasonable and founded upon legal consideration, will be enforced. 62 Ark. 101; 91 *Id.* 373. The rule in 62 Ark. 101 has been uniformly followed in this State. 94 Ark. 475; 95 *Id.* 387, 449; 112 *Id.* 129.

3. The contract was merely a sale of the good will of the business and not in restraint of trade. 3 A. L. R., p. 254, and note. On the question of consideration of public policy, the rule is stated in 6 R. C. L., § 197, p. 793; *Ib.* 803, § 204. The cases in 127 Ark. 593 and 49 N. E. 1030, are not applicable. Under the law and the facts the decree is right.

SMITH, J. In October, 1916, appellant Wakenight, a licensed plumber, owned and operated a plumbing shop in the city of Searcy, and carried a line of plumbing supplies. Appellees are also licensed plumbers, and operate a plumbing shop in that city, and in connection with that business were also engaged in selling certain automobile accessories.

The appellant sold all of his plumbing supplies and fixtures to the appellees, in consideration of their sale to him of all their automobile accessories and their agreement to pay him the difference between the value of the plumbing supplies sold to them and the automobile accessories and supplies sold by the appellees to the appellant. And in said contract of sale appellant bound himself not to again enter into the plumbing business in any capacity, or to be interested therein, either directly or indirectly, as long thereafter as the appellees might be engaged in said business in said city; and the appellees, on their part, agreed not to sell or be interested in the sale of automobile accessories or in the repairing of automobiles in said city. After said contract was entered into and the sale was made by the parties, the appellant went into the business of operating a garage for the repair of automobiles and the sale of automobile accessories in Searcy; and the appellees continued to operate their plumbing business and discontinued the sale of automobile repairs and accessories.

The parties to the contract mutually observed its terms until February, 1920, when appellant resumed work as a plumber in the city of Searcy as an employee of his brother, who owned and operated a plumbing business in that city. This suit was brought to enjoin appellant from engaging in that business; and the appeal is from a decree granting the relief prayed.

Testimony was offered at the trial below to the effect that a sewer improvement district had been organized which included the larger part of the city, and that an ordinance had been passed requiring residents therein to connect their premises with this sewer system, and

that compliance with this ordinance within the time limited made more plumbing work necessary than could be done by the resident plumbers, and that it was difficult and expensive to get competent plumbers elsewhere.

We think the decree should be affirmed. In the recent case of *Shapard* v. *Lesser,* 127 Ark. 590, we had occasion to construe the extent to which contracts to suppress business would be upheld. The opinion in that case cites the leading authorities and collects our own cases on the subject. This case is annotated in 3 A. L. R. 247, where cases from many States are cited. In the same volume and immediately preceding our own case of *Shapard* v. *Lesser* is found the case of *Pearson* v. *Duncan & Sons* (page 242), which is also annotated.

The contract construed in the case of *Shapard* v. *Lesser, supra,* was one in which the Marianna Cotton Oil Company contracted with another cotton oil company against erecting and operating a competing gin, and we refused to enforce that contract because, as we there said, the contract was not entered into for the purpose of protecting the Marianna Cotton Oil Company in a legitimate use of something which it had acquired by the contract, but the purpose and effect of the contract was to enable the Marianna Cotton Oil Company to enjoy an illegitimate use of something which it already had, that is, a monopoly of the ginning business. In other words, our holding was that it was contrary to public policy for two parties to make a contract whereby one might have a monopoly.

That opinion, however, recognized the right of one to sell his business and, as a means of obtaining a fair price therefor, to sell the good will accompanying it. We there said: "Contracts in partial restraint of trade with reference to a business or profession, where ancillary to the sale of the business or profession and the good will thereof, are valid and enforceable to the extent reasonably necessary for the protection of the purchaser. *Hampton* v. *Caldwell,* 95 Ark. 387, 129 S. W. 816; *Bloom* v. *Home Ins. Agency,* 91 Ark. 367, 121 S. W. 293, and

cases cited; *Edgar Lumber Co.* v. *Cornie Stave Co.*, 95 Ark. 449, 130 S. W. 452. In such cases the vendor, by entering into and observing the covenant not to engage in his business or profession for a stipulated time in a certain locality, secures to himself the full value of his business or profession and its good will, and such contract does not in any wise tend to stifle competition or to the detriment of the public. The good will of the business or profession has a value which the seller has an absolute right to secure in this way."

The appellant here has not contracted to abandon his trade or to cease to follow it as a means of earning a livelihood. The restriction assumed is limited both as to time and place. He is at liberty to follow his trade anywhere except in Searcy, and that limitation will expire when appellees cease to engage in the plumbing business in Searcy. These self-imposed restrictions were assumed as an inducement to appellees to buy appellant's business, and the law does not prevent the making of contracts of that character for that purpose.

It is no doubt true the public may suffer some inconvenience on account of this contract; but it is that inconvenience—differing only in degree—which arises when any of these enforceable contracts in partial restraint of trade are made; and the right to make them is not denied on that account.

Judgment affirmed.

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BOSTLEMAN v. HUTCHINS.

Opinion delivered February 7, 1921.

MANDAMUS—COMPELLING JUDICIAL ACTION.—Mandamus will not lie to compel the chancery court to enter a decree by default, though it will lie to compel a court to entertain jurisdiction of a cause when it erroneously refuses to do so.

Mandamus to Woodruff Chancery Court; *A. L. Hutchins,* Chancellor; mandamus denied.

*W. J. Dungan,* for petitioners.

1. The chancellor erred in declining to exercise jurisdiction in the cause set out in the petition, although the defendant entered a general appearance by filing a demurrer to the complaint.

2. It was error to refuse to grant a default judgment. On October 9, 1920, the same being an adjourned day of court, after a general appearance and more than twenty days after the date of the general appearance, defendant not having filed any defense to the complaint. 103 Pac., July 7, 1909, *Olcese* v. *Justice Court, etc.,;* 139 Ark. 590; 91 *Id.* 231. See, also, 95 Ark. 302; 95 *Id.* 588; 35 *Id.* 276. The chancellor should have entered decree for default judgment, no defense having been filed. Acts 1915, p. 1081.

*Harry M. Woods,* for respondent.

Where a court has discretion, it can not be controlled by mandamus. This rule is so well settled as not to require citations. It is not the duty of the trial court to enter a default judgment regardless of discretion, on the first day of the term or at an adjourned day where the answer has not been filed. The chancellor has judicial discretion, and his discretion will not be controlled by mandamus. This is too well settled to need authorities cited.

HUMPHREYS, J. This is a petition in this court for a writ of mandamus requiring A. L. Hutchins, Chancellor of Woodruff Chancery Court, Northern District, to enter a default decree in a case pending in said court, wherein petitioners were plaintiffs and B. F. Crissman, a nonresident, was defendant. The petition filed in this court set out the pleadings, rulings and orders of the court as a basis for the issuance of the writ of mandamus, which are, in substance, as follows:

A bill in equity to cancel an alleged quitclaim deed to certain lands in said county, executed by petitioners to B. F. Crissman, of date March 20, 1916, on the ground that it was procured through fraud and without consideration.

A warning order, the appointment of an attorney *ad litem,* proof of publication of the warning order, and the report of the attorney *ad litem.*

General demurrer of B. F. Crissman to the bill, filed September 13, 1920, on the ground that the bill did not state facts sufficient to constitute a cause of action, in that neither the deed, nor a copy thereof, sought to be canceled as fraudulent, was filed with the complaint as an exhibit, although referred to therein as exhibit "A."

General motion of B. F. Crissman, filed on the same date as a demurrer, to dismiss the bill on the ground that he had not been properly served, in that the warning order was not indorsed on the complaint as required by the statute, and because it bore no date.

An order of the court, of date September 14, 1920, to the effect that the service was insufficient and a continuance of the cause for service, notwithstanding the contention of petitioners that the filing of the demurrer and motion constituted a general appearance of the said B. F. Crissman as respondent in the cause.

The withdrawal on the same date of the demurrer by the said B. F. Crissman.

The filing on the same date of a certified copy of the quitclaim deed referred to in the bill of petitioners.

Motion of the petitioners filed the 9th day of October, 1920, which was on a day of the September adjourned term of said court, for a decree by default, reciting therein the proceedings had and done in said cause and the fact that B. F. Crissman had not filed a response to the bill and had not asked further time to do so.

Petitioners contend for the issuance of a writ of mandamus upon the ground that the refusal to render a decree by default was in effect a declination to entertain jurisdiction of the cause, because of a mistake in the law. Petitioners invoke the rule announced in *Gilbert* v. *Shaver,* 91 Ark. 231, in support of their contention, which rule is as follows: "Where a chancery court erroneously decides, under a mistake of law, and not as a decision of

fact, that it has no jurisdiction in a case, and declines to proceed in the exercise of its jurisdiction, a mandamus to proceed will lie from the Supreme Court, unless there is a specific and adequate remedy by appeal or writ of error." In the case cited, the chancery court refused to entertain jurisdiction of the cause and transferred it to the circuit court. The record of the proceedings in the case between respondents and B. F. Crissman for the cancellation of the deed in question does not disclose that the chancery court, the respondent in this petition, refused to entertain jurisdiction of the cause. On the contrary, the court refused to dismiss the cause on the motion of B. F. Crissman and continued it for service. It is true that, on the 9th day of October, 1920, thereafter, the court overruled a motion on the part of petitioners for a decree by default, but a refusal to grant a decree by default is not in any sense a declination to entertain jurisdiction of a cause. The record does not affirmatively, or by necessary inference, show that the court refused to entertain jurisdiction of the cause. The petitioners have not brought themselves within the rule they invoke.

The petition for mandamus is therefore denied.

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## HOUSEHOLDER v. HARRIS.

Opinion delivered February 7, 1921.

1. HIGHWAYS—PLATS TO SHOW BOUNDARIES OF DISTRICT.—Plats accompanying a petition for establishment of a road improvement district under Acts 1915, No. 338, being a part of the petition, must show the correct boundaries of the district, and must not conflict with the recitals in the petition proper.

2. HIGHWAYS—IMPROVEMENT DISTRICT—VARIANCE IN PETITIONS.—A difference of 15.45 acres between two sets of petitions circulated for the establishment of a road improvement district under Acts 1915, No. 338, is fatal to the establishment of the district where neither set represented a majority in value, acreage or number of inhabitants therein.

3. HIGHWAYS—ESTABLISHMENT OF DISTRICT—RIGHT TO CONTEST.—One who signed a petition for the establishment of a road improvement district is not estopped from claiming that the petition was not signed by a majority in value, acreage or number of inhabitants therein, and may appeal from an order establishing the district, without withdrawing his name from the petition.

Appeal from Prairie Circuit Court, Northern District; *Geo. W. Clark,* Judge; affirmed.

*Emmet Vaughan,* for appellant.

1. There are only two questions involved here, (1) the right of J. C. Harris and Henry Bull, the only appellees, to appeal from the order of the county court organizing the district, and (2) the alleged variance between the plats attached to petitions 1 to 7 and 8 to 13 inclusive.

Appellees having signed the petition for the district and the court having granted it, they had no right to appeal. 217 S. W. 781; 105 N. E. 569. A party can not appeal from a judgment favorable to him. 33 Ind. 267; 217 S. W. 781.

2. The court erred in striking the seven petitions because there is no variance. 138 Ark. 549; 139 *Id.* 277; 216 S. W. 690; 218 S. W. 381. Appellees have no appealable interest, as they obtained all they asked.

*Young & Elms* and *Cooper Thweatt,* for appellees.

1. The court did not err in not sustaining the motion to dismiss the appeal of Harris and Bull. One who joins in a petition for a district and obtains all he asks for can not appeal, as he is estopped. 273 Ill. 165; 2 Page & Jones on Tax., art. 1013. 85 Ark. 304 settles the question.

2. There was no error in striking petitions 8 to 13. The plats speak for themselves, and there is no question of variance. Acts 1915, No. 338, § 1 (A); 118 Ark. 119; 209 S. W. 82. The variance is material. 113 Ark. 566. The court properly overruled the motion to dismiss the appeal and the motion to strike 8 to 13 from the files.

HUMPHREYS, J. This is an appeal from the Prairie Circuit Court, Northern District, to reverse a judgment overruling appellants' motion to dismiss an appeal which

appellees had taken from the county court, establishing Fairmount Road Improvement District No. 13 of Prairie County, Arkansas; in sustaining appellees' motion to strike petitions 8 to 13, inclusive, from the files; and in setting aside the order of the county court and denying the establishment of said district. Appellees had joined others, under the provisions of act 338, Acts of the General Assembly of 1915, in a petition to the county court to establish said district. For convenience in obtaining signatures, thirteen petitions were prepared and filed, in which the territory to be embraced within the district was similarly described. The plats attached to the first seven petitions embraced not only the territory described in the petitions but 15.45 acres of land in the northeast quarter of the northeast quarter of section 9, township 1 south, range 6 west, and a part of Bayou Two, Prairie Lake. The plats attached to petitions 8 to 13, inclusive, did not include any part of said section 9, township 1 south, range 6 west, or any part of Bayou Two, Prairie Lake. Appellee J. C. Harris signed the petition numbered 1, and appellee Henry Bull signed petition No. 4. After the petitions were signed, they were all filed as one petition as a basis for procuring the establishment of said district. A remonstrance, in which appellees J. C. Harris and Henry Bull joined, was filed against the establishment of the district, on the ground that there was a material variance between the plats attached to petitions 1 to 7, inclusive, and those attached to petitions 8 to 13, inclusive, thereby rendering the territory to be embraced in said district, as well as the boundaries thereof, uncertain. In the remonstrance they sought, along with others, to have their names stricken off the original petitions, on the ground that their signatures had been secured through fraud.

The cause was submitted to the court upon the petitions, with the plats attached to each, the remonstrance and the evidence of William Radican, surveyor of Prairie County, who testified from the field notes that 15.45 acres of that part of section 9, township 1 south, range

6 west, was included within the boundaries on the plats attached to the first seven petitions, but not included within the boundaries on the plats attached to petitions 8 to 13 inclusive, which resulted in the judgment heretofore set out in substance.

The act, under which it was sought to establish the district, authorizes the circulation among the landowners of the original petition, or such number of exact copies thereof as may be deemed necessary, and the consolidation of said petitions as one for purposes of filing and hearing. The same act requires that a plat shall be filed with the petition, upon which the boundaries of the proposed district shall be plainly indicated. This court, in construing the act in *Tarvin* v. *Road Improvement District No.* 1 *of Perry County,* 137 Ark. 354, said: "The map or plans, specifications and estimate of costs must be regarded as a part of the petition for the purpose of determining whether the proposed improvement is certainly and definitely described." It has been uniformly held by this court that the recitals of a petition to form a road district must conform to the requirements of the statute, because the petition is jurisdictional. *Cox* v. *Road Improvement Dist. No.* 8 *of Lonoke County,* 118 Ark. 119. The plats accompanying the petition, being a part thereof, must necessarily show the correct boundaries of the district, and not conflict with the recitals in the petition proper. So it follows that, if the plats attached to the several petitions as a part thereof show different boundaries of the proposed district, the petitions cannot be exact copies of each other. In that event the petitions would not conform to the requirements of the statute. For example, in the instant case, the plats, which were a part of the petitions and attached to petitions 1 to 7, inclusive, included more territory within the district than the plats attached to petitions 8 to 13, inclusive. It follows that the signers to petitions 1 to 7, inclusive, petitioned for a different road district from those who signed petitions 8 to 13, inclusive. It is contended, however, by appellees that the variance is so

infinitesimal that it will not be noticed by the court. According to the plats attached, the first seven petitions contain 15.45 acres more land within the boundaries of the district than is shown by the plats attached to petitions 8 to 13, inclusive. An inspection of the plats also shows that a part of Bayou Two, Prairie Lake, is included in the first seven petitions and not included in the petitions 8 to 13, inclusive. If the only variance consisted in the difference of 15.45 acres, we are not prepared to say this would not be material and fatal. In the case of *Voss* v. *Reyburn,* 104 Ark. 298, it was held that the omission of two half blocks from the proposed improvement district constituted a material variance and invalidated a street improvement district; and, in the case of *Norton* v. *Bacon,* 113 Ark. 566, it was held that the omission in the published notices of 200 acres of land constituted a material variance between the notice and the plat and invalidated the formation of the improvement district. In the case of *McRaven* v. *Clancy,* 115 Ark. 163, the court also ruled that the omission of one lot from the publication of an ordinance, creating a district, invalidated the district. This court also said, in the case of *Heinemann* v. *Sweatt,* 130 Ark. 70, that "the tract of land in question forms a very small part of the large territory embraced in the district, but we can not treat it as being too insignificant to be seriously taken into account in adjudicating the rights of the parties who own lands in the district. We do not know what its value really is compared with the other lands in the district. We must assume, at least, that it is of substantial value, and that is sufficient to call for the application of the principle herein announced, for, if we undertake to vary the application of those principles according to the amount or value involved, we would have a very uncertain rule."

One of the grounds of remonstrance against the organization of the district in the instant case is that the petitions did not represent a majority of the landowners in the district. It is conceded that the petitions 1 to 7,

inclusive, or 8 to 13, inclusive, separately did not constitute a majority in either value, acreage or number of the landowners. It is contended by appellants that appellees J. C. Harris and Henry Bull had no right to prosecute an appeal from the county court to the circuit court because they petitioned for the organization of the district, and that, at the time they remonstrated, their names had not been withdrawn from the petitions. In our view that there was a material variance between the lands proposed to be included in petitions 1 to 7, inclusive, from those proposed to be included in petitions 8 to 13, inclusive, a district could not be legally established upon either set of petitions, because neither represented a majority in value, acreage or numbr of landowners therein. It is said in Page & Jones on Taxation by Assessment, vol. 2, art. 1013, that "where a petition is by statute to be effective only if signed by a certain number, one who signs the petition is not estopped from claiming that the requisite number did not join in signing the petition." Again, on account of the variance in the boundaries of the proposed districts, as shown by the plats, the petitioners on the two sets of petitions sought to establish different districts. Those in the first set sought to include in the district northeast quarter of the northeast quarter of section 9, township 1 south, range 6 west, and Bayou Two, Prairie Lake, whereas, those in the second set of petitions did not include any lands in said section 9 nor any part of Bayou Two, Prairie Lake. Appellees, therefore, did not obtain an order in the county court establishing the district prayed for, because the order of the county court establishing the district did not include any part of said section 9 or any part of Bayou Two, Prairie Lake. So appellees had a right to appeal from the order of the county court establishing a district, upon two grounds, notwithstanding they had not withdrawn their names from the original petition at the time—first, because the county court established a different district from the one petitioned for by them; second, because the petitions signed by ap-

pellees did not contain a majority in value, acreage or number of landowners in the district established by the county court.

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

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LAYTON v. CENTRAL STATES LEAD & ZINC COMPANY.

Opinion delivered February 7, 1921.

1. PLEADING—EXHIBITS.—A bill in equity is not demurrable because the allegations therein are broader than the subject-matter covered by exhibits thereto, as the exhibits could not control or limit proper allegations relating to matters not covered by the exhibits.
2. CORPORATIONS—PROMOTERS' CONTRACT.—Under a bill alleging that a certain contract was made on behalf of a proposed corporation by its promoters, part of the consideration of which was the sale of certain stock in the corporation, which was guaranteed to be worth $2,000, and that the corporation, with knowledge of such contract, adopted the same and accepted the benefit thereof, *held* that the corporation was bound by the contract, including the guaranty.
3. CORPORATIONS—ADOPTION OF PROMOTERS' CONTRACTS.—A corporation may adopt contracts made for it by its promoters in advance of organization as effectually as if made by it after organization, and after accepting the benefits of such contracts can not repudiate the accompanying burdens and obligations.
4. FRAUDS, STATUTE OF—PROMOTERS' CONTRACT.—A contract on behalf of a prospective corporation, made for its benefit by promoters, though not in writing, is not within the statute of frauds as being a contract to answer for the debt, default or miscarriage of another, since, on its adoption by the corporation, it became, *in toto*, an original undertaking of the corporation.

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

*J. C. Floyd,* for appellant.

The appellee adopted the contract made by the promoters, Stanfield and Harrison, with plaintiff and are bound by it. The contract was made on behalf of the corporation by its promoters and the corporation after its organization, and with full knowledge of all the facts

accepted its benefits and took them *cum onere,* and it may be enforced against the corporation. Clark on Contracts, pp. 133-4, § 17; 44 Ark. 383; 37 *Id.* 164; 86 Tex. 35; 7 R. C. L., §§ 60-1-2; Clephane on Bus. Corp., chap. 4, p. 29; § 48; 91 Ark. 367; 79 *Id.* 273; 96 S. W. 277; 121 *Id.* 293. The verbal agreement modifying the written lease contract is not within the statute of frauds. 4 L. R. A. (N. S.), pp. 980-1, and note. *Stearns* v. *Hall,* 9 Cush. 31; 415 Wis. 38; 74 Minn. 224; 77 N. W. 34. The bill states a cause of action, and it was error to sustain the demurrer.

*Williams & Seawell,* for appellee.

While the authorities cited by appellant state clearly the general principles governing the adoption by a corporation of a contract originally made in advance for it by promoters, yet there are certain well-defined qualifications and exceptions which are supported by authorities. 39 So. Rep. 712; 18 N. E. 868; 112 *Id.* 112. See, also, 253 Fed. 340, 351; 14 C. J., § 860; 16 Arizona 485; 102 N. E. 599; 42 Okla. 440; 14 C. J., § 293 (4); 161 Fed. 874; 37 Ark. 164; 44 *Id.* 383; 87 S. W. 210; 37 N. E. 549. There is a radical difference between a promise made on behalf of the future corporation in the contract itself, the benefits it has accepted, and the promise in a previous contract to pay for services in procuring the latter to be made. Elliott on Private Corp., § 61; 24 S. W. 795. Before a corporation becomes bound by adoption or ratification of a contract made by promoters for it, there is a qualification that it must have been such as it could have originally made itself. 14 C. J., § 291 (2); 123 Ark. 575. It is alleged that appellee is a corporation organized and incorporated by the laws of Arizona, and its charter powers are governed by the Constitution and laws of that State. 71 Ark. 379; 96 *Id.* 594. Under the laws of Arizona no corporation shall issue stock except to *bona fide* subscribers to its stock or their assignees; nor shall issue any bond or other obligation for payment of money except for money or property received or labor done. Const. Ariz., art. 14, § 6. The rule of this

court with reference to stock subscriptions is applicable. 126 Ark. 400. The contract here is against public policy. 105 N. W. 578; 148 *Id.* 47; 149 *Id.* 1156; 204 *Id.* 408. On the whole case the decree is right, and the demurrer was properly sustained, but, if error was committed and the complaint does state a cause of action, appellee prays leave to answer.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Marion County, sustaining a demurrer to and dismissing the amended bill of appellant against the Central States Lead and Zinc Company, a foreign corporation duly organized under the laws of the State of Arizona and doing business in the State of Arkansas. The sole question for determination is whether the facts alleged in the amended bill constitute a cause of action against said corporation. The petition, in substance, alleged that A. N. Stanfield and C. H. Harrison were promoters of the Central States Lead and Zinc Company, and for its benefit secured an option contract from appellant in consideration of the payment of $500 cash and $7,500 within sixty days, wherein it was agreed, in writing, with A. N. Stanfield, for himself and his associates, that, upon payment by him, his heirs, successors or assigns, of a total sum aggregating $8,000, appellant would transfer to him, his heirs, successors or assigns, all his interest in a mining lease dated the first day of June, 1916, from the Monkey Hill Mining and Milling Company to Zimmerman Engineering Company, embracing certain lands in Marion County, with supplemental contract relating thereto, dated March 14, 1917, and also supplemental contract modifying the terms of the original lease so as to extend the time and reduce the royalties, executed on December 24, 1917, by the said Monkey Hill Mining and Milling Company directly to him; that the Central States Lead and Zinc Company was being organized for the express purpose of taking over said leasehold contracts held by appellant; that, pending the organization, said promoters, being desirous

of obtaining the immediate assignment of the leasehold contracts and the possession of the property to the said A. N. Stanfield for the Central States Lead and Zinc Company, verbally agreed with appellant for a modification of the option contract so as to pay him $6,000 in cash and to secure him in the payment of the remaining $2,000 of unpaid purchase money by issuing to him a certificate of stock in the contemplated corporation for $4,000, with an express understanding on the part of said promoters to guarantee the immediate sale of said stock for $2,000 upon the completion of the organization of the said Central States Lead and Zinc Company; that, pursuant to the verbal agreement, appellant, on the 11th day of April, 1918, transferred his leasehold estate and supplemental contracts relating thereto in said property to the said A. N. Stanfield for the use and benefit of said Central States Lead and Zinc Company, and placed said A. N. Stanfield, his associates and the Central States Lead and Zinc Company in possession of said leasehold estate; that, at the time appellant transferred the mining lease and supplemental contracts aforesaid to A. N. Stanfield, said appellant, as a part of the same transaction, undertook to procure from the Monkey Hill Mining and Milling Company a new mining lease, embodying the terms and conditions of the original lease and supplemental contract thereto; that, after the organization of the Central States Lead and Zinc Company was completed, A. N. Stanfield, on the 29th day of May, 1918, transferred said leasehold estate, including the mining leases and supplemental contracts relating thereto, to the Central States Lead and Zinc Company; that, pursuant to agreement, appellant, on July 16, 1918, procured a lease embodying the terms and conditions of the original lease and supplemental contracts thereto from the Monkey Hill Mining and Milling Company directly to the said Central States Lead and Zinc Company; that said corporation, Central States Lead and Zinc Company, through its officers and agents, accepted said transfer of said mining lease and supplemental contracts

aforesaid, and mining property thereto belonging and new lease aforesaid and possession of said mining property, with full knowledge of the option contract wherein said A. N. Stanfield had agreed and contracted to pay $8,000 for said property, and with full knowledge of the subsequent agreement of A. N. Stanfield and C. H. Harrison to guarantee the sale of the $4,000 stock issued to appellant at and for the sum of $2,000 in cash immediately upon the completion of the organization of said corporation, so as to enable said appellant to realize the full sum of $8,000 out of the sale aforesaid; that it adopted and ratified said contract and agreement as its own by issuing its certificate of stock to him for $4,000 as security for $2,000, balance of the purchase money for the leasehold estate, and by accepting and receiving the full benefits therefrom and the possession thereof; the said A. N. Stanfield and C. H. Harrison and Central States Lead and Zinc Company, in the breach of said contract, failed and refused to place on the market and sell the $4,000 in stock, held by appellant as security for his said debt of $2,000, balance due under his contract with A. N. Stanfield upon the sale and transfer of the aforesaid property; that, on the 28th day of September, 1918, appellant attached the $4,000 certificate of stock aforesaid to a draft for $2,000 and demanded payment thereof from the said C. H. Harrison and Central States Lead and Zinc Company, but payment of said draft was refused; that appellant now tenders in court the said certificate of stock for $4,000, assigned in blank to appellee and the promoters, and to each of them, and prays judgment for the sum of $2,000 against them.

The option contract, original lease and supplemental contracts in relation thereto, the assignment thereof to A. N. Stanfield and his assignment thereof to appellee, the new lease from the Monkey Hill Mining and Milling Company directly to appellee, letters verifying the oral agreement changing the manner of payment of the purchase money for the property and the $4,000 certificate of stock attached to the draft aforesaid, were attached

as exhibits to the complaint. None of these writings connected the Central States Lead and Zinc Company with the transaction except the lease made directly to it by the Monkey Hill Mining and Milling Company, the transfer of the leases and supplemental contracts in relation thereto, the stock certificate and the reference to said corporation in the letters. The contents of the exhibits are correctly alleged in the bill, and, there being no discrepancy or conflict between them and said allegations, it is unnecessary to apply the principle in equity that the allegations of the bill are controlled by the exhibits, as suggested by appellee. It is true the allegations in the bill are much broader than the subject-matter covered by the exhibits, but the additional allegations in the bill were proper as tending to render appellee responsible by adoption of the contract between appellant and the promoters of appellee. The exhibits could not control or limit proper allegations relating to matters not covered by the exhibits.

The chancery court sustained the demurrer to the bill upon the theory that it alleged a personal guaranty of the sale of the $4,000 certificate of stock for $2,000 by A. N. Stanfield and C. H. Harrison, which contract of guaranty was not made for appellee corporation or with the express intention that it should become bound thereon; and upon the further theory that the contract was void under the statute of frauds as being an attempt to hold appellee liable for the debt of said promoters on a parol contract. The allegations of the bill are of greater breadth and scope than this. They are, in substance, to the effect that the contract was made for the corporation and would be assumed by it. The purchase price agreed upon in the option contract for the Monkey Hill leasehold was $8,000. The promoters of appellee corporation verbally agreed with appellant that, if he would forbear $2,000 of the purchase price, appellee, when organized, would issue him $4,000 of its stock to secure the payment thereof, and they would guarantee the immediate sale thereof for not less than $2,000. With a

full knowledge of the contract, it thereafter accepted the assignment of the original lease and subsequent contracts in relation thereto, the possession of the property, the new and direct lease from the Monkey Hill Mining & Milling Company to it, and issued its certificate of stock for $4,000 to appellant, as security for the unpaid purchase money of $2,000. Under these allegations, the guaranty to convert the stock into money became an integral part of the contract. The allegations are that appellee adopted the entire contract, not simply a part thereof. We think the allegations of the bill bring it within the general rule of law that a corporation may adopt contracts made for it by its promoters in advance of organization as effectually as if made in the first instance by it after organization, and within the rule that corporations accepting the benefits of such contracts can not repudiate the accompanying burdens and obligations. Clark on Contracts, § 47, pp. 133, 134; R. C. L., vol. 7, §§ 6061-62; *Bloom* v. *Home Insurance Agency,* 91 Ark. 367.

We do not think the contract void under the statute of frauds, as seeking to charge appellee upon the debt of A. N. Stanfield and C. H. Harrison. The allegations are, in substance, that, as promoters for appellee corporation, they entered into a written option contract for a mining leasehold estate in Marion County for a consideration of $8,000, $500 of which was to be paid in cash and $7,500 upon delivery of the lease and leasehold estate to said appellee. Subsequently, and by verbal agreement, in order to obtain the immediate assignment of the leases and possession of the property, it was agreed that $6,000 should be paid in cash and that appellee would forbear the immediate payment of the balance of the purchase price of $2,000 upon condition that appellee, when organized, would assign $4,000 of its stock to appellant as collateral to secure the payment of the unpaid purchase money with a guaranty on the part of the promoters that the stock would be immediately sold for not less than $2,000 to pay said appellant the balance

of the purchase money; that, with full knowledge of this contract, appellee, after organization, accepted the leases, possession of the property, and issued the certificate of stock for $4,000, pursuant to said understanding. Treating these allegations as true, the effect of the acceptance of the leases and property by appellee was an adoption by it of the contract *in toto,* including the guaranty to sell the stock for enough money to pay the balance on the purchase price for said property. By such adoption the contract *in toto* became an original undertaking on behalf of appellee and is not void under the statute of frauds as an undertaking to answer for the debt, default or miscarriage of another.

We are of opinion that the bill states a cause of action, and, for the error in sustaining the demurrer thereto and dismissing it for want of equity, the decree is reversed and the cause remanded with leave to appellee to answer, and for proceedings not inconsistent with this opinion.

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## McCORD v. WELCH (1).

## ROAD IMPROVEMENT DISTRICT No. 6 v. ROAD IMPROVEMENT DISTRICT No. 8 (2).

Opinion delivered February 14, 1921.

1. INJUNCTION—CLOUD ON TITLE.—Where a statute authorizing the county court to annex certain territory to a road improvement district is invalid, the owners of property within such territory have a right to enjoin proceedings in the county court to effect such annexation, as such proceedings would constitute a cloud upon their title.
2. PLEADING—CONCLUSION OF LAW.—In a complaint to enjoin proceedings to place plaintiff's land in a road improvement district, an allegation that the land will not be benefited by the improvement is a mere statement of a conclusion and is not sufficient to overturn the legislative decision that such land will be benefited.
3. HIGHWAYS — REMEDY AGAINST UNJUST ASSESSMENTS.—Since the statute relating to highway improvement districts affords an adequate remedy to owners of property for relief against unjust assessments, the remedy thus afforded must be resorted to.

4. HIGHWAYS—LEGISLATIVE DETERMINATION OF BENEFITS.—Although the county court determined, on the organization of a highway improvement district, that certain lands would not be benefited by being included in a certain road improvement district, this did not preclude the Legislature from determining that they would be benefited and from annexing them to the district.
5. CONSTITUTIONAL LAW—LEGISLATIVE ENCROACHMENT ON JUDICIARY. —Although the county court determined, on the organization of a highway improvement district, that certain lands would not be benefited by inclusion in a road district, a subsequent legislative determination to the contrary did not invade the jurisdiction of the county court, as the Legislature could disregard the court's determination and take up the subject and determine the benefits for itself.
6. CONSTITUTIONAL LAW—JUDICIAL PROCEEDINGS.—The county court, in proceedings in regard to placing land within road improvement districts, acts in an administrative, rather than a judicial, capacity.
7. HIGHWAYS — CONFLICTING SPECIAL ACTS.—Where a special act placed certain territory in one district, and a later special act transferred it to a second district, the later act, to the extent of the conflict only, repeals the prior act.
8. HIGHWAYS—INCLUSION OF TERRITORY WITHIN TWO IMPROVEMENT DISTRICTS.—There is no legal objection to including land in two road improvement districts if benefits are to accrue to it from the improvements in both districts.

Appeals from Little River Chancery Court; *Jas. D. Shaver,* Chancellor; *McCord* v. *Welch* reversed; *District No.* 6 v. *District No.* 8 affirmed.

*A. D. Dulaney* and *John J. Dulaney,* for appellants.

1. The chancery court erred in granting the injunction to McCord, county judge, because (1) the complaint shows that court is without jurisdiction of the subject-matter. 91 Ark. 534; 7 R. C. L. 1030. (2) The county court has exclusive original jurisdiction over matters relating to county roads with which a chancery court has no power to interfere. Article 7, § 28, Const.; 98 Ark. 64. (3) The county court is a constitutional superior court of record, while chancery courts are created by the Legislature with limited jurisdiction. Article 7, § 1, and *Ib.,* § 15. Equity has no power to restrain another

superior court of record from proceeding to exercise its conceded authority in a regular, lawful manner. 95 Ark. 621. The proceedings of a court without jurisdiction are a nullity. 7 R. C. L. 1033. See, also, 54 Ark. 118; 106 *Id.* 508; 109 *Id.* 250. (4) Neither the act 338 of 1915, nor the validating act, No. 369 of 1920, conferred jurisdiction upon the chancery court to act upon the road matters involved. 22 Cyc. 879; 69 Ark. 376.

2. The chancery court erred in overruling the demurrer of the commissioners of district No. 6 and in granting the injunction against them, because (1) the commissioners were proceeding lawfully under authority of act No. 338, Acts 1915, and the special act 369 of 1920. There is no allegation in appellee's petition that the commissioners were acting unlawfully, capriciously, or were abusing their power or discretion. 84 Ark. 29.

A statute validly enacted can not be repealed by the courts. Act 369 is valid and the Legislature had power to enact it. 216 S. W. 692. Validating the formation of district No. 6 made a legislative determination that appellee's lands were benefited by the proposed road and was an exercise of legislative power which the chancery court could not set aside and could not take said added lands of appellee's out of district No. 6, in the absence of a showing of excessive, unreasonable and exorbitant assessment of benefits. 216 S. W. 692; 218 *Id.* 386.

In defining the boundaries of a road improvement district the Legislature necessarily made a determination as to what lands will and will not be benefited, and it is only in case of demonstrable mistake that the court will declare a statute void. 217 S. W. 260. A legislative determination of benefits has repeatedly been upheld. 215 S. W. 882; 213 *Id.* 767, 773; 133 Ark. 118. Reviewing courts should not substitute their judgments for that of assessors and commissioners unless the evidence clearly shows that the assessment and proceedings are erroneous. 213 S. W. 749; 137 Ark. 573.

In their petition appellees allege that special act 369 was passed without their knowledge or consent and invalidates the act, but the notice required by the Constitution must be presumed to have been given. 216 S. W. 500; 218 *Id.* 386; 220 *Id.* 57; 221 *Id.* 465.

3. A party seeking to enjoin a strictly legal proceeding must first submit to judgment and then proceed to enjoin the enforcement of the judgment. Appellees should have permitted the assessments to be passed on and then, in case of unfair treatment, applied to chancery for injunction. 31 Ark. 373; 21 *Id.* 197; 220 S. W. 38.

4. Appellees allege no facts show comparable injury or that a multiplicity of suits would follow.

5. Appellees had an adequate remedy at law. 106 Ark. 552; 92 *Id.* 118; 10 R. C. L. 273; 29 Ark. 340; 223 S. W. 400.

6. Section 27, act 681 of 1919, is unconstitutional and void. 218 S. W. 384; 213 *Id.* 762, 768. Such extensive powers can not be exercised. 118 Ark. 119; 89 *Id.* 513; 91 *Id.* 274. Section 27 is too vague and uncertain and is invalid. 220 S. W. 311; 215 S. W. 255.

Commissioners can not so alter the boundaries of the district, routes of the roads, etc., so as to destroy the singleness or original plan of the improvement; if so, the statute is invalid. 219 S. W. 23; 213 *Id.* 374; 137 Ark. 355. The cost of the improvement can not exceed the benefits. 133 Ark. 491; 135 *Id.* 102.

7. Section 27, act 681 of 1919, was repealed by implication by special act No. 369 of 1920. 218 S. W. 179; 123 Ark. 184; 120 *Id.* 530.

8. If section 27 is valid it does not apply because appellant district No. 6 has issued bonds.

9. If injunction is not granted appellant will suffer irreparable injury and no adequate remedy at law is available to appellant. 34 Ark. 356.

*Reynolds & Steel,* for appeellees.

1. The court was correct in overruling the demurrers and granting the injunction because the complaint

on its face states no cause of action. Clearly appellees have shown a cause of action against both the county court and the commissioners, and have alleged that a multiplicity of suits would result if the injunction should not be granted. The law has been complied with and no bonds have been issued. Kirby's Digest, § 3965-6-81; 59 Ark. 344; 222 S. W. 59. Since no bonds had been issued in district 6, a levy would be illegal and injunction would lie. 30 Ark. 101-110; 32 *Id.* 527.

2. The petition alleges that a petition in compliance with law has been filed with the commissioners of district No. 8 asking for the transfer of the territory to No. 8.

3. The demurrers admit, so far as this suit is concerned, that every statement in the petition is true.

4. Section 27, act 681, Acts 1919, p. 2721, is valid and has not been repealed by act 369 of 1920. Section 27 is valid (109 Ark. 28; 73 Ark. 536), as it has not been expressly repealed, nor by implication, as the acts are not repugnant. 109 Ark. 28; 50 *Id.* 132; 72 *Id.* 119; 93 *Id.* 621; 112 *Id.* 102; 88 *Id.* 327; 36 Cyc. 1077, etc. A general act is not usually intended to repeal a special act. 2 Ark. 119; 50 *Id.* 132.

5. In the event the act of 1920 is valid, it and section 27, Acts of 1919, are "*in pari materia,*" and section 27 is valid. 4 Words and Phrases 3478; 101 Ark. 238; 76 *Id.* 443; 82 *Id.* 302; 80 *Id.* 411; 36 Cyc. 1077-90.

6. The chancery court clearly had jurisdiction and the citations of appellant are not applicable. 222 S. W. 59. A cause of action is stated. 223 S. W. 368.

McCULLOCH, C. J. These two cases, both involving controversies between two road improvement districts in Little River County and between one of the districts and the owners of certain real property, can be disposed of in one opinion.

Road Improvement District No. 6 is an appellant in each of the cases and was organized under the general statutes of the State authorizing the creation of such dis-

tricts for the construction of rural highways under orders of the county court (Crawford & Moses' Digest, § 5399 *et seq.*, act March 30, 1915, page 1400), and was organized by order of the county court of Little River County on May 14, 1918, to improve a public road running north from Ashdown by way of Wilton to Mills Ferry on Little River.

The General Assembly of 1919, at the regular session enacted a special statute, approved April 3, 1919 (Vol. 2, Road Acts, page 2707), creating Road Improvement District No. 8 of Little River County for the purpose of improving a certain public road running northeasterly from Ashdown. This statute is in the customary form for the creation of road districts by special statute, and it names the commissioners, describes the boundaries of the district, and authorizes the assessment of benefits for the construction of the described improvement.

Section 27 of that statute reads as follows:

"In case a majority in numbers of landowners, a majority in acreage, or a majority in value, of the landowners in territory adjacent to the district created by this act desire that any such adjacent territory be annexed to and become a part of the district hereby created, they may file their petition with the commissioners of the district, who shall thereupon give notice of such filing by publication for two weeks in some newspaper published and having a general circulation in Little River County fixing a date when all persons will be heard at the circuit court room in the town of Ashdown; and on said date the said commissioners shall assemble and hear all persons who desire to be heard in support of or against said petition, and if the board finds that a majority in acreage, in numbers or in assessed value has petitioned for annexation, it shall enter upon its records an order which shall have all the force of a judgment, annexing such territory to this district; and from that time forward such territory shall be treated in all respects as a part of the district created by this act; and in case said territory is located in any other road improvement dis-

trict which has not issued bonds, the said territory shall cease to form a part of said other district, but for road purposes shall be exclusively a part of the district created by this act."

Certain tracts of real estate owned severally by Welch and other appellees in the first case mentioned in the caption of this opinion are situated in the angle formed by the two highways to be improved by the two districts mentioned, as those highways converge toward Ashdown, but the lands were not situated in either of the districts at the time they were organized. The General Assembly at the extraordinary session in February, 1920, enacted a special statute incorporating those lands into Road Improvement District No. 6 and authorizing the assessment of betterments thereon, the same as other lands in that district. That statute (unpublished) was approved February 26, 1920. The statute cures defects in the organization of District No. 6, and contains authority "to construct other laterals within the territory now embraced within said district or to enter into territory that may be annexed to said district if in their judgment and discretion they see fit to do so; provided, that all roads and laterals that may be built shall be upon public roads that are now or may hereafter be declared by the county court of said county to be public roads."

Said appellees, as the owners of the aforesaid lands, in April, 1920, filed their petition in the county court pursuant to section 27 of the act of April 3, 1919, *supra,* to have their lands annexed to Road District No. 8. In the meantime the assessors of Road District No. 6 proceeded to assess the lands added to the district by the aforementioned special statute and filed their assessment list with the county court. Thereupon Welch and others, who were the owners of the lands annexed to District No. 6 by special statute sought to be annexed to District No. 8 by petition of the property owners, filed a complaint in the chancery court of Little River County against the county judge and the commissioners of Road Improvement District No. 6 praying for an injunction to

restrain the county judge and the commissioners from proceeding to annex the lands mentioned to District No. 6 and from assessing benefits on said lands. This action was commenced after the assessment list had been filed with the county court and before the same had been approved by the court. The chancery court overruled a demurrer to the complaint in that case, and on the refusal of the defendants therein to plead further a final decree was entered in accordance with the prayer of the complaint, and an appeal has been prosecuted from that decree.

The commissioners of Road Improvement District No. 6 also instituted an action in the chancery court against the commissioners of Road District No. 8 to restrain the latter from proceeding to annex to District No. 8 the territory referred to in the petition of the property owners. The chancery court sustained a demurrer to that complaint and dismissed the complaint for want of equity, and an appeal has also been prosecuted from that decree.

It would seem from these recitals that the real controversy between the parties relates to the question of the right of the respective districts to exercise authority over the lands of Welch and the other appellees. The first contention of counsel for appellant in their effort to secure a reversal of the decree in the case first mentioned is that the chancery court has no jurisdiction to entertain a suit to restrain the proceedings in the county court. The solution of this question depends upon whether or not the statute which attempts to annex the disputed territory to District No. 6 is valid, for, if the statute is void, and there is no authority to proceed under such attempted annexation, then the owners of the property in the district have the right to prevent, by injunction issued from the chancery court, such further proceedings. The proceedings, if unauthorized by law, would constitute a cloud upon the title of the owners and equity will afford relief. It will be observed that both of the districts assert authority over the disputed territory—

District No. 6 claiming under the special statute approved February 26, 1920, *supra,* and District No. 8 claiming under section 27 of the special statute approved April 3, 1919.

In the complaint in the first case it is alleged in general terms that the lands of appellees will not be benefited by the improvement constructed in District No. 6. This, however, is a mere statement of a conclusion, and is not sufficient to overturn the decision of the Legislature in enacting the special statute that such lands will be benefited by the improvement. *McClelland* v. *Pittman,* 139 Ark. 341; *Cumnock* v. *Alexander,* 139 Ark. 153; *Rogers* v. *Arkansas-Louisiana Highway Imp. Dist.,* 139 Ark. 322. The statute in question affords an adequate remedy to owners of property for relief against unjust assessments, and the remedy thus afforded must be resorted to. *Bush* v. *Delta Road District,* 141 Ark. 247.

It is next contended that the special statute annexing the new territory to District No. 6 is void for the reason that there had been a previous adjudication by the county court that the lands in question would not be benefited, and that such adjudication must prevail over any determination by the Legislature in passing the statute. It is also argued in this connection that the adjudication by the county court demonstrates the mistake in the legislative finding, and that to permit this finding to be disregarded by the Legislature would constitute an invasion of the jurisdiction of the county court. We do not think that this contention is sound. The complaint contains an allegation in general terms that the county court had adjudged that these lands would not be benefited by the improvement in District No. 6. It can scarcely be said that this allegation is sufficiently definite to set forth the adjudication of the county court, but, conceding that it constitutes a sufficient allegation that the county court, in a proceeding authorized by the general statute, *supra,* determined, upon the organization of the district, what particular lands would be benefited or determined on a petition to annex territory that these

particular lands had not been benefited, we do not think that such a state of facts is sufficient to defeat the legislative will in determining that these lands will be benefited and in annexing them to the district. Such a determination by the Legislature, in spite of the former decision of the county court in the character or proceedings referred to, does not constitute an invasion of the jurisdiction of the county court, and the decision of the county court in those proceedings did not destroy the power of the Legislature to determine for itself the question of benefits and the creation of the district embracing the territory. This is so because the Legislature has original power to create local improvement districts and to determine for itself the benefits to be derived from a given improvement, and, since the Legislature possesses the power in the first instance to dispense with the action of the county court in determining benefits, it may disregard such determination by the county court and take the subject up anew and determine those benefits for itself. The county court in such proceedings does not act in a strictly judicial capacity in the ordinary sense of that term, or as used in the Constitution, but the duties thus performed are administrative. *Mo. Pac. Ry. Co.* v. *Izard County Highway Improvement District,* 143 Ark. 261, 220 S. W. 452. Therefore, the determination by the county court that there were no benefits or that the benefits were insufficient to justify the annexation of the territory to the district would not, as before stated, prevent the Legislature from taking up the subject anew and making a determination for itself.

Now, since the statute has been found to be valid, it constitutes the last expression of the legislative will in regard to the annexation of this territory to a road district. It is provided in section 27 of the act of the special statute creating Road District No. 8 that, in case of annexation of territory to that district if such territory "is located in any other road improvement district which has not issued bonds, the said territory shall cease to form a part of said other district, but for road pur-

poses shall be exclusively a part of the district created by this act." The act of February 26, 1920, adding this territory to District No. 6 is necessarily in conflict with the above-quoted provision of section 27, in so far as it might operate on this territory, and must prevail, since it is the last expression of the legislative will. It does not necessarily repeal that feature of section 27, so far as it gives authority to annex territory, but there is such an irreconcilable conflict between the two that it necessarily repeals that feature of the statute, so far as it withdraws the land from the operation of any other district. In other words, notwithstanding the fact that the lawmakers said in section 27 that any territory added to District No. 8 in that manner would be withdrawn from the boundaries of any other district, yet the Legislature subsequently by the enactment of the statute approved February 26, 1920, declared, in express terms, that this particular land should be added to District No. 6.

Our conclusion, therefore, is on this branch of the litigation that the statute adding the disputed territory to District No. 6 is valid and confers authority upon that district to proceed with the assessment of benefits on this land, and the chancery court erred in restraining such proceedings.

In the other case the appellants proceeded under the theory that the inclusion of the disputed territory into the boundaries of District No. 6 necessarily excluded the right of District No. 8 under section 27 of the statute creating that district, from proceeding to annex the territory. This does not follow from the conclusion that the statute annexing the territory to District No. 6 is valid. There is no legal objection to including the territory in both districts if benefits are to accrue from the improvements in each of the districts. *Reitzammer* v. *Desha Road Improvement District,* 139 Ark. 168.

The statutes under which each of these districts are operating provided for ascertainment of benefits by boards of assessors, and, as before stated, there can be

no objections to including them in both districts if it be found that benefits will accrue.

It is contended by counsel for appellants that the question of the validity of section 27 falls within the decision of this court in *Easley* v. *Patterson,* 142 Ark. 52, where it was held that the provisions of the annexation of territory and construction of roads was void because no method of assessment was provided for the improvement of such roads. It will be seen from a perusal of section 27 that it merely provides for annexation of territory found to be benefited by the improvement in the district as originally provided, or by additional improvement authorized under the same statute. There is another section of the statute which authorizes the construction of laterals, but it is unimportant for us to consider that section now, as it has no bearing on the present controversy, which relates solely to the authority of District No. 8 to annex territory found to be benefited by the improvement.

We have refrained from discussing the question whether or not appellant Road District No. 6 is in the attitude to question the authority of District No. 8 to annex territory. That question has not been raised in the case, and it is unnecessary for us to discuss it, since we reach the conclusion that the assault upon the authority of Road District No. 8 is unfounded. The chancery court was correct in the case in sustaining the demurrer to the complaint.

The decree is in the first case therefore reversed and the cause remanded with dirction to dismiss the complaint for want of equity. In the other case the decree is affirmed.

WOOD and HART, JJ., dissent.

BARTLETT v. WILLIS.

Opinion delivered February 14, 1921.

1. COUNTIES—REGISTRATION OF WARRANTS AS AFFECTING ACCEPTANCE FOR TAXES.—Acts 1917, p. 449, providing for the registration of warrants of Johnson County by the treasurer and for their redemption by him in the order of their presentation, does not expressly or impliedly prohibit their acceptance by the collector in payment of taxes, under Crawford & Moses' Digest, § 1993.
2. STATUTES—IMPLIED REPEALS.—Repeals by implication are not favored unless irreconcilable repugnance exists between the two statutes.

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

*Heartsill Ragon*, for appellant.

The court erred in sustaining the demurrer, as act 94 of 1917 is constitutional. The act does not contravene article 16, § 10, of the Constitution. 133 Ark. 90; 77 *Id.* 250.

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

The act, No. 94 of 1917, contravenes article 16, § 10, Constitution 1874, and the court below so held properly. The decision is sustained and supported by 133 Ark. 90; 77 *Id.* 250.

McCULLOCH, C. J. Appellee is a taxpayer in Johnson County, and he instituted this action against appellant, who is the tax collector of said county, to compel the latter to accept county warrants tendered in payment of taxes levied for county purposes. Appellant refused to accept the warrants on the ground that he is prohibited from doing so by a special statute in force in that county. Acts 1917, p. 449.

Appellee contends that the statute in question is in conflict with a clause of the Constitution which provides that "taxes of counties, towns and cities shall only be payable in lawful currency of the United States, or the orders or warrants of said counties, towns and cities, respectively." Art. 16, § 10.

This statute provides for the registration of county warrants by the treasurer "in the order of their presentation to him by the holder thereof." Section 5 of the statute provides that "warrants properly registered under the requirements of the act shall be redeemable in cash, or at par, by the county treasurer to the credit of the county general fund to meet the same;" and section 6 provides that "county warrants mentioned in section 5 shall be redeemable in the order of their registration, and for this purpose the county treasurer shall number said warrants consecutively in the order registered * * *."

Our conclusion is that this statute does not expressly nor by necessary implication prohibit the acceptance of warrants in payment of county taxes, and that it is not in conflict with the general statute which provides that collectors "shall receive county warrants in payment of county taxes." Crawford & Moses' Digest, § 1993. There is no irreconcilable repugnance between the two statutes, and repeals by implication are not favored unless such repugnancy exists. The special statute now under consideration only provides the order in which county warrants are "redeemable" by the county treasurer. It says nothing about the acceptance of warrants in payment of taxes—a method of honoring warrants expressly recognized in the Constitution and expressly provided for in the general statute. *Worthen* v. *Roots*, 34 Ark. 356; *Stillwell* v. *Jackson*, 77 Ark. 250; *Gould* v. *Davis*, 133 Ark. 90.

The treasurer is the officer who receives and pays out the funds of the county, and the word "redeemable," as used in the statute, must be construed to refer to payments of warrant by the treasurer out of the county funds in his custody. It is unnecessary, therefore, to discuss the constitutionality of the statute in any of its aspects.

Affirmed.

## WALKER v. WALKER.

Opinion delivered February 14, 1921.

1. DIVORCE—VALIDITY OF JUDGMENT ON CONSTRUCTIVE SERVICE.—In an action for divorce against a nonresident on constructive service of process, a decree for recovery of attorney's fees and alimony is strictly personal, and the court has no power to render such decree.
2. DIVORCE—ALIMONY IN GROSS SUM.—A decree for alimony was erroneous where it awarded a gross sum, instead of a continuing allowance.
3. DIVORCE — VOID DECREE — MERITORIOUS DEFENSE.—The contention that a so-called "motion for new trial" was properly overruled for the reason that a meritorious defense was not set up therein and verified by affidavit was not well taken where the personal decree for attorney's fee and alimony was void on its face, so that an appeal could be prosecuted without moving to set aside the judgment.
4. APPEARANCE—TAKING APPEAL.—A defendant who appeals from a decree for want of personal service enters his appearance in the cause for all purposes.

Appeal from Drew Chancery Court; *E. G. Hammock,* Chancellor; reversed.

*W. A. Singfield,* for appellant.

1. The court erred in rendering a personal judgment against defendant, as he was a nonresident of the State and was only constructively summoned. He did not appear in the trial nor consent to the mode of service, and the judgment for attorney's fees and alimony is void. 95 U. S. 714; 21 R. C. L. 1299; 42 Ark. 268; 16 L. R. A. 231.

2. The court erred in decreeing a certain sum of money as alimony (38 Ark. 324), and in declaring it a lien on the defendant's lands. 38 Ark. 119; *Ib.* 477.

3. It was error to overrule appellant's motion for new trial. Kirby's Digest, § 6259. The statute is mandatory.

*H. L. Veazey,* for appellee.

1. The court was correct in rendering a personal judgment against defendant for attorney's fees and ali-

mony. 189 S. W. 841; Kirby's Digest, § 2682.

2. The court having jurisdiction did not err in decreeing a certain sum as alimony.

3. The court correctly overruled the motion for rehearing. Appellant's motion does not comply with our statute. Kirby's Digest, § 6520.

McCULLOCH, C. J. Appellee instituted this action in the chancery court of Drew County against appellant, her husband, to secure a decree for divorce and for a division of her husband's property and for recovery of attorney's fees and alimony. Appellant was not a resident of the State, and the service of process was by publication of a warning order. The cause was heard by the court upon the complaint and the report of the attorney *ad litem* and upon oral testimony. The decree was in favor of appellee for dissolution of the bonds of matrimony and for the recovery of attorney's fees in the sum of one hundred dollars and alimony in the sum of five hundred dollars. Appellant is the owner of certain real estate in the county, and the decree also awarded appellee an interest in said property to the extent of one-third, and declared a lien in favor of appellee on the remaining interest. The court appointed a commissioner to sell the remaining undivided interest of appellant for the purpose of satisfying appellee's lien as declared by the court.

The decree was rendered by the court and entered on June 15, 1920, and appellant made no appearance in the action until after the rendition of the decree. He appeared on July 19, 1920, and filed what is designated in the caption as a motion for new trial, in which he asked that the decree for the recovery of attorney's fees and alimony be set aside by the court and that a retrial of the cause be granted. The court overruled the motion on September 28, 1920, and an appeal has been duly prosecuted to this court.

The court erred in rendering a personal decree against appellant for attorney's fees and for alimony. In an action for divorce against a nonresident on con-

structive service of process a decree for recovery of attorney's fees and alimony is strictly personal, and the court has no power to render such decree. A personal judgment can only be rendered upon personal service of process. *Allen* v. *Allen,* 126 Ark. 164; Black on Judgments, vol. 2, p. 933. The decree for alimony was also erroneous in awarding a gross sum, instead of a continuing allowance. *Brown* v. *Brown,* 38 Ark. 324; *Shirey* v. *Shirey,* 87 Ark. 175.

It is contended by counsel for appellee that the motion for retrial of the cause was properly overruled for the reason that a meritorious defense was not set forth in the motion and verified by affidavit. The answer to this contention is that the personal decree against appellant for attorney's fees and alimony was void on its face, and an appeal could be prosecuted without moving to set aside the judgment. The decree for recovery of attorney's fees and for alimony is, therefore, reversed, and the cause remanded for further proceedings not inconsistent with this opinion, the appeal to this court having the effect of entering appellant's appearance in the cause for all purposes.

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## BRIDGEMAN v. AUGUSTA COOPERAGE COMPANY.

Opinion delivered February 14, 1921.

1. REPLEVIN—QUESTION FOR JURY.—In an action to recover possession of logs, the question whether the logs had been taken from plaintiff's land by defendant, or had been taken from other land, *held* a question for the jury.
2. REPLEVIN—EVIDENCE AS TO VALUE.—In an action for the unlawful taking of thirty gum sawlogs, evidence *held* to sustain finding as to value of logs.
3. REPLEVIN—JUDGMENT FOR VALUE OF LOGS.—In an action to recover possession of logs, a judgment awarding to plaintiff the value of the logs where found, and, in addition thereto, the cost of hauling the logs to the river, was erroneous as to the additional amount where the testimony showed that, after being hauled to the river, the logs would be worth an increased amount equal to the cost of hauling it.

4. NEW TRIAL—LACK OF DILIGENCE.—In replevin for logs refusal to grant a new trial for newly discovered evidence as to the time when the timber was cut was proper where such issue should reasonably have been anticipated, sufficient diligence not having been shown.

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

*Brundidge & Neelly* and *G. G. McKay,* for appellant.

1. There is absolutely no testimony to show that appellee was the owner of the logs or that it was entitled to the immediate possession of same. Under the testimony giving it the most favorable consideration for appellee, there could not have been rendered a verdict for more than four of the logs at most. In replevin the plaintiff must rely on the strength of his own title, and not on the weakness of his adversary's. There is no evidence at all, much less preponderance, in favor of plaintiff. 29 Ark. 277; 22 *Id.* 396; 14 *Id.* 141; 19 *Id.* 650; 4 *Id.* 94.

2. The cause should be reversed, because the jury returned a verdict for $96 damages. No damages were shown by the testimony; the jury gave appellee judgment for all the logs were worth. The judgment as to damages is not warranted by the testimony. 25 Ark. 183.

3. The court erred in overruling the motion for new trial, for the reason that all the witnesses for plaintiff showed that the timber cut from the land in section 29 was cut in September or October, 1919, and this fact was not known to the defendant before the trial, and that, after the cause was submitted to the jury and judgment entered, he learned from A. E. Thomas that green timber of the kind and character in controversy, and which defendant had rafted and sold, was cut within six weeks or sixty days prior to the time of the institution of this suit and that the timber could not have been cut in September or October, 1919. Appellee wholly failed to prove title to the logs in controversy, and there was absolutely no proof of damages to the amount of $96.

*W. J. Dungan,* for appellee.

1. The testimony shows that appellee was the owner of the thirty logs involved.

2. The verdict is not excessive, and the question is raised here for the first time. No objections were offered in the court below on this account, nor was the objection embodied in the motion for new trial. 66 Ark. 460. It is immaterial how the logs were moved, whether by wagon or floated, as the jury were warranted in finding that a value had been added to the logs by reason of being assembled and floated, and plaintiff was entitled to the value of the logs in the condition when found. 44 Ark. 210.

3. There was no error in overruling the motion for new trial, as no material new evidence was discovered, and there was no surprise. The evidence was merely cumulative and not material. 52 Ark. 120; 60 *Id.* 481; 73 *Id.* 377. If surprised, the appellant should have moved for postponement. 57 Ark. 567; 57 *Id.* 60; 67 *Id.* 47.

4. Thomas and Clements failed utterly to identify the logs as the ones involved here.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover possession of thirty gum saw logs alleged to be the property of appellee and found in appellant's possession. There was a verdict and judgment below in appellee's favor, fixing the value of the logs at the sum of $504, and awarding damages in the sum of $96 for detention.

The principal ground urged here for reversal of the judgment is that the evidence is insufficient to sustain the verdict, in that it does not sustain appellee's claim of ownership of the logs in controversy, and does not sustain the amount of the verdict with respect to the value of the logs and damages sustained.

Appellee owned the timber on the tract of land known as the Retzel land and had four or five hundred logs lying loose on the land. The contention of appellee is that the logs found in appellant's possession were taken

by the latter from the Retzel land from among those owned and left there by appellee. The testimony introduced in the case tended to prove that contention to be sound. The logs were found in appellant's possession rafted together in Glaize creek. One of the witnesses testified that he saw appellant and another man push four logs from the Retzel land. The water was up over the land, and the logs were floating. The Retzel land was surrounded by a wire fence, and witness testified that they found the gate open and evidences of logs having been floated through the gate. They testified that they found where a log had been sawed in front of the gate, and that they followed the trail along which the logs had been floated to the point where the raft was found in Glaize creek. The witnesses testified that they had no trouble in following the trail of the raft from the gate on the Retzel land to the place where the logs were found. They stated that they could see where the trail had been cut out through the woods so as to permit the logs to pass, and they could see evidences of the ends of the logs raking against the trees and also the pole marks where they pushed the raft. They also testified that there was no other trail that led into the trail they followed.

The logs found in appellant's possession were of the kind which came off the Retzel land. Appellant contended that he got the logs from another tract of land from which he had a right to take the timber. There was a clean cut issue for the jury to decide, and we are of the opinion that there was abundant evidence to warrant the jury in believing that appellant wrongfully took appellee's logs from the Retzel land and floated them along the trail or road to Glaize Creek.

There was also evidence legally sufficient to establish the value of the logs as found by the jury. One of the witnesses testified that the logs would amount to 12,000 feet worth $42.00 per thousand at the place where they were found, and that it would cost $8.00 per thousand to haul them to the river. The jury fixed the

value of the logs according to the testimony of this witness at $42.00 per thousand, making an aggregate of $504, and awarded damages in the sum of $96 which, according to the testimony, was the cost of hauling them to the river so as to get them to market.

We fail to discover any evidence in support of the claim for damages for the reason that the jury fixed the value of the timber at the place where it was found and under the judgment appellee recovered that amount without hauling it to the river. It is true that the cost of hauling to the river would be $8 per thousand, but the testimony shows that the timber would then be worth $50, so, if we allow the verdict to stand, appellee would be awarded double compensation for the expense of hauling the timber. We are therefore of the opinion that according to the undisputed evidence this part of the judgment is erroneous.

It is also contended that the court erred in refusing to grant a new trial on the ground of newly discovered evidence relating to the time when the timber alleged to have been taken by appellee was cut. Affidavits of the witnesses who would testify were filed with the motion. Sufficient diligence was not, however, shown to justify the court in granting a new trial on account of this testimony. There is no reason why appellant could not have anticipated the issue as to when the timber was cut. This was a part of the identification of the timber which should have been reasonably anticipated, and appellant should have prepared himself for the trial by making inquiry for testimony on that issue.

If appellee will enter a remittitur within fifteen days as to the $96 awarded as damages, the judgment will be affirmed; otherwise judgment will be reversed and cause remanded for a new trial.

KELLEY v. STERN PUBLISHING & NOVELTY COMPANY.

Opinion delivered February 14, 1921.

1. EVIDENCE—EXISTENCE OF CORPORATION.—In an action in which defendant denied that plaintiff was a corporation, testimony of plaintiff's officer and manager was competent to prove plaintiff's corporate existence, and that defendant dealt with it as such.
2. CORPORATIONS—EXISTENCE—EVIDENCE.—In an action in which defendant denied plaintiff's corporate existence, testimony of plaintiff's manager was competent to prove plaintiff was a *de facto* corporation and that defendant had dealt with it as such in incurring the liability on which the suit was based.

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

*Brundidge & Neelly*, for appellant.

It was error to permit the witness, Rudinger, to testify that the Stern Publishing & Novelty Company was a corporation. The corporate existence of a corporation is a matter of record, and the best evidence must be introduced, and a certified copy of the articles of incorporation should have been introduced. 7 R. C. L. 102; 28 Ark. 263; 107 *Id.* 56.

*J. N. Rachels*, for appellee.

Parol evidence may be introduced to prove the existence of a corporation. 3 Enc. of Ev., p. 604; Elliott on Corp. (4 ed.) 52. Appellant dealt with appellee as a corporation, and he can not be heard now to dispute its corporate existence. 47 Ark. 281. See, also, 58 Ark. 102; 97 *Id.* 251; 138 *Id.* 267, 275. There is no law that says that the method pointed out by our statute is the only way corporate existence can be proved.

McCULLOCH, C. J. Appellee sues as a corporation organized and doing business in the State of New York, and its cause of action is based on an account for merchandise alleged to have been sold and delivered to appellant, who was engaged in the business of selling merchandise, especially military novelties, at or near Camp Pike. The answer contained a denial that appellee is a

corporation as alleged in the complaint. There was a trial of the issues before a jury, and the verdict was in favor of appellee for the full amount of the account sued on.

The only assignment of error presented on this appeal relates to the ruling of the court in allowing parol testimony to be admitted to establish the corporate existence of appellee. The court admitted the testimony of witness Rudinger, who stated that he was one of the officers and the manager of appellee's business, and that appellee was a corporation organized under the laws of the State of New York, and was doing business at a certain place in the city of New York. He also testified that appellee was engaged in the business of manufacturing and selling military novelties and that the bill of goods described in the account against appellant was sold to appellant and shipped to him. The witness exhibited with his testimony numerous letters which passed between appellee and appellant with respect to the sale of the goods. We are of the opinion that the testimony of witness Rudinger was competent.

We have decided in criminal cases that parol evidence of general reputation is competent, under certain circumstances, to establish the existence of a corporation. *Fleener* v. *State,* 58 Ark. 98; *Brown* v. *State,* 108 Ark. 336; *Turner* v. *State,* 109 Ark. 332.

It has also been held by this court that in actions by or against corporations the parties dealing with a *de facto* corporation are estopped to deny its legal existence. *Bank of Midland* v. *Harris,* 114 Ark. 344; *Wesco Supply Co.* v. *Smith,* 134 Ark. 23. That view is supported by the weight of authority, and it is held that parol evidence that a putative corporation was acting as such or was dealt with as such in a given instance was admissible. 3 Ency. of Ev. 604; 4 Elliott on Corporations, p. 52.

The testimony of witness Rudinger was sufficient to establish the fact that appellee is a *de facto* corporation and that appellant dealt with it as such in incurring

the liability upon which the present suit is based. We are of the opinion, therefore, that the court did not err in admitting this testimony. It was, as before stated, sufficient to warrant the verdict of the jury.

Judgment affirmed.

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## DAVIS v. RODMAN.

Opinion delivered February 14, 1921.

1. PHYSICIANS AND SURGEONS—NEGLIGENT SPREAD OF DISEASE.—A complaint against physicians attending plaintiff's son, a typhoid fever patient, for negligence in failing to prevent the spread of typhoid fever to plaintiff's other children, *held* insufficient for failure to allege specific facts showing that the negligence complained of was the direct and proximate cause of such children contracting the disease.
2. PHYSICIANS AND SURGEONS—DUTY TO AVOID SPREAD OF INFECTIOUS DISEASE.—It is the duty of physicians who are attending patients afflicted with contagious or infectious diseases not to do any negligent act that would tend to spread the infection, and to exercise reasonable care to advise members of the family and others liable to be exposed thereto of the nature of the disease and the danger of exposure.
3. PHYSICIANS AND SURGEONS—LIABILITY FOR DAMAGES.—One who, by reason of his professional relation is placed in a position where it becomes his duty to exercise ordinary care to protect others from danger is liable in damages to those who are injured by reason of his failure to exercise such care.
4. PHYSICIANS AND SURGEONS—DUTY TO WARN ATTENDANTS.—It was the duty of a physician attending a typhoid fever patient to notify the family, nurses and attendants of the nature and character of the disease, to warn them of the danger of infection, and to instruct them as to the usual approved methods for the prevention of the spread of the disease.
5. PHYSICIANS AND SURGEONS—VIOLATION OF RULE OF BOARD OF HEALTH.—An allegation that attending physicians violated a rule of the State Board of Health in negligently failing to report a case of communicable disease, without alleging that such negligence was the proximate cause of the injury of which plaintiffs complain, *held* insufficient.
6. PHYSICIANS AND SURGEONS—NEGLIGENCE—PLEADING.—An allegation that defendant physicians were negligent in advising plain-

tiffs to put their son, a typhoid fever patient, among plaintiff's other children, who subsequently became ill of the same disease, without alleging that such negligent exposure of the other children was the direct proximate cause of their illness was insufficient to state a cause of action, especially where the complaint alleged another source of infection.

7. PHYSICIANS AND SURGEONS—FAILURE TO INOCULATE PERSONS EXPOSED TO TYPHOID FEVER.—An allegation that defendant physicians negligently failed to inoculate the parents, their minor children, the attending nurses, and other persons exposed to typhoid fever, was insufficient both because it failed to allege that plaintiffs requested defendants to inoculate them or their children, or that plaintiffs would have consented thereto if defendants had suggested it, and because the question whether the inoculation should be resorted to is a matter solely within the judgment and discretion of the attending physicians under the circumstances of each particular case.

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

*J. R. Alexander* and *W. K. Ruddell,* for appellants.

1. The court erred in sustaining the demurrer and dismissing the complaint, as defendants were guilty of actionable negligence. It was the duty of defendants to protect plaintiffs from injury. 29 Cyc. 419.

2. The demurrer admits every allegation in the complaint to be true. 90 Ark. 158; 102 *Id.* 380; 104 *Id.* 466; 94 *Id.* 505; 94 *Id.* 453.

3. Defendants failed to take the precautions required by the board of health and are liable. Rules and Regulations State Board of Health, January 1, 1918, p. 16, § 92. They negligently failed to isolate the cases of typhoid fever or securely screen against flies. *Id.,* p. 16, § 89. The violation of a law made for the protection of persons against infection by the negligence of defendants make them liable. 15 L. R. A. (N. S.) 784-8. Assumption of risk was not available as a defense. 15 L. R. A. (N. S.) 784; 53 Ark. 201; 80 *Id.* 528; L. R. A. 1015 E 500 and note, p. 502.

4. Failure to vaccinate was negligence. 30 Cyc. 1576; 21 R. C. L. 385; 81 Am. Dec. 593.

5. Defendants liable because they failed to instruct plaintiffs. Rules and Regulations State Board of Health, January 1, 1918, p. 9, § 32 (b); 30 Cyc. 1577; 21 R. C. L. 389; 63 A. L. R. 655-61; 7 L. R. A. 566.

6. Plaintiffs had a right to rely on defendants' instructions. 30 Cyc. 1579; 21 R. C. L. 402; 5 A. L. R. 922, 925; 18 L. R. A. 627-31.

7. It was negligence to allow typhoid fever patients to go to the house of plaintiffs without warning. Rules and Regulations, *supra,* p. 16, § 92; 19 Am. Dec. 164-6; 7 L. R. A. (N. S.) 496-9; 30 Cyc. 1577. See, also, 54 Am. Dec. 547; 5 A. L. R. 922; 93 Am. St. Rep. 834-8. Typhoid fever is highly contagious. Prac. of Med. (5 ed.) pp. 1, 26. It was actionable negligence. 58 Ark. 401; 57 *Id.* 402; 122 *Id.* 570. It is the duty of doctors to guard against infection of diseases, and if they fail they are liable. 21 R. C. L. 389; 12 L. R. A. (N. S.) 752; cases *supra;* 7 L. R. A. (N. S.) 496-9.

*J. J & John B. McCaleb* and *Samuel C. Knight,* for appellees.

1. We agree with appellants' contention as to actionable negligence and their definitions, but with this qualification, that there must have been a failure on part of defendants to perform some duty imposed upon them which failure was the *proximate cause* of the injury complained of. 22 R. C. L., p. 110. None of the acts or failures here alleged, which occurred after appellees were called to treat the patients, was the proximate cause of the contagion. The question of vaccination was not an issue in the case, for there was allegation in the complaint that vaccination was customary and the usual mode of avoiding or preventing typhoid fever. Before an attending physician is justified in vaccinating a person, that person's consent is necessary and no such consent or even willingness is alleged. The allegation of failure to vaccinate does not state a cause of action and could not have been properly submitted to a jury. The more modern medical authorities hold that there is a se-

rious drawback to vaccination in typhoid fever cases. Forcheimer's Practice of Medicine; Sajou's Enc. of Medicine. Appellees had a perfect right to choose their course of treatment, whichever they perferred. 21 R. C. L. 383.

2. Failure to notify the county health officer was not actionable negligence. 21 L. R. A. (N. S.) 115.

3. Allowing Lawson Davis to be moved to the residence of appellants. The contention of appellants is without merit, and the cases cited are not in point. 19 Am. Dec. 164-6; 7 L. R. A. (N. S.) 496-9.

4. Failure to instruct plaintiffs as to the treatment and prevention of typhoid fever is not negligence. Act 96, Acts 1913, § 6; *Ib.*, § 29, Acts 1911. Courts and parties must take notice of the rules, acts and regulations of the duly constituted health boards, commissions, etc. 130 Ark. 453; 26 *Id.* 260; 90 *Id.* 343.

5. As to the *excreta* and other bodily secretions, the contentions of appellants are without merit. The rules and regulations pleaded by appellants give ample information for the care and disposition of such. 130 Ark. 453; 26 *Id.* 260; 90 *Id.* 343.

The complaint does not state a cause of action and the court properly sustained the demurrer.

WOOD, J. This action was brought by appellants against the appellees to recover damages. The appellants alleged in substance that the appellees were regularly licensed and practicing physicians associated together as partners and doing a general practice of medicine at Newark and vicinity in Independence County, Arkansas; that appellants were man and wife, having a family of six minor children, and two adult married sons, who lived in their own homes apart from the appellants; that one of these sons, Curtis Davis, on June 15, 1919, was stricken with typhoid fever; that their son Lawson nursed him and was also, on July 15, 1919, stricken with typhoid fever; that the appellees were the attending physicians, and as such they negligently and wilfully

failed to notify the county health officer that typhoid fever was at the residence of Curtis and Lawson Davis; that they failed to post notices in front and at the rear of the residences of Curtis and Lawson Davis and failed to instruct the patients and their attendants, appellants, and other nurses in all the necessary sanitary measures for them to observe in order to prevent the spread of the disease; that they failed to vaccinate the appellants, and other nurses, attendants, and all other persons who had been exposed to the disease; that they failed to isolate the patients in a room to themselves and to screen the room from flies; that they failed to have buried or disinfected the secretions and excretions from the body of the patients and failed to instruct the attendants to carry out and execute all the rules and regulations of the board of health pertaining to and necessary to prevent the spread of typhoid germs, which it was their duty to do, and ignored all precautions and sanitary measures necessary to prevent the spread of the disease, which was contagious; that appellees advised the appellants to move the patients from their own homes to the homes of appellants, which appellants did; that the appellees failed to notify the appellants that typhoid fever was a contagious disease and failed to take the precautions above set forth to prevent the spread of the disease; that as a result of appellees' negligence as above set forth, appellant, N. A. Davis, on the 12th day of October, 1919, became infected with typhoid germs, from which she suffered great physical pain and mental anguish resulting in permanent injury to her health, all of which, together with the sums she was compelled to expend for nursing, medicine and doctors' bills, damaged her in the sum of $3,000; that the minor sons, Paul and Dallas Davis, as a result of the negligence above set forth, also contracted typhoid fever on the 15th day of October, 1919, to the appellants' damage, items of which were specified, in the sum of $3,000; that Walker Davis, another minor son, on October 15, 1919, from the same cause, contracted the disease and thereafter died, to ap-

pellants' damage, which they specified, in the sum of $3,000; that appellant J. L. Davis, also by reason of the negligence of appellees as above set forth, contracted the disease, from which he suffered physical pain and mental anguish, which rendered him unable to perform his regular work, impaired his health permanently, decreased his earning power and compelled him to incur debts for medicine, nursing and doctors' bills, all to his damage in the sum of $3,000. The complaint concludes with a prayer for judgment in the sum of $3,000. The appellees entered a general demurrer to the complaint. The court entered judgment sustaining the demurrer and dismissing the complaint, and for costs in favor of the appellees, from which judgment is this appeal.

1. Typhoid fever is an infectious febrile disease caused by a micro-organism called *bacillus typhosus,* introduced into the system by the fingers, or with the food or drinking water. Osler's Principles and Practice of Medicine, 1-5; Forcheimer's Therapeusis of Internal Diseases, vol. 5, p. 203; (Webster's Dictionary; New International Dictionary—Typhoid Fever). It is declared by the State Board of Public Health to be "contagious, infectious, and communicable." Rules and Regulations of the State Board of Health, p. 5, § 11.

A contagious disease is one communicable by contact with a patient suffering from it, or with some secretions or object touched by such a patient. (Webster "Contagious.") "Fingers, food, water and flies are the chief means of propagation." Osler's Principles and Practice of Medicine, 5.

Keeping in mind these definitions of infectious and contagious diseases, and their means of propagation, we have reached the conclusion that the allegations of the complaint do not state facts sufficient to show that any of the acts of negligence alleged were the proximate cause of the typhoid fever contracted by the appellants and their children. It is not alleged in the complaint that typhoid fever is an infectious disease. While there is an allegation to the effect that the appellees "failed to have

buried or disinfected the secretions and excretions from the bodies of the patients," there is no allegation to the effect that such failure caused the typhoid germs to get into the food or water used by appellants and their children, or in any other manner to be introduced through the mouth into the intestines of the victims of the disease. Moreover, there is no duty imposed upon physicians by statute to personally bury, or disinfect, the secretions or excretions of their typhoid fever patients.

The State Board of Health requires that "no person in charge of a typhoid fever patient shall so dispose of the excreta or other infectious bodily secretions or excretions as to cause offense or danger to any person or persons." R. & R. of State Board of Health, 1918, p. 16, § 89.

If it be conceded that this section makes it the duty of physicians to instruct those in immediate charge of a patient to dispose of the excretions and secretions in the above manner, still there are no allegations of fact which show that the failure to discharge that duty was the proximate cause of the communication of the disease to appellants and their children. In other words, it is not alleged that the failure of the physician to instruct the nurses or attendants in charge of the patient caused such nurses or attendants to dispose of the excretions and secretions, so that the water which appellants and their children drank, and the food they ate, became infected thereby with the typhoid bacillus.

It is undoubtedly the duty of physicians who are attending patients afflicted with contagious or infectious diseases not to negligently do any act that would tend to spread the infection. It would likewise be their duty to exercise reasonable care to advise members of the family and others, who are liable to be exposed thereto, of the nature of the disease and the danger of exposure. The relation of a physician to his patient and the immediate family is one of the highest trust. On account of his scientific knowledge and his peculiar relation, an attending physician is, in a certain sense, in custody of a

patient afflicted with infectious or contagious disease. And he owes a duty to those who are ignorant of such disease, and who by reason of family ties, or otherwise, are liable to be brought in contact with the patient, to instruct and advise them as to the character of the disease.

It is a sound rule of law that one who by reason of his professional relation is placed in a position where it becomes his duty to exercise ordinary care to protect others from injury or danger, is liable in damages to those who are injured by reason of his failure to exercise such care. *Skillings* v. *Allen,* 5 A. L. R., p. 922 and note. It was, therefore, the duty of the appellees, when called to attend the children of appellants, to notify the latter, other nurses and attendants, of the nature and character of the disease, to warn them of the danger of infection, and to instruct them as to the usual methods approved by the profession, of which they have knowledge, for the prevention and spread of the disease. This duty was incumbent upon the appellees, regardless of the rules and regulations of the State Board of Health on the subject. 30 Cyc. p. 1577; 21 R. C. L., § 33, p. 389. But it was not the duty of appellees as physicians to enforce the rules of the State Board of Health for the prevention of typhoid fever. That was the duty of local health officers. R. & R. of State Board of Health, p. 16, R. 90.

It is alleged in the complaint that "appellees negligently failed to instruct said patients, their attendants, the plaintiffs, and other nurses that the patients had typhoid fever, a contagious disease, or as to what were necessary sanitary precautions for them to observe and practice to prevent the spread of said disease." There is no allegation of fact to show that the alleged negligence of the appellees in the respects named caused appellants' children to contract the disease. The general allegations that "appellees encouraged people to come in contact with their patients," and that grossly negligent acts of defendants conduced to infect plaintiffs and

their families with typhoid fever germs," are not sufficient. There is no allegation that if the warning and instructions had been given appellants could and would have heeded and obeyed them. Specific acts and facts showing how and why the alleged negligence of appellees was the proximate cause of the injury of which the appellants complain, were necessary to be stated. These can not be supplied by intendment.

2. One of the rules of the State Board of Health requires "every physician to report, as soon as possible, every case of communicable disease, declared notifiable, which occurs in his practice, to the local city and county health officer having jurisdiction." Typhoid fever is such a disease. It is made a misdemeanor for any person to violate this rule. R. & R. State Board of Health 1918, p. 6, rule 12; Act 96, p. 360 of Acts 1913.

It is alleged that the appellees negligently failed to comply with this rule. But again there is no allegation of specific acts or facts showing that the failure of appellees to perform this statutory duty was the proximate cause of the injury to appellants. There is no allegation that, if appellees had complied with this rule, appellants and their children would have escaped typhoid fever. Violation of the rule was evidence of negligence. *Bain* v. *Fort Smith L. & T. Co.*, 116 Ark. 125; *Pankey* v. *Little Rock Ry. & Elec. Co.*, 117 Ark. 337-44. But such violation was not actionable negligence creating civil liability unless it was the proximate cause of the injury to appellants. The necessary facts and acts to show this are not alleged.

3. Appellees were negligent in advising appellants to move their son, Lawson Davis, from his residence to appellants' residence, and telling them that they could put him among the other children where he could see his little brothers and sisters. *Skillings* v. *Allen, supra; Hewett* v. *Woman's Hospital Aid Assn.*, 73 N. H. 556, 7 L. R. A. (N. S.) 496-99. Assuming this allegation to be true, which we must on demurrer, such instructions coming from attending physicians without warning of

the danger of infection to the other children of the appellants, were acts of gross negligence. But here again specific acts and facts are not alleged which show how or why this advice and these instructions caused the injury to appellants. On the contrary, it is alleged that typhoid fever was a contagious disease, and that the appellants had nursed their son, Curtis Davis, before he was removed to the residence of the appellants; and other allegations show that appellants were in attendance upon him before the appellees were called to his bedside. Now, "the period of incubation for typhoid germs lasts from eight to fourteen days, sometimes twenty-three." Osler, P. & P. Med. 14. An allegation further shows that one of the appellants, N. A. Davis, was infected with typhoid germs on the 12th day of October, 1919, three days before any of the minor children of appellants became infected with the disease. According to this allegation, the minor children were affected on the 15th day of October, 1919. Therefore, according to the allegations of the complaint, the appellants may have contracted the disease before either of their adult sons were moved to the residence of appellants, and the minor children may have contracted the disease from their mother, rather than from their elder brother. For she had voluntarily exposed herself and had come down with the fever before the minor sons were attacked.

To fix civil liability for so serious a delinquency as that set forth in the complaint, it was necessary to allege specific acts and facts showing that the injury to appellants was caused directly and approximately by such delinquency. Here the allegations show that appellants may have contracted the disease before appellees advised appellants to move their adult son, and the minor sons may have contracted the disease from their mother, rather than from their brother. Therefore, the source of infection of the minor children is not definitely traced to any act of negligence of appellees. The allegations on this vital subject are not sufficient to state a cause of action.

4. It is alleged that the appellees negligently failed to vaccinate the appellants, their minor children, attending nurses and other persons who had been exposed to the disease. The term "vaccinate" is here loosely used by the pleader for "inoculate." In the first place, the appellees could not inoculate the appellants, or their minor children, without appellants' consent. It is not alleged that appellants requested appellees to "vaccinate" them or their children, or that appellants would have consented thereto if appellees had suggested it. In the second place, in the absence of a statute requiring it, whether inoculation shall be resorted to as a means for preventing the spread of contagious or infectious diseases is a matter addressed solely to the independent judgment and discretion of the attending physician. It can not be said that the efficacy of inoculation of a specific vaccine to prevent the spread of typhoid fever has been so thoroughly established by medical science as to make it the absolute duty of physicians to inoculate nurses, attendants and persons exposed during an epidemic of that disease.

The medical authorities cited in the briefs of learned counsel for the respective parties to this litigation show that doctors themselves differ as to whether inoculation would furnish complete immunization against typhoid fever. Although the majority of eminent medical authorities now advocate inoculation as a preventive of typhoid fever, yet, until it has been demonstrated beyond doubt that inoculation affords complete immunization against the disease, it must be left to the judgment and discretion of the physician, under the circumstances of each particular case, to determine whether inoculation is necessary. Tyson's Practice of Medicine (5 ed.), p. 126; 2 Forcheimer's Practice of Medicine; Sajous' Ency. of Medicine; Osler, P. & P. of Med. 41; 5 Forcheimer's Therapeusis of Internal Diseases, 201. Matters of this kind require scientific investigation and expert knowledge to determine. It can not be left to a jury to say whether

the expert in the practice of his profession has pursued the proper course.

The judgment is correct, and it is therefore affirmed.

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COLE v. BLOYED (two cases).

Opinion delivered February 14, 1921.

CORPORATIONS—INSOLVENT CORPORATION—PREFERENCE.—Under Crawford & Moses' Digest, § 1800, preferences obtained against an insolvent corporation by attachment can not be set aside in chancery "unless complaint thereof be made within ninety days after the same is given or sought to be obtained."

Appeal from Marion Chancery Court; *Ben F. McMahan,* Chancellor; and Marion Circuit Court; *J. M. Shinn,* Judge; affirmed.

STATEMENT OF FACTS.

On the 3d day of October, 1919, J. M. Bloyed filed a suit in attachment against the Bankers Mining Company, and as ground therefor alleged that said company was indebted to him on a promissory note in the sum of $2,002.50, and was a foreign corporation. An attachment was duly issued and levied by the sheriff upon the property of the Bankers Mining Company on the 7th day of October, 1919. On the 30th day of January, 1920, the circuit court sustained the attachment and ordered a sale of the property to pay Bloyed's debt. Pursuant to the orders of the court, the property was sold by the sheriff on the 20th day of March, 1920, at public sale after being duly advertised. On March 11, 1920, Charles Cole filed a proceeding in the chancery court to wind up the affairs of the Bankers Mining Company as an insolvent corporation and asked that his claim for services in taking care of the mine be allowed under the statute as a preferred claim. On the 27th day of April, 1920, Charles Cole filed an amendment to his original complaint in which he asks that J. M. Bloyed and the sheriff of the county, who had seized the property of the corporation under the attach-

ment proceedings above referred to, should be made parties.

Bloyed and the sheriff entered their appearance in the chancery court and filed a demurrer. The chancellor sustained the demurrer, and, the plaintiff having declined to plead further, his complaint was dismissed, in so far as it affects the sheriff and J. M. Bloyed, for want of equity.

The decree was entered of record on April 29, 1920, and Charles Cole has duly prosecuted an appeal to this court. After this decree was rendered, Cole filed an intervention in the attachment case in the circuit court, and set up the facts above recited.

The circuit court denied him relief, and from that judgment he has also prosecuted an appeal to this court.

*Allyn Smith,* for appellant.

1. In the chancery case the court erred in sustaining the demurrer and in holding that court had no jurisdiction. In the law case the court erred in overruling the demurrer of intervener to the plea in bar and holding that the chancery proceedings was a bar to intervener's petition in the law case.

Both the sheriff and Bloyed were proper parties. 84 S. W. 1040 (Col. 2); 74 Ark. 93. The lien is claimed under Kirby's Digest, § 5359, giving a lien on the output, machinery, tools, etc., in any mine in this State. Statutes giving liens to laborers, etc., should be liberally construed. 104 U. S. 176-9; 94 *Id.* 545. A watchman and caretaker are entitled to the probation of the statute. 21 Pac. 413-415; 12 Pac. 433; 104 U. S. 176. The statutes of various States are substantially the same as ours, and their construction is strongly advisory and persuasive, and, if followed (21 Pac. 413), is decisive of the claim of plaintiff for a lien as caretaker and custodian. Plaintiff was in possession of the property when seized by the sheriff, and if he had not a statutory lien, yet as a bailee

he had the right to retain possession until his lien was satisfied. 36 Ark. 276; 94 Kan. 38, 41-2.

The attachment did not displace nor supersede the lien of plaintiff. 15 Ark. 343-4; 58 *Id.* 252; 24 S. W. 496. Neither the attaching creditor nor the purchaser takes any greater interest than the debtor himself had. 24 S. W. 499.

The statute vests in the chancery court jurisdiction of the estate of insolvent corporations and may be instituted by any creditor. Kirby's Digest, § 950. Section 949 gives preference to wages of laborers and employees and the only limitation on the power of the chancery court is that complaint must be made within ninety days. Kirby's Digest, § 951. This would include an attachment, but such attachment would not displace the lien of the plaintiff, the laborer. 58 Ark. 252.

The lien of plaintiff was enforcible in equity. 101 Ill. App. 13; 178 Ill. 107; 68 Am. St. 290; 182 Ala. 291; Ann. Cas. 1915, 758.

Where one has a lien on property which is taken, and said property wrongfully converted by another with notice of such lien, the lien attaches to the proceeds of the property. 36 Ark. 575; 72 *Id.* 132; 92 *Id.* 248; 126 *Id.* 281. Wherever a lien is to be enforced, the right of the parties to resort to equity is unquestioned. 33 Ark. 233; 38 *Id.* 387. Equity has jurisdiction to determine the priority of liens between creditors (59 Miss. 327; 53 Ark. 140; 47 *Id.* 41), and will always enforce a lien or declare priorities. 92 Ark. 248; 72 *Id.* 132. See, also, 72 Ark. 132; 36 *Id.* 575.

Whatever may have been the rule prior to act April 14, 1883 (§§ 949-52, Kirby's Digest), see 52 Ark. 426; 12 S. W. 876. The chancery court is expressly given jurisdiction by this statute, in a suit by a creditor to declare priority of all the claims of creditors against the corporation, and the court erred in sustaining the demurrer of Bloyed and Flippin to the complaint.

2. Under §§ 949-52, Kirby's Digest, any creditor has the right to institute proceedings to wind up the affairs of an insolvent corporation and distribute its assets and the filing of the complaint vested in the chancery court exclusive jurisdiction over the estate of the Bankers Mining Company, and Bloyed and Flippin, or any other person who had assets of the insolvent corporation or claimed to be a creditor, were proper parties, and when chancery took jurisdiction for any purpose it took for all purposes. 14 Ark. 50; 30 *Id.* 278; 114 *Id.* 206. Its receiver became custodian for all purposes of all the assets of the insolvent corporation. Cole was a creditor and had a lien, and there is no conflict of jurisdiction between the equity court and the law court. The jurisdiction is well defined, and both subject to the same Supreme Court. A conflict of jurisdiction is not possible. 56 Ala. 138-143; 91 Pac. 276. If our construction of Kirby's Digest, §§ 949, 952, is correct, then the action of the chancery court in declining to direct its receiver to take the custody and control of the assets of the Bankers Mining Company and in dismissing Bloyed and the sheriff from the case was erroneous. The complaint stated a cause of action, and it was error to decline to take jurisdiction and in sustaining the demurrer of Bloyed and the sheriff.

If the complaint in the chancery case did state a cause of action within its jurisdiction, the ruling of chancellor was erroneous; if it did not, then the proceeding was not a bar, and the ruling in the law case was error and must be reversed.

*Williams & Seawell,* for appellee.

1. The rights of the parties to this litigation were detemined by the decree of the chancery court. The same facts were pleaded as those set up in the intervention in the circuit court. If the complaint in chancery court stated a cause of action against the sheriff or Bloyed, appellant should have moved to transfer to the law court. When appellant refused to plead further and the court dismissed his complaint, his rights were adju-

dicated and there was error; his remedy was by appeal. He can not abandon his equity case and proceed in another court. 63 Ark. 254; 99 *Id.* 433. The plea of former adjudication was properly sustained.

2. Appellant had no lien on the property of the insolvent corporation, under Kirby's Digest, §§ 949-952. This statute does not displace liens on property of insolvent corporations, but the receiver takes the property subject to all valid liens at the time of his appointment. 97 Ark. 534.

Bloyed's attachment was a lien from the date of its levy, October 7, 1919. C. & M. Digest, § 512. After the expiration of ninety days the lien of the attachment became fixed absolutely, and it was not within the power of the chancery court to vacate it or set it aside. 67 Ark. 11; 109 *Id.* 584; 114 *Id.* 26.

3. Appellant did not have a lien by virtue of § 5393, Kirby's Digest. 50 Ark. 244; 54 *Id.* 522; 69 *Id.* 23; 71 *Id.* 334. The decree of the chancery court was an adjudication of all appellant's rights and is in accordance with law.

HART, J. (after stating the facts). Cole seeks his relief under sections 1798 to 1800 inclusive of Crawford & Moses' Digest. He was the caretaker at the mine of the Bankers Mining Company, and that company owed him for his services.

Section 1798 of the digest referred to provides that no preferences shall be allowed among creditors of insolvent corporations except for the wages of the laborers and employees.

Section 1799 provides that the procedure for winding up insolvent corporations shall be in the chancery court.

Section 1800 reads as follows: "Every preference obtained or sought to be obtained by any creditor of such corporation, whether by attachment, confession of judgment or otherwise, and every preference sought to be given by such corporation to any of its creditors, in contemplation of insolvency, shall be set aside by the chan-

cery court, and such creditor shall be required to relinquish his preference and accept his *pro rata* share in the distribution of the assets of such corporation; *provided,* no such preference shall be set aside unless complaint thereof be made within ninety days after the same is given or sought to be obtained."

Cole waited too late to file his proceedings in the chancery court to wind up the affairs of the Bankers Mining Company as an insolvent corporation, to obtain a preference under the statute.

The section just quoted provides that every preference obtained by attachment or otherwise shall be set aside by the chancery court; *provided,* that no such preference shall be set aside unless complaint thereof be made within ninety days after the same is given or sought to be obtained. Cole did not comply with the statute. The preference by attachment was completed by a levy on the property of the corporation under the attachment proceedings on the 7th day of October, 1919. Cole did not file his complaint in the chancery court until March 11, 1920. This was longer than the ninety days given him under the statute, and he was barred of his relief. The decree of the chancellor was correct and must be affirmed.

After the decree against him in the chancery court was rendered, Cole filed an intervention in the attachment suit in the circuit court and set up the same state of facts as was shown in the chancery court. The circuit court correctly denied him relief there. The very identical question he sought to have adjudicated in the circuit court had already been adjudicated in the chancery court. Therefore, the judgment in the circuit court must also be affirmed.

## RANDLE v. INTERSTATE GROCER COMPANY.

Opinion delivered February 14, 1921.

1. CONTRACTS—VIOLATION OF BLUE SKY LAW.—Under Crawford & Moses' Digest, §§ 751, 762, 770, making it unlawful for any investment company to sell stocks, bonds or other securities without procuring the Bank Commissioner's approval, and making a violation of the act a misdemeanor, notes given in pursuance of a sale of securities made without the commissioner's approval are void, and can not be validated by a subsequent compliance with the statute.
2. STATE—POLICE POWER.—Under its police power, the State may regulate certain occupations and the terms on which stocks and other securities may be sold.
3. APPEAL AND ERROR—DISMISSAL ON REVERSAL.—Where a case has been fully developed, it will be dismissed on reversing it.

Appeal from Marion Circuit Court; *J. M. Shinn*, Judge; reversed.

STATEMENT OF FACTS.

The Interstate Grocer Company sued J. M. Randle in the circuit court to recover an amount alleged to be due it upon three promissory notes. The plaintiff was a foreign corporation and had not complied with our statutes in regard to the sale of corporate stock by investment companies. The notes in question were given for shares of stock in the plaintiff company. At a later date the plaintiff complied with the statute and secured a certificate authorizing it to sell six hundred shares of its capital stock. It then instituted the present suit.

The case was tried before the court sitting as a jury and judgment was rendered in favor of the plaintiff against the defendant for the amount sued for. The defendant has appealed.

*Williams & Seawell*, for appellant.

A foreign corporation can not legally sell is capital stock in this State until after it has complied with the blue sky law and secured from the State Bank Commissioner a certificate authorizing such a sale. Act No.

242, Acts 1915, §§ 2, 21. The contract and notes are void. 2 Pet. 527; 91 Ark. 69-72; 145 Ark. 61.

*J. H. Black,* for appellee.

The only question here is settled. See 183 S. W. 741; 70 Ark. 525; 77 *Id.* 203.

HART, J. (after stating the facts). It is contended by counsel for the defendant that the judgment against him should be reversed because the contract in question was made unlawful by sections 751 and 762 of Crawford & Moses' Digest.

Section 751 provides, among other things, that every person, corporation, copartnership, company or association, a resident of, or organized in, any other State, shall be known for the purposes of this act as a foreign investment company.

Section 762 provides, among other things, that it shall be unlawful for any investment company, or dealer, or representative, either directly or indirectly, to sell or cause to be sold, offer for sale, take subscription for, or negotiate for the sale in any manner in this State, any contracts, stocks, bonds, or other securities (except as expressly exempt herein) unless and until said bank commissioner has given his approval in accordance with the act.

Section 770 of the digest makes it a misdemeanor to violate the provisions of the act and imposes a fine of not more than $1,000, or imprisonment in the county jail for not more than a year, or by both such fine and imprisonment.

It is sought to uphold the judgment upon the authority of our holding that the failure of a foreign corporation to comply with the requirements of the statute prescribing conditions upon which foreign corporations may enter and do business within the State do not render its contracts void, but only prevents their enforcement by such corporations until compliance with the terms of the statute. *Waxahachie Medicine Co.* v. *Daly,* 122 Ark. 451, and *Buffalo Zinc & Copper Co.* v. *Crump,* 70 Ark. 525.

We do not think that these cases control here. It was within the power of the State to prescribe terms and conditions upon which foreign corporations might do business in this State. The statute under consideration in the cases referred to were dealing with the rights of such corporations to do business in the State at all, and did not make unlawful the business itself.

In the last mentioned case the court said: "The act of February 16 does not expressly prohibit the institution of an action because of a failure to perform any condition, nor does it intend to forever prohibit the maintenance of any action because the plaintiff therein is a foreign corporation, and has not within any particular time complied with its terms. Penalties are imposed on account of past conduct or omissions. The penalties of the act in question are, doubtless, intended to compel an observance of its terms. When that is done, its purpose is accomplished, the condition upon which the right to mtaintain an action depends is performed, and the plaintiff can in the future prosecute it to a final judgment." The same principle enters into the decision of the first mentioned case.

The present case is distinguishable in principle from these cases. It expressly makes it unlawful for every person, corporation, copartnership, or association of any other State to sell stocks, bonds, or other securities in this State unless and until the bank commissioner has given his approval in the manner provided by the act. A subsequent section makes the violation of the act a misdemeanor. Thus it will be seen that it was the intention of the lawmakers, as expressed by the language of the act, to make unlawful, contracts like the one in question, unless the permission to make them was given in accordance with the statute. It is directed against the kind of business to be conducted and is not directed against the persons carrying on the business. This is shown by the fact that it is equally unlawful for persons or copartnerships to carry on such business without the required permission as it is for corporations to do so. The statute

is not directed at the person or corporation doing the act, but at the act done by them. It is intended to regulate the business. Therefore, we are of the opinion that the case is ruled by the principles of law laid down in the case of *Compagionette* v. *McArmick,* 91 Ark. 69. In that case, suit was brought upon a note given for the purchase of a horse known to the seller to have the glanders, and the contract was held void. The statute in that case provided, in effect, that any person who shall sell any horse having the disease known as the glanders should be guilty of a misdemeanor. In discussing the question the court said:

"A sale is illegal where the statute expressly declares it to be so, or where it prohibits its execution; and a sale is equally invalid where the statute only imposes a penalty upon the party for making it. It is not necessary that the statute should expressly declare the contract of sale to be void; but the infliction of a penalty upon what is declared as an offense implies a prohibition of such act, and thereby renders void any contract founded on such act. In this State it is the well settled doctrine that, 'every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void.' "

So here, the statute makes it unlawful for a person, firm or corporation of another State to come into this State and sell stocks without obtaining permission from the Bank Commissioner in accordance with the statute. The plaintiff sold the stock without complying with the statute and thereby rendered the contract void.

Under our bill of rights, all are created equally free and have certain inherent and inalienable rights. It has been well said that the right to follow any of the common occupations of life is an inalienable right. It is equally well settled that the State, under its police power, may regulate certain occupations, and that statutes regulating the terms on which stocks and other securities may be sold in a State are generally held valid. *Standard Home*

*Co.* v. *Davis,* 217 Fed. Rep. 904, and *Ex parte Taylor,* (Fla.) Ann. Cas. 1916 A, p. 701 and case note.

It follows that the judgment must be reversed, and, inasmuch as the case has been fully developed, the cause of action will be dismissed.

SMITH, J., dissents.

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STATE *v.* ST. LOUIS COTTON COMPRESS COMPANY.

Opinion delivered February 14, 1921.

INSURANCE—TAX ON PREMIUMS PAID.—Crawford & Moses' Dig., § 9967, requiring persons, firms or corporations doing business in Arkansas to pay into the treasury a tax of 5 per centum of the gross insurance premiums paid by them on their property in the State to persons or corporations not authorized to do business in this State, is valid in its application to foreign corporations; being referable to the State's power to prescribe the conditions on which such corporations may do business in the State.

Appeal from Pulaski Circuit Court; *A. F. House,* Judge; reversed.

STATEMENT OF FACTS.

Appellant instituted this action in the circuit court against appellee to recover taxes alleged to be due by it to the State of Arkansas on premiums paid for insurance from corporations not authorized to do business in this State.

Appellee is a foreign corporation authorized to do business in this State and operates compress plants in several cities in the State of Arkansas. It owns real estate, warehouses, and compresses at each of the towns in which it does business. Appellee is a corporation organized under the laws of the State of Missouri and in that State entered into contracts of fire insurance with companies not authorized to do business in this State for the insurance of all its property situated in this State. It refused to pay the tax on gross premiums so paid as required by our statute. Hence this lawsuit.

The circuit court rendered judgment in favor of appellees and the case is here on appeal.

*John D. Arbuckle,* Attorney General, and *F. G. Lindsey,* for appellants.

The court erred in overruling plaintiffs' demurrer and dismissing the complaint. Act 159, § 1, Act 1913, p. 676. The statute is mandatory. It is admitted that defendant is a corporation doing business in this State and took out contracts of insurance without complying with our laws and is liable for the tax. Act 1913, p. 676; act 264, § 1, p. 1362; Acts 1917.

*Rose, Hemingway, Cantrell & Loughborough,* for appellee.

The question presented has been settled by decisions of our United States Supreme Court. 165 U. S. 578, 587-9-90; 234 U. S. 149; 239 *Id.* 103; 246 *Id.* 357-373. See, also, 140 Ark. 133.

HART, J. (after stating the facts). Section 9967 of Crawford & Moses' Digest requires fire and other insurance companies authorized to do business in this State, to pay a tax of two per cent per annum on their gross receipts after deducting return premiums and authorized reinsurance. This suit is based upon the provision of the act which, among other things, provides: "That any person, firm or corporation, individual or association doing business in this State securing indemnity contracts or policy of insurance from any person, firm, corporation, association or individual not authorized to do business in this State shall, on or before the first day of March, each year, file with the Auditor of State a sworn affidavit of the amount of premiums paid to such unauthorized persons, firms, associations or corporations, and shall pay into the State treasury a tax of 5 per centum of the gross premiums paid."

It is sought to uphold the decision of the circuit court on the ground that the act is unconstitutional, and to support their contention counsel rely upon the cases

of *Allgeyer* v. *Louisiana,* 165 U. S. 578; *N. Y. Life Insurance Co.* v. *Head,* 234 U. S. 149; *Provident Savings Life Assurance Society* v. *Commonwealth of Kentucky,* 239 U. S. 103, and *New York Life Ins. Co.* v. *Dodge,* 246 U. S. 357.

In *New York Life Ins. Co.* v. *Head, supra,* a resident of New Mexico, while in the State of Missouri, borrowed from a New York life insurance company, a foreign corporation, on a policy issued to him a sum of money and subsequently defaulted in the payment of the interest on the loan and the premium on the insurance policy. The company settled under the terms of the loan agreement and the laws of the State of New York. The beneficiary sued the company for the full amount of the policy, basing her right to relief under a statute of Missouri regulating loans on policies of life insurance by the company issuing the policy. The Supreme Court of the United States held that a State may not extend the operation of its statutes beyond its borders into the jurisdiction of other States so as to destroy and impair the rights of persons not its citizens to make a contract not operative within its jurisdiction and lawful in the State where made.

In *Provident Savings Life Assurance Society* v. *Commonwealth of Kentucky,* 239 U. S. 103, a suit was brought by the State against the insurance company to recover a tax on premium receipts under the State statute. The company ceased to write insurance in the State, but continued to collect premiums on business already written but refused to pay the tax on the premiums. The court said that the continuance of insurance contracts on the lives of residents of the State already written by the company does not depend upon the consent of the State; nor has the State the power to treat the mere continuance of the obligation of existing policies of insurance held by residents as the transaction of local business justifying the imposition of a privilege tax in the absence of actual conduct of business within the limits of the State. Therefore, the court held that the

imposition of taxes on premiums collected on policies on residents of Kentucky in pursuance of the statutes of that State after the company had ceased to do business therein, to be an unconstitutional exercise of power under the due process provision of the Fourteenth Amendment.

In *New York Life Ins. Co.* v. *Dodge,* 246 U. S. 357, the court held that a statute of the State of Missouri governing a life insurance contract made locally between a resident citizen and a locally licensed foreign corporation, and prescribing how the net value of the policy should be applied to avoid forfeiture if the premium was not paid, could not be extended so as to prevent the policy holder, while present in such State, and the company from making and carrying out a subsequent independent agreement in the company's home State, pursuant to its laws, whereby the policy is pledged as security for a loan and afterward canceled in satisfaction of the indebtedness. The decision was placed upon the ground that to so hold would be an invasion of the citizen's liberty of contract under the Fourteenth Amendment and could not be sustained.

These cases would be applicable to the present case if the statute had required the tax in question to be paid by the foreign insurance company. No such attempt is made by the statute, and we do not regard the cases as controlling under the facts as disclosed by the record.

In *Allgeyer* v. *Louisiana,* 165 U. S. 578, a citizen and resident of Louisiana made in New York, with a corporation doing business there, a contract for marine insurance to cover cotton to be purchased and shipped. Allgeyer mailed in Louisiana a letter addressed to New York City, reporting the shipments as required by the contract. Under the Louisiana statutue it was a crime for any one to do any act to effect insurance in any marine insurance company which had not established a place of business within the State and appointed an agent upon whom process might be served. The insurance company had not been authorized to do business in Louisiana and

did no business there. Allgeyer was convicted of mailing the letter, and the Supreme Court of the United States held that the statute was unconstitutional as construed by the State court because it denied to citizens of the United States rights guaranteed by the Fourteenth Amendment.

We do not think that case furnishes any support to the contention of counsel for appellee. The court said that the statute in question was not due process of law because it prohibited an act which, under the Federal Constitution, Allgeyer had a right to perform. The court further said, however, that this did not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police power as it may seem proper. No attempt is made under the present statute to interfere with the freedom of contract between the appellee and foreign insurance companies which are not carrying on business in this State. Appellee had a perfect right to make the contract of insurance without the State of Arkansas. Its right to do so is not affected or questioned by this decision. The question presented for our determination is whether or not the statute requiring persons, firms, or corporations doing business in this State to pay into the State treasury a tax of 5 per cent. of the gross premiums paid by it to corporations or associations not authorized to do business in this State, for policies of insurance on its property in this State, is a valid one. Appellee is a foreign corporation, and in any event the statute is valid insofar as it is concerned. The Legislature has complete control over corporations and can create them or permit them to do business in this State upon such terms as it deems proper. The Legislature had the power to prescribe terms upon which foreign corporations might do business in this State as well as domestic corporations which it brings into existence, and therefore had the power to lay this imposition upon appellee as an occupation tax. *State ex rel.* v. *N. Y, Life Ins. Co.,* 119 Ark. 314.

The judgment of the circuit court holding the statute unconstitutional was wrong. Therefore the judgment must be reversed, and the cause will be remanded for further proceedings according to law.

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DENTON v. BERRYVILLE AUTO SERVICE COMPANY.

Opinion delivered February 14, 1921.

1. LIENS—INNOCENT PURCHASER.—In an action by an auto repair company to enforce a lien on a car for supplies and repairs, under General Acts 1919, p. 123, evidence *held* to establish that defendant claiming to have purchased the car was not an innocent purchaser thereof.
2. ESTOPPEL TO DENY OWNERSHIP.—Where the owner of an automobile suffered plaintiff, an auto repair company, to extend credit to a third person in possession of the car for accessories to and repairs on the car, upon the assumption that the supplies and repairs would be secured by a lien on the car, under General Acts 1919, p. 123, the owner was estopped to deny the third person's ownership, so far as the lien is concerned.

Appeal from Carroll Chancery Court, Eastern District; *Ben F. McMahan,* Chancellor; affirmed.

*Johnson & Simpson,* for appellant.

The chancellor erred in declaring a lien in favor of appellees on either of the automobiles in controversy. The evidence fully sustains appellant in his contention that no work or labor was ever done on either of the automobiles by appellees or that appellees by their work or labor ever at any time placed or put any repairs, appliances or accessories on either car, and the clear preponderance of the evidence is that appellant had no knowledge of Cole's indebtedness to appellees. The evidence was insufficient under act No. 140, Acts 1919, § 1, to authorize a judgment in this case. Appellees had no lien under the act or any other act, and the judgment is against the clear preponderance of the evidence. The lien given by the act can not take precedence over a *bona fide* purchaser of the vehicle.

*Andrew J. Russell,* for appellees.

The act No. 140, Acts 1919, authorizes a suit of this nature and gives a lien for all accessories furnished and the evidence sustains the decree. Denton certainly knew what Cole was doing and is bound. Section 1 of the act dissipates appellant's theory, and the evidence sustains the chancellor's findings.

SMITH, J. This is an appeal from a decree of the court below rendering judgment against Hugh Cole for certain automobile supplies and repairs and declaring a lien for the amount thereof on two automobiles now claimed by W. D. Denton. Denton alone has appealed.

The account sued on covered accessories for and repairs on two Ford touring cars, all of which items were charged on the 8th and 9th of September, 1919, except an item of $3.05 which was charged on September 11, and another item of $1.50 which was charged on September 12. The total amount of the account was $134.73.

The items were all furnished and charged to Cole, who does not dispute their correctness; but he says he only owned one of the cars, and that he sold that car, together with the accessories, to Denton on September 12, and that the sale was on a credit of thirty days, whereas the suit was brought before the expiration of that time. Denton testified that he only bought one car from Cole, and that he bought that one without any knowledge of the claim which the plaintiff seeks to enforce, and that he was the sole owner of the other car long before the indebtedness sued on was incurred.

The testimony of Cole and Denton makes a complete defense to the demand sued on. But we can not say that the chancellor's finding against them is clearly against the preponderance of the testimony.

Both Cole and Denton operated jitneys, and Cole was the admitted owner of one of the cars in controversy and the ostensible—if not the actual—owner of the other. Denton claims to have made his purchase on or about September 12 of the Cole car and the accessories on and in his own car, yet all the items of the account bear

about that date. Cole represented himself to be the owner of both cars, and obtained the credit which was extended on the faith of that reprsentation, and Denton must have known that fact.

Seventy-five dollars of the account was for three casings and three inner tubes, which Hanbury, who represented appellee, testified he saw on the car which Denton claimed as his own, and which he did not buy from Cole. Denton admitted these accessories were in and on his car, but he testified that he bought them from Cole and paid for them without notice of any claim on the part of appellee. But his answers to the questions asked him on cross-examination justified the court in diregarding that testimony. He claimed to have taken these accessories from Cole in satisfaction of a debt which Cole owed him at the time; but when asked what Cole then owed him he did not remember, and when asked about how much was still due him answered, "I could not say." He was equally indefinite about the terms of the purchase of the car which he claimed to have bought from Cole.

Other questions and answers by Denton are as follows:

Q. How much difference did you pay him between what he owed you and the $375, the price of the car?

A. We didn't make that kind of a trade. I was to give $375 for the car and nothing was said about what he owed me.

Q. Did you give him $375 for the car?

A. No.

Q. How much did you give him for the car?

A. I paid him $150 out of the $375.

Q. Have you paid him the balance due on the car?

A. No.

Q. Did you pay him $75 in cash for supplies, or did you give him credit on what he owed you?

A. Part credit and part cash—I don't remember the amounts of each.

Q. Can you give the court some idea of the respective amounts?

A. No.

Q. How much do you owe Mr. Cole at this time?

A. I don't know.

Q. Can you give an approximate estimate of the amount?

A. No.

Q. Did you own any car other than the Stanhope car at the time you purchased the three casings and three inner tubes from Hugh Cole?

A. Owned a half interest in one.

Q. Where was the car at that time?

A. Okmulgee, Oklahoma.

Q. Did you use those supplies or any part of them on that car; if so, state what you did use of them?

A. Three casings and maybe one inner tube—I am not sure.

Q. Were these the casings you purchased from Hugh Cole?

A. Yes.

These essential details were left in as much doubt by Cole as by Denton.

The proceedings to enforce the lien here declared on the two automobiles was authorized by act 140 of the Acts of 1919 (General Acts 1919, p. 123). This statute gives all dealers in automobile accessories, and to all repair men who perform work or labor on any automobile, a lien on the automobile for which such accessories were furnished or repair work done for the value thereof. The act provides that the lien shall not take precedence over a *bona fide* purchaser for value, without notice, either actual or constructive, of the claim of a lien. The act provides for constructive notice of a claim for a lien.

We think Denton knew of the transaction between Cole and appellee, and was not, therefore, an innocent purchaser of the car which he claims to have bought from Cole. We are also of opinion that Denton must have known that Cole had obtained credit for the $75

worth of accessories which were in and on the Denton car upon the assumption by appellee that Cole was the owner of the Denton car. He, therefore, suffered appellee to extend this credit upon the assumption that the supplies furnished would be secured by a lien on the car for which they were bought, and Denton is, therefore, estopped from denying Cole's ownership of the Denton car so far as enforcing the lien against it for the accessories found in and on it is concerned. *Miller* v. *Wilson,* 56 Ark. 360; *Turner* v. *Watkins,* 31 Ark. 429; *Franklin* v. *Meyer,* 36 Ark. 96; *Jowers* v. *Phelps,* 33 Ark. 465; *Geren* v. *Caldarera,* 99 Ark. 260; *Fagan* v. *Stuttgart Normal Institute,* 91 Ark. 141.

Judgment affirmed.

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## GILSTRAP *v.* STAHL.

Opinion delivered February 14, 1921.

VENDOR AND PURCHASER—TIME NOT OF ESSENCE WHEN.—Where a vendor agreed to furnish an abstract showing a good title, and, upon a defect being discovered which would require an order of the probate court to correct, a supplemental agreement extended the time to furnish such abstract of title until May 1, it being deemed that the order could be had at the April term of such court, time was not of the essence of the contrct, in the absence of a stipulation to that effect, and where the April term of the court was not held and the order was obtained in May following, there was substantial performance, and the purchaser could not recover the advance payment.

Appeal from Sevier Circuit Court; *J. S. Steel,* Judge; reversed.

*B. E. Isbell,* for appellant.

The court erred in sustaining the demurrer. The only question which the demurrer presents is the sufficiency of the answer as a legal defense to the complaint, and it is sufficient and sustained by many decisions. In determining its sufficiency every allegation therein made, together with every inference which is reasonably deducible therefrom, must be considered. 102 Ark. 294; 93 *Id.*

374; 91 *Id.* 404; 70 *Id.* 163; 71 *Id.* 564; 75 *Id.* 66; 77 *Id.* 354; 110 *Id.* 139; 116 *Id.* 506; 52 *Id.* 378.

The answer is a complete defense to the plaintiff's complaint, and the trial court erred in holding that it is not.

The exhibits may not assist the demurrer. This is a suit at law, and the exhibits can not be looked to to aid the complaint. The presumption on demurrer is that the allegations of the answer are true, and, the complaint thus standing alone, a good defense was interposed, and the demurrer should have been overruled. 53 Ark. 478; 33 *Id.* 544; 37 *Id.* 543; 34 *Id.* 536; 133 *Id.* 190. Nor does the fact that the answer admits the execution of the contract avail plaintiff anything. 33 Ark. 597. Even if the exhibits could be used to aid the demurrer, they could give no assistance in this case, for May 1 is not the essence of time of the contract, but the time limit is the date upon which the probate court finally approved the guardian's sale. In arriving at the essence of time in a contract, the conditions of the parties and all the circumstances under which the contract is made should be taken into consideration. 105 Ark. 629; 134 U. S. 68. The nature of the transaction and the avowed object of the purchaser and seller could hardly be ascertained without a trial upon the merits of the issue raised by the answer.

Defendant should be protected against the court's failure. Both defendants did all in their power to perfect the title and within the time prescribed; they dealt openly and in good faith. Defendants should not suffer because the term of the court lapsed. The citizen is bound by the courts and their action; he can not control them. At most, he can only order his affairs and make his contracts in keeping with their holdings and the statutes which govern their procedure. Defendants have done this, and the answer so alleges and its truthfulness can not be here attacked. The order sustaining the demurrer and the judgment should be reversed.

*Abe Collins,* for appellee.

The language of the contract is plain, simple, certain and unambiguous; there is no room for construction. The intention of the parties is plain and easily ascertained from the language used, and they are bound by it. May 1 was the time limit; if not, why was not a different date written therein? Courts can neither supply nor rearrange words and sentences in an unambiguous contract, but must construe it as made. 105 Ark. 213. Where the language is clear and unambiguous, the acts of the parties under it can not be considered in construing it. 56 Ark. 414. It is only where the contract is ambiguous that the courts can resort to extraneous circumstances to ascertain the intention of parties. 28 Ark. 282; 52 *Id.* 65; 55 *Id.* 18; 90 *Id.* 272; 6 R. C. L. 841, § 231. Where a contract evidences care in its preparation, it is presumed that its words were employed deliberately and with intention. It is not the province of courts to alter a contract by consideration or make a new one for parties; its duty is confined to the interpretation of the contract as made by the parties themselves. 13 C. J. 524-5, § 485. The question here is whether or not, admitting all the allegations of the answer, it amounted to a legal defense. We submit that the answer does not amount to a legal defense for the reasons stated *supra.* The contract was unambiguous, and its construction a question of law for the court. 101 Ark. 213; 79 *Id.* 172; 75 *Id.* 55; 67 *Id.* 553; 112 *Id.* 165. Hence the court did not err by setting the case by sustaining the demurrer. Antecedent propositions, correspondence and all prior writings and oral statements and representations were merged into the written contract. 104 Ark. 475. There is no error.

SMITH, J. Appellee, plaintiff below, filed a complaint in the Sevier Circuit Court, in which he alleged that on December 6, 1919, he entered into a contract with the defendant, Gilstrap, who was acting as agent for his codefendant, Mrs. Cox, by the terms of which he had bought from Gilstrap, as the agent of Mrs. Cox, two lots in the

town of De Queen, for the consideration of $2,575, of which $500 was cash in hand paid to said Gilstrap for Mrs. Cox. That it was provided in the contract of sale that an abstract of title would be furnished and submitted to plaintiff for his inspection within thirty days, and that the cash payment of $500 was to be refunded in the event it should be impossible for Mrs. Cox to make a good title to said lands. A copy of that contract was made Exhibit A to the complaint. That on February 19, 1920, the said Mrs. Cox had wholly failed to submit to plaintiff the abstract of title in accordance with said agreement, and in order to give her an opportunity to do so plaintiff entered into a new contract with defendant—made Exhibit B to the complaint—by which time was extended to May 1, 1920, to furnish an abstract, with the opinion of B. E. Isbell, showing a good title in Mrs. Cox, with the proviso that upon failure so to do the $500 should be returned to plaintiff. It was alleged that the abstract and opinion were not furnished within the time limited, and the money had not been returned, and there was a prayer for judgment for the $500.

The answer admitted the execution of a contract for the sale of the lots for the price and upon the terms set out in the complaint; but it recites the fact to be that the abstract was furnished to plaintiff's attorney, who, upon an examination thereof, concluded that it would be necessary to obtain a certain order from the probate court, and the plaintiff was advised that this order could not be obtained before the second Monday in April, when the court convened, and the plaintiff thereupon agreed that the necessary time should be given to obtain the order, and a supplemental agreement was then entered into, which provided that Mrs. Cox should have until May 1, 1920, in which to obtain the necessary order of court, it being the agreement and understanding of the parties that the order should be obtained at the earliest date consistent with the law and the procedure of the court, and that the supplemental contract was entered into for the sole purpose of giving Mrs. Cox an opportu-

nity to obtain that order. That the April term of said court was not held, and was allowed by the judge thereof to lapse, but a session of the court was later held on the ..... day of May under proclamation convening a special term of court. That the greatest diligence was used in perfecting the title, and that the title has been perfected and approved by the examiner. Wherefore it was prayed that plaintiff take nothing by his suit.

A demurrer to the answer was sustained, and upon defendants refusing to plead further judgment was rendered for the $500, and this appeal is from that order.

The suit is at law, and the allegations of the answer are not, therefore, controlled by the exhibits. But it is insisted that the recitals of the exhibits have been incorporated into the answer and have become a part of it, and that it appears from the recitals of the answer that May 1 was fixed as the time limit within which an abstract showing a good title should be delivered, and that the abstract and opinion approving the title were not furnished by that time. In other words, the question to be decided is whether the parties have made time of the essence of the contract.

In the case of *Nakdimen* v. *Brazil,* 137 Ark. 188, we quoted from 9 Cyc., pp. 604-5, the following statement of the law: "In determining whether stipulations as to the time of performing a contract are conditions precedent, the court seeks simply to discover what the parties really intended; and if time appears, on a fair construction of the language and under the circumstances, to be of the essence of the contract, the stipulations in regard to it will be held conditions precedent. * * * Time is of the essence of a contract when it is a material object to which the parties looked in the first conceptions of it."

Here the parties amended their original contract by extending to May 1 the time for furnishing abstract and for obtaining the opinion of Mr. Isbell. It does not contravene any rule of evidence to show the purpose of the parties in changing the date upon which the abstract and opinion were to be furnished. In interpreting a con-

tract it is proper for the court to consider the situation of the parties with reference to the subject-matter about which they have contracted, and it was, therefore, proper to show that the purpose of the extension was to afford an opportunity to procure the necessary court order. These orders are obtainable only by following the procedure prescribed by law; and while, under the allegations of the answer, it was the intent of the parties that the utmost diligence should be used in applying for and procuring this order, it was necessarily in their contemplation that the thing contracted for could only be obtained in the orderly processes of the law, and the answer alleges that it was thought that May 1 would afford reasonable time to obtain the order which made the extension of time necessary. In contemplation of the parties the thing really contracted for was expedition and diligence in obtaining the order. The contract does not recite that time was of the essence of the contract; nor is that inference necessarily deducible from the language employed; and, when this language is read in the light of the situation of the parties and the subject-matter with reference to which they were contracting, we conclude that the parties had no intention to make time of the essence of the contract. They were contracting in regard to the approval of the title to real estate, and it was known, when the supplemental contract extending the time was made, that the attorney to whom the abstract had been submitted had found a defect which, in his opinion, could be remedied only by an order of the court, and time for that purpose was granted, and this was the purpose of the amendment to the original contract. The contract between the parties was not a mere option to buy which might or might not be exercised. *Ind. & Ark. Lbr. Co.* v. *Pharr,* 82 Ark. 573. It was one for the sale of land to be consummated upon the approval of the title.

We think the recitals of the answer set out above show a substantial compliance with the contract, which entitles the defendants to demand that plaintiff proceed with the discharge of the terms of purchase before de-

manding the return of the money which was to be treated as an initial payment if the title was approved. *Mays* v. *Blair,* 120 Ark. 69; *Smith* v. *Berkau,* 123 Ark. 90; *Feibelman* v. *Hill,* 141 Ark. 297; *Butler* v. *Colson,* 99 Ark. 340; *Atkins* v. *Rison,* 25 Ark. 138; *Evans* v. *Ozark Orchard Co.,* 103 Ark. 212.

We conclude that the demurrer to the answer should have been overruled, and, for the error in sustaining it and in rendering judgment on the complaint, that judgment will be reversed and the cause remanded with directions to overrule the demurrer.

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## BROCK *v.* TURNER.

Opinion delivered February 14, 1921.

1. WILLS—PRESUMPTION AGAINST PARTIAL INTESTACY.—The presumption against partial intestacy, though not controlling, must always be taken into account when the language employed in a will is so ambiguous as to require construction.
2. WILLS—AFTER-ACQUIRED REAL ESTATE.—A wife's will, leaving to her husband "all of my personal property and real estate as follows, towit, describing a certain tract, also all chattel property," etc., *held* to apply to real estate acquired after the execution of the will.
3. WILLS—AFTER-ACQUIRED PROPERTY.—Where a will manifests a purpose to dispose of after-acquired property, such effect will be given to it.

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

*Minor Pipkin,* for appellants.

The will does not show an intent on the part of the testatrix to give her husband, J. F. Marshall, or any one else the land acquired after executing the will. The intention as shown by the words used should be carried out. 90 Ark. 152. But construction is unnecessary here, as there is no ambiguity, nor inconsistent or repugnant clauses. 124 Ark. 548. The testatrix had in mind no other land than that described in the will, and only in-

tended a gift of lands then owned by her and no other. 68 Conn. 177. It is clear the testatrix died intestate as to the after-acquired lands. It was her intent to devise only the lands described in the will and this intent should be effectuated. 116 Ark. 328.

The presumption against partial intestacy is not applicable here. 111 Ark. 54; Page on Wills 545; 142 Ill. 214.

*Norwood & Alley,* for appellees.

The will shows an intent to dispose of all the property of which she died seized and to make her husband the sole beneficiary and appellees holding under him are the legal owners, and the lower court so held and properly.

The will should be construed to cover after-acquired property. It was the intention to dispose of the whole estate existing at time of death. 51 Ark. 61.

The presumption is against partial intestacy. 51 Ark. 61; 90 *Id.* 152; 104 *Id.* 448; 115 *Id.* 9. The words "the remainder and residue of my money" in a will made by one who had no real estate at the time will pass after-acquired realty where the will shows an intent not to die intestate and to exclude the heirs except as they were given legacies. 11 L. R. A. 767. This case is not like 111 Ark. 54.

The purpose of construction of a will is to ascertain the intention of the testator from the language used, and when ascertained, it must prevail. 104 Ark. 445. There was no children, and it is clear she intended to leave what she had to her husband, and the court so held.

SMITH, J. The decision of this case turns upon the construction of the following will:

"I give, devise and bequeath to my beloved husband, John F. Marshall, all of my personal property and real estate, as follows, towit: Forty acres, being the southeast quarter of the northwest quarter of section eleven (11), township four (4), range 32 west, containing sixty acres, more or less. Also all chattel property

of any kind, including money on hand, notes, household goods, etc. And if there should hereafter be any legal heirs of any of this, my estate, then and in that event it is my will and testament that all such may be paid the sum of one dollar in money to each."

The will was executed by Mrs. Marshall, the testatrix, on February 1, 1908. On September 2, 1909, she acquired the real estate which forms the subject-matter of the litigation, and after her death, February 1, 1913, her brothers and sisters and the children of certain brothers and sisters claimed the property which she had acquired subsequent to the execution of the will as her heirs at law. Did the property acquired after the execution of the will pass under it?

We answer the question in the affirmative. In the first place, there is a presumption against partial intestacy. Of course, no controlling effect is to be given to this presumption, but it is one which must always be taken into account when the language employed in a will is sufficiently ambiguous to require the application of rules of construction in extracting its meaning.

The will devises "all of my personal property and real estate." It is apparent that the adjective "all" modifies both classes of property—the real estate as well as the personal property. The sentence immediately following the one which undertakes a specific description of all the land then owned by the testatrix undertakes a description of the personal property. Its language is: "Also all chattel property of any kind, including money on hand, notes, household goods, etc." The phrase "on hand" referred, of course, to the time of death. Manifestly, there was no purpose to devise specific pieces of money owned by the testatrix at the time of the execution of the will; nor is it to be believed that she did not intend to collect the notes then due her but meant to keep them for the benefit of her husband at her death.

The will, of course, was made in contemplation of death, and the property disposed of was that "on hand" when that event occurred. No other construction of the

will appears possible so far as the personal property is concerned; and we think the testatrix made no distinction between her real estate and her personal property in this respect.

We think this construction of the will is reinforced by the concluding sentence thereof. The testatrix knew that she had brothers and sisters who might survive her or be themselves survived by their own descendants. She referred to them as a class—as they will exist at the time of her death—and she designates the part they each and all of them are to have of "my estate." The phrase "my estate" as certainly comprehends real estate as it does personal property, and the part of that estate given to each of these heirs is "the sum of one dollar in money to each."

We conclude, therefore, that it was the purpose of the testatrix to dispose of the estate which she might own at the time of her death; and when a will manifests that purpose, it includes after-acquired property of which the testator or testatrix dies seized and possessed. *Patty* v. *Goolsby,* 51 Ark. 61; *Galloway* v. *Darby,* 105 Ark. 558.

The court below so construed the will and entered judgment in accordance with that construction; and that judgment is therefore affirmed.

McCULLOCH, C. J. (dissenting). I think the majority is giving too much force to the presumption against partial intestacy, and in so doing have disregarded and overturned the express language of the will of the testator. We have recognized the force of that rule in many of our decisions, but have usually qualified the statement of it by saying that the presumption of partial intestacy does not arise where "such intention clearly appears from the language used in the instrument." *Galloway* v. *Darby,* 105 Ark. 558; *Webb* v. *Webb,* 111 Ark. 54.

In the present case the language of the will unmistakably showed what the intention of the testator was. He willed all the property that he owned at that time,

and it is manifest that he had no intention of willing anything else. He described the particular property that he intended to convey, and that was all he owned at that time. He did not own the property now in controversy.

In interpreting the language of the will for the purpose of ascertaining the intention of the testator we should treat it as having spoken as of the date of the execution of the will. *Webb* v. *Webb, supra.* At that time the land in controversy was not owned by the testator; and, since the language used applied only to specific property which he then owned, there is no room to apply the doctrine of presumption against partial intestacy. Nor should we give any additional force to the presumption by reason of the fact that the heirs were cut off with a nominal legacy. That only shows that, out of the property sought to be conveyed under the will, his intention was to limit the bequest to the heirs to a nominal one. It seems to me to be that the effect of the court's decision in this case is to make a will for the testator which he did not see fit to make for himself—that is, to include after-acquired property which the testator evidently did not have in mind when he executed the will, and did not use appropriate language to convey.

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## HAINES v. RUMPH.

Opinion delivered February 14, 1921.

1. PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S UNAUTHORIZED ACT.—Before one can be held to have ratified any unauthorized act of one who assumes to be his agent, the principal must have knowledge of all the material facts upon which such agency is predicated; and ignorance of such facts renders the alleged ratification ineffectul and invalid.
2. PRINCIPAL AND AGENT—RATIFICATION OF UNAUTHORIZED LAND SALE.—In order to ratify an unauthorized sale of their land by an agent, the principals must know the consideration, terms and conditions of sale.
3. PRINCIPAL AND AGENT—RATIFICATION BY EXECUTION OF DEED.—Principals will be held to have ratified an unauthorized sale of

their land by an agent where they signed and acknowledged a deed with full knowledge of the consideration, terms and conditions of the sale.

4. PRINCIPAL AND AGENT—WITHDRAWAL OF RATIFICATION.—Principals who have ratified their agent's unauthorized sale of land can not withdraw such ratification upon discovering that the land had increased in value on account of oil developments.

5. SPECIFIC PERFORMANCE—DIRECTING ATTORNEY TO DELIVER DEED.—Where grantors delivered a deed to attorneys to be delivered to the grantees, and one of the grantors, who was not made a party to the suit, directed the attorneys not to deliver the deed until certain conditions were performed, delivery of the deed by such attorneys will not be compelled where the stipulated conditions were not performed.

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

*Thomas W. Hardy* and *Mehaffy, Donham & Mehaffy,* for appellants.

Plaintiffs to be entitled to recover would have to show either that Haines with whom it was claimed a contract was made and to whom $25 was paid, had authority to bind them in the transaction, or that Haines ratified the transaction after full knowledge of the facts; and the evidence is insufficient to sustain the findings of the chancellor on either of these points. 105 Ark. 446; 53 *Id.* 208; 124 *Id.* 360; 64 *Id.* 217; 92 *Id.* 315. Ratification with full knowledge is not shown. 55 Ark. 240; 64 *Id.* 217; 74 *Id.* 557; 21 R. C. L. 922-8.

The parties signed the deed without a full knowledge of the facts, and there was no ratification, and there was no delivery of the deed. 24 Ark. 244. Delivery was necessary, and there was none. 8 R. C. L., § 53; *Ib.,* § 57.

*Powell & Smead,* for appellees.

1. The evidence sustains the findings of the chancellor. If there was either a sufficient delivery of the deed so as to pass title, or if there was a ratification of the contract by G. L. Haines and Grace Tannehill, the decree is correct.

2. There was certainly a sufficient delivery of the deed. 77 Ark. 89; 100 *Id.* 127; 123 *Id.* 601, and the evidence shows ratification with full knowledge. 55 Ark. 241; 90 S. W. 737.

HUMPHREYS, J. This suit was instituted by appellees against appellants in the Ouachita Chancery Court to enforce a contract executed on the 11th day of December, 1919, between appellant, W. S. Haines, and appellees, for the sale and purchase of certain lands in said county, for and in consideration of the sum of $2,000, $25 of which sum was paid in cash at the time, the balance to be paid when the deed was executed and delivered. It was alleged that W. S. Haines represented himself, his brother, G. L. Haines, and his sister, Mrs. Grace Tannehill, in the transaction, and, that, pursuant to said contract, the said W. S. Haines, G. L. Haines, Laura Haines, his wife, and Mrs. Grace Tannehill, executed a deed conveying said real estate to the appellees and delivered same to Gaughan & Sifford, a firm of attorneys in Camden, for appellees, upon the payment of the consideration; that said appellees offered to pay the consideration to Gaughan & Sifford, who refused to accept same; that they will return the deed to the grantors unless enjoined from doing so. Appellees tendered the balance of the purchase money into court, prayed for a restraining order against appellants from encumbering or transferring said real estate to others, and for a mandatory injunction against Gaughan & Sifford, commanding them to deliver the deed to appellees, and for all other relief to which they might be entitled.

Gaughan & Sifford filed answer, admitting that the deed was in their possession, having received same through the mail from Roy L. Haines, who resided in Gloster, Mississippi, with instructions not to deliver it until appellees paid them $500 for him and until he received his share of the personal property in the estate of his grandmother, Cora J. Haines, deceased; that they would continue to hold the deed subject to the orders of the court.

Appellants interposed the defense that W. S. Haines, in making the alleged contract for the sale of said real estate, was without authority to represent G. L. Haines, his brother, or Mrs. Grace Tannehill, his sister, and that neither, after obtaining full knowledge of the facts of the trade, by act or word ratified said contract; that, before they obtained knowledge of the facts of the trade, they executed the deed in question, but, before same was delivered, they recalled it. Their prayer was for a dismissal of appellees' bill for the want of equity.

The cause was submitted to the court upon the pleadings and evidence, which resulted in a decree commanding Gaughan & Sifford to deliver the deed in question to appellee, upon their payment to the clerk of the court of $1,975, the balance of the purchase money, which sum should be equally divided between W. S. Haines, G. L. Haines and Mrs. Grace Tannehill after the administration upon the estate of Cora J. Haines, deceased, with the will annexed, should be closed and all bequests under the will and probated debts against the estate should be paid.

The testimony offered in behalf of appellees was, in substance, to the effect that W. S. Haines, claiming to represent himself and the other heirs of Cora J. Haines, deceased, sold the land in question to appellees for $2,000, $25 of which sum they paid to him in cash, the balance to be paid when the deed for said lands was delivered; that the following receipt was given by him for the cash payment: "Camden, Arkansas. 12-11-1919. Received of G. S. Rumph and H. B. Lide, $25 as part payment on our home place, south part of city of Camden, known as the Joel Haines place, consisting of about 30 acres, more or less, and the consideration of the whole amount is to be $2,000 and all taxes for year 1919 to be paid by us, Haines heirs. (Signed) W. S. Haines." That, at the time, it was understood Roy L. Haines owned an interest in the real estate; that, pursuant to the agreement, a deed was executed by appellants and sent to the firm of Gaughan & Sifford in Camden for delivery to them;

that, some time after the deed was made, W. S. Haines requested them to take back the $25 and call the trade off; that they refused, and Haines then said he was going to call the trade off anyhow and threw the $25 down in the office, which was picked up by Joe Terrell, put in an envelope with Mr. Haines' name on it and put in the safe; that they refused to accept the $25; that, after appellants refused to carry out the contract, they offered to pay them the balance of the consideration, which they refused; that they also offered to pay the balance of the consideration to Gaughan & Sifford, which was refused; that they did not tender the actual money.

The testimony offered in behalf of appellants was, in substance, to the effect that W. S. Haines acted for himself and, without authority, assumed to act for the other appellants in the sale of the real estate in question for a cash consideration of $2,000 and at the time accepted $25 as a part payment; that, pursuant to the contract, he executed a deed himself for the land to appellee, G. S. Rumph, in which he expected appellants, Geo. L. Haines, Laura Haines, his wife, Mrs. Grace Tannehill (*nee* Haines) and Roy L. Haines and wife to join, it being understood at the time that Roy L. Haines had an interest in the real estate; that, without explaining the nature of the transaction to Geo. L. and Laura Haines, they signed and acknowledged the deed, and it was then sent to Mrs. Grace Tannehill in Texas for her signature and execution; that she executed it and forwarded it to Roy L. Haines at Gloster, Mississippi, for execution; that Roy L. Haines claimed an interest in the land, as well as the personal property, belonging to his grandmother, Cora J. Haines, deceased, executed the deed and mailed it to Gaughan & Sifford for delivery to appellees when they paid $500 to said firm for him for his interest in the real estate and such additional sum as might be due him on settlement of the estate of Cora J. Haines, deceased; that the will of Cora J. Haines, deceased, was probated, by the terms of which only $50 was devised to the said Roy L. Haines, and the entire real estate be-

queathed to W. S. Haines, G. L. Haines and Mrs. Grace Tannehill. Before the transaction was closed by delivery of the deed to appellees by Gaughan & Sifford, the trade was called off by the appellants and Gaughan & Sifford instructed not to deliver it. The letter written by Mrs. Grace Tannehill to her brother, W. S. Haines, instructing him not to proceed further with the deal is as follows: "If sale of place has not gone through, call it off at once. I believe we can do better. The papers are full of oil prospects there in Arkansas."

Neither Roy L. Haines nor his wife, Clara Haines, were made parties defendant. The cause was submitted to the court upon the pleadings and evidence, which resulted in findings that W. S. Haines, representing himself and assuming to represent Geo. L. and Laura Haines and Mrs. Grace Tannehill, contracted to sell the lands in question to appellees for $2,000, which contract was ratified by Geo. L. Haines, Laura Haines and Mrs. Grace Tannehill; that W. S. Haines, George L. Haines and Mrs. Grace Tannehill were the sole owners of the land devised from their mother, Cora J. Haines. Upon these findings a decree was rendered requiring appellees to pay the clerk of the court the balance of the purchase price of the land to be held by the clerk until the administration pending on the estate of Cora J. Haines, deceased, should be finally settled and the liabilities on same liquidated, after which the balance of the consideration not used in liquidating the indebtedness against said estate and paying the bequests in the will should be divided equally between W. S. Haines, George L. Haines and Mrs. Grace Tannehill, and that, upon the payment of the balance of the consideration to the clerk by appellees, Gaughan & Sifford should deliver the deed, deposited with them by Roy L. Haines, conveying said real estate to appellee G. S. Rumph. From the decree, appellants have prosecuted an appeal to this court.

Appellants insist that the evidence is insufficient to uphold the finding of the chancellor that the contract for the sale of the land, made by W. S. Haines, was ratified

by Geo. L. Haines and Mrs. Grace Tannehill, and that, for that reason, the court was in error in ordering a delivery of the deed, deposited with Gaughan & Sifford, to appellees. In relation to the doctrine of ratification of an unauthorized act of an agent by the principal, this court said in the case of *Coffin* v. *Planters Cotton Company,* 124 Ark. 360, that (syllabus 2), "Before one can be held to have ratified any unauthorized act of one who assumes to be his agent, the principal must have knowledge of all the material facts upon which said agency is predicated, and ignorance of such facts renders the alleged ratification ineffectual and invalid." The question at once arises, what are the material facts necessary for a principal to know in a land sale, in order to bind him on a contract of sale of same, executed by an unauthorized agent? Where no fraud or deception is charged, the material facts are the consideration, terms and conditions of sale. All this was known, or could have been known, by Geo. L. Haines and Mrs. Grace Tannehill before the execution of the deed in question. No misrepresentation as to the contents of the deed was made. The deed showed on its face that the consideration was $2,000 cash. With full knowledge of the consideration, terms and conditions of the sale, they both signed and acknowledged the deed conveying same to appellees, and it was mailed by Mrs. Grace Tannehill to Roy L. Haines for execution and delivery by him. The only reason for recalling the deed is that, after the execution of same, it was discovered that there was oil talk in the neighborhood of the lands. Unless some deception had been practiced by appellees or the unauthorized agent upon them in this regard, the mere discovery that lands had enhanced on account of oil developments would furnish no excuse for withdrawing their ratification of the unauthorized act of their agent, W. S. Haines. We think the execution of the deed by Geo. L. Haines and Mrs. Grace Tannehill, under the facts detailed, was a ratification of the contract of sale and purchase of said land. The facts were ample to justify a decree against appellants

for specific performance, and the court should have ordered W. S. Haines, Geo. L. Haines and Mrs. Grace Tannehill to execute a deed to appellees for said real estate, upon the payment by them of the consideration agreed upon.

We do not think, however, the facts warranted a decree ordering Gaughan & Sifford to deliver the deed, because one of the parties grantor therein was Roy L. Haines, who claimed an undivided one-fourth interest in the land, and deposited it with Gaughan & Sifford with directions not to deliver it until that amount was paid to them for him and until they procured an adjustment and settlement of his interest in the personal estate of Cora J. Haines, deceased. He was not made a party to the suit, and the court could not adjudicate his interest in the real estate so as to bind him without first making him a party to the suit. The decree, in regard to the delivery of the deed, was erroneous, and, in that respect, is reversed, and the cause is remanded with directions to render a decree for specific performance of the contract.

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## LESS v. LESS.

Opinion delivered February 14, 1921.

1. DOWER—RIGHT TO RENTS BEFORE ASSIGNMENT.—Under Crawford & Moses' Dig., § 89, a widow was entitled to rents on her husband's real estate in proportion to her interest therein from her husband's death until dower has been assigned to her.
2. ESTOPPEL—TO CLAIM FORFEITURE OF RENT.—Administrators of a husband's estate, having filed their report of rents collected from and disbursements on land in which the widow was entitled to dower, were estopped to claim that the wife had forfeited her right to such rents by failure to pray for her share of the rents in her bill for assignment of dower.
3. EXECUTORS AND ADMINISTRATORS—DEDUCTIONS FROM DOWER.—Where a widow accepted a building in its completed condition as part of her dower, the administrators were not entitled to deduct the expenses of completing the building from the rents accruing to her.

4. EXECUTORS AND ADMINISTRATORS—DISBURSEMENTS ON DOWER PROPERTY.—The court, in passing upon disbursements of administrators, made on property assigned to the widow as dower, should either allow or disallow items claimed, instead of refusing to pass upon them.

5. APPEAL AND ERROR—HARMLESS ERROR.—Refusal of the court to pass upon items of credit claimed in an administrators' account was harmless where the administrators were not entitled thereto.

6. EXECUTORS AND ADMINISTRATORS—ALLOWANCE FOR PAYMENTS OF ALIMONY AND MORTGAGE LIENS.—Where the property out of which dower was assigned was subject to mortgage and alimony liens, the administrators, having paid such alimony and interest on the mortgage, were entitled to credit therefor.

7. DOWER—ASSIGNMENT OUT OF MORTGAGED PROPERTY.—Assignment of dower may be made out of mortgaged property, in which case the widow takes the dower subject to the payment of a just proportion of the indebtedness.

8. EXECUTORS AND ADMINISTRATORS—REIMBURSEMENT OF EXPENDITURES ON DOWER PROPERTY.—Administrators were entitled to be reimbursed for expenditures for taxes, insurance and necessary improvements upon property assigned as dower prior to its actual assignment, where such amounts were expended pending an appeal from the decree assigning dower.

Appeal from Lawrence Chancery Court, Eastern District; *Lyman F. Reeder,* Chancellor; reversal in one case, affirmance in the other.

*W. A. Cunningham* and *Beloate & Anderson,* for appellant.

1. The record shows that there was left by Isaac Less landed interest in the sum of $136,078.40, and it was error to hold that the rents accruing from the time Isaac Less died down to December 6, belonged to the estate and not to Ida Less. The records show that there had only been accounted for to the widow the rents on the dower lands collected from date of death down to and including the time the action was in the Supreme Court. 131 Ark. 237. The widow is entitled to one-third of the rents collected between the time of the death of the husband and the assignment of dower. 40 Ark. 393; 60 *Id.* 477.

As the rents on one-third of the estate were accounted for by defendants, Jake Less and Morris Less, adminis-

trators, the widow was entitled to same without deductions. She should have been allowed her one-third of these rents under the law as the widow of Isaac Less, deceased. New causes of action can not be filed after the passing on same by the superior courts. Items paid after the decree setting aside dower fall within the rule. 59 Ark. 147, and are not chargeable.

2. The court erred in refusing to allow appellant rents from the death of I. Less until the decree assigning dower. The decree should be modified and decree entered here for the additional amount, $1,531.62, with interest from December 12, 1917, with costs, in addition to the $659.92 found due, and the decree on the second branch of the case reversed and dismissed or the second part of the decree be modified as that part of the second decree was not within any issue raised.

*A. S. Irby* and *Ponder & Gibson,* for appellees.

1. Was Ida Less, the widow, entitled to rents off the lands afterward assigned to her from the date of the death of I. Less until the date of the assignment of dower? This question was not raised nor settled in 130 Ark. 232. The case in 40 Ark. 393, settles this. See, also, 60 Ark. 461; Kirby's Digest, § 77. Appellant, having acquiesced in the assignment of dower and having made no claim for rent, waived her rights as to rents and can not recover. 8 Gill (Md.) 207.

2. If the widow is entitled to dower in the rents collected before assignment, this would be subject to repairs, taxes and insurance, etc., and should be deducted. 132 Ark. 69. The entire record shows acquiescence by the widow. 132 Ark. 69; 127 *Id.* 98.

3. The second subdivision of this case only embraced and presented the question of payments by appellant of the sum already found to be due by the court. The decree of the chancellor was for $985.82, and it is sustained by the evidence. Appellees are entitled to credit for repairs, taxes and insurance, and these should be ascer-

tained by reference to the clerk and the amount found should be allowed.

HUMPHREYS, J. The correctness of two decrees is challenged by appellant in this case. The first was rendered by the Lawrence Chancery Court in the case of *Ida Less* v. *Miriam Less* after an affirmance of said cause by this court. The opinion affirming this cause will be found in 131 Ark. 232. The second was rendered by the same court in the case of *Miriam Less et al.* v. *Ida Less,* filed in the latter part of the year 1920, for amounts paid by the plaintiff in the cause, the appellees herein, to liquidate mortgage and alimony liens adjudged against the dower properties in the original case of *Ida Less* v. *Miriam Less et al.,* and which accrued after the affirmance of the case in the Supreme Court on November 26, 1917.

After affirmance of the case of *Ida Less* v. *Miriam Less et al.,* Jake and Morris Less, two of the appellees, as administrators of the estate of I. Less, deceased, filed a statement in the cause, of all rents collected by them on the lands assigned to appellant as dower, from the 30th day of January, 1917, the date I. Less died, until December 6, 1917, the date appellant acquired possession of her dower properties under the decree of assignment, of date May 21, 1917; also a statement of disbursements made by them upon said properties during the same period.

Upon the issues joined by exceptions to the statement of disbursements, the answer to said exceptions and the evidence adduced, responsive to the issues, the court decreed that appellant was not entitled to rents collected by the administrators from the date of the death of I. Less until the date of the decree assigning dower on May 21, 1917. This is the first decree from which appellant appealed. The court also decreed that appellees were entitled to only two items contained in the account of disbursements. These items were $400 paid as interest to the Commonwealth Farm Loan Company and $373.22 paid to Mrs. Gussie Less on account of alimony which had been charged against the dower property. In the

decree the court found that it was unnecessary to determine whether other disbursements were chargeable against the dower interest in order to determine the cause. The account of disbursements contained other items of interest paid by appellees to the Commonwealth Farm Loan Company as interest on the mortgage against the property; additional items paid to Gussie Less on account of the alimony lien against said property; items of cost entering into the completion of the garage which was in the course of construction at the time I. Less died, on lot 12, block 3, assigned to appellant as a part of her dower property; items paid out for taxes, insurance and repairs on the dower properties after the decree of assignment of dower on May 21, 1917, and before the delivery of said dower properties to appellant on December 6, 1917, a short time after the decree for assignment of dower was affirmed in this court. As to this part of the first decree, appellees prosecuted and perfected a cross-appeal.

Appellant insists that the court erred in refusing to allow her rents from the date of the death of I. Less until the decree assigning dower, of date May 21, 1917. The amount of rents collected during that period was $1,531.62. There can be no question that a widow is entitled to rents on the real estate of the deceased in proportion to her interest therein before the assignment of dower. Section 89 of Crawford & Moses' Digest provides that, "Until the widow's dower be apportioned, the court shall order such sums to be paid to her out of the rents of the real estate as shall be in proportion to her interest therein." Appellees insist, however, that appellant forfeited her rights to such rents by not praying for them in the bill filed by her for the assignment of dower. We pretermit a determination of that question, for appellees are not in a position to raise it. After the affirmance of the decree assigning dower, appellees filed their report of the rents collected from, and the disbursements made on, the properties, and, in doing so, presented the issue of rents and disbursements them-

selves. They are estopped to claim a waiver on the part of appellant. The court erred in disallowing appellant's claim for rents on the dower properties from the date of the death of I. Less to the date of the decree assigning dower.

Appellees, upon their cross-appeal, insist that the court erred in refusing to pass upon the expenditures made by them in relation to the dower properties from the date of the death of I. Less until December 6, 1917, the date the dower properties were delivered to appellant. The undisputed evidence showed that all the items entering into the completion of the garage, which was in the course of construction at the time I. Less died, except the amounts expended on the ceiling, had been made at the time the garage property was assigned to appellant as a part of her dower; that the widow accepted it at its appraised value in its completed condition as a part of her dower. This being true, appellees received payment for the improvements they made on this property in completing the garage in the value of property received by them at the time the dower was assigned. If these items had been allowed by the court, appellees would have received double pay for the improvements. While the court should have ruled one way or the other on the items, the failure to allow them is not in any sense prejudicial to the rights of appellees, and they can not complain. The court, however, did err in failing to pass upon and allow all items paid by appellees on account of interest due upon the mortgage of the Commonwealth Farm Loan Company and for alimony items due Mrs. Gussie Less, from the date of the death of I. Less, because these were burdens in the nature of liens against the entire real estate of which I. Less died seized and possessed, and out of which dower assignments were made. The rule has been established by this court that assignments of dower may be made in mortgaged property, and that the widow takes dower subject to the payment of a just proportion of the indebtedness. *Hewitt* v. *Cox,* 55 Ark. 225; *Crosser* v. *Crosser,* 121 Ark. 64; *Less* v. *Less,* 131 Ark. 232; *Mayo* v.

*Ark. Valley Trust Co.*, 132 Ark. 69. The court also erred in failing to pass upon and allow the items for taxes, insurance and necessary improvements and repairs upon the dower properties after the decree of May 21 assigning dower and the date the dower properties were actually delivered to appellant. Appellant's insistence is that appellees had no right to expend any amount for any purpose upon the dower properties after the decree of assignment. An appeal was prosecuted from the decree of the assignment of dower, and her right to the possession of the lands assigned as dower was not decided by the Supreme Court until November 26, 1917. She did not receive possession of the dower properties until December 6, 1917. It was during the interim that these expenditures were made on the dower properties, and at the time appellees were collecting rents thereon. We think a proper interpretation of section 89 of Crawford & Moses' Digest is that the widow shall receive her proportionate part of the net rents after the payment of all necessary expenses, such as repairs, taxes, etc., during the time the administrator or heirs continue in possession of the lands and are held to account for the rents.

For the error indicated, the decree will be reversed and the cause remanded with directions to the court to either state, or appoint and have a master state, an account between the parties in accordance with this opinion.

Appellant assails the decree rendered in the last action filed and treated as a part of this suit, upon the ground that the following part of the decree was not within the issues and proof: "It is further ordered and decreed by the court that Ida Less make all future payments on amount to Gussie Less as alimony, her part, $46.66 per month, to the clerk of this court, each month and all interest items which may be due the Commonwealth Farm Loan Company, or any other party." The question whether or not appellant, Ida Less, should take her dower interest in the lands of I. Less, deceased, subject to these burdens became the sole issue in the original suit after it became an adversary one. The evidence

shows that the lien in favor of the Commonwealth Farm Loan Company was a mortgage lien covering the entire property, out of which dower was assigned. Likewise, the lien in favor of Gussie Less for alimony was a lien upon certain tracts of land belonging to I. Less at the time of his death, out of which dower was assigned. Appellees could not pay two-thirds of either lien and clear the property which they receive in the division. It was necessary to pay the whole lien in order to clear their part of the property. Appellant was assigned dower in the lands subject to the payment of one-third of the Gussie Less lien for alimony and one-third of the Commonwealth Farm Loan Company's mortgage lien. They were continuing liens until liquidated, and we think the order within the reasonable inferences deducible from the allegations of the original bill. In no event could the rendition of such a decree be prejudicial to appellant unless the payments required to be made to the clerk are misappropriated or unless appellant is required to pay the amounts directly to the owners of the liens. Upon the happening of either event, appellant could apply for a modification of the order.

The decree of the court rendered upon the second branch of this case is therefore affirmed.

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NEWMAN v. NEEL.

Opinion delivered February 14, 1921.

1. CREDITORS' SUIT—REMEDY AT LAW.—A judgment-creditor had a complete and adequate remedy at law by execution to enforce his judgment at law against the judgment-debtor's equity in lands, and a creditors' bill will not lie for that purpose.

2. CREDITORS' SUIT—EXTENSION OF JUDGMENT LIEN.—A creditors' bill will not lie to extend a judgment-creditor's lien; the remedy of *scire facias* being provided therefor.

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

*Miller & Yingling* and *John D. DeBois,* for appellant.

1. The chancery court did not have jurisdiction of the suit instituted May 5, 1919, against J. W. and Ellen Matthews, Chalkley and J. G. Howard, which was in the nature of a creditor's bill, for the reason that Neel had not exhausted his remedy at law, and J. W. Matthews was insolvent, and the judgment might have been collected out of his personal property or other property than the land in question. It is well settled equity will not assume jurisdiction where an adequate remedy at law exists. 27 Ark. 157. Here the judgment-creditor sought to subject the land of his debtor to a sale under a decree of chancery without giving his debtor the statutory right to select and point out the property upon which an execution might be levied. This right was given to J. W. Matthews, and he had the right to expect that Neel would pursue the remedy at law provided for collection of judgments at law. Neel was not attempting to reach any equitable assets of J. W. Matthews in this suit, but simply trying to subject the land to the payment of the debt without showing that J. W. Matthews was insolvent. This was requisite and ought to have been shown and would have been shown if it had been a fact. The agreed statement of facts shows that Neel brought this suit without any attempt to collect his common-law judgment. A creditor's bill can not be sustained until the remedies at law are exhausted. 5 Pom. Eq. Jur. (2 2ed.), § 2309; 99 Cal. 271; 37 Am. St. R. 50. It is admitted that at the time Neel brought suit in chancery and while it was pending Matthews and his wife were actual residents of White County, Arkansas, and their home was upon said land. No summons was ever issued or served, and neither Matthews nor his wife ever entered their appearance. Therefore no suit was pending, and they are not bound by the decree. The decree against Matthews and his wife was an absolute nullity and should have been restrained.

2. No lien existed at the time appellant purchased the land. The lien had expired as three years had passed and the lien was not revived. 101 Ark. 408; 24 R. C. L. 665, 685. See, also, 15 R. C. L., p. 904, § 382; 130 Ind. 33; 21 Utah 126; 60 Pac. 305; 30 Am. St. Rep. 194; 81 *Id.* 670.

3. Appellant was an innocent purchaser. The proceeding adopted here is proper. 101 Ark. 404.

*Culbert L. Pearce,* for appellees.

1. The chancery court had jurisdiction of the suit which was a creditors' bill and a lien existed. 101 Ark. 404; 53 *Id.* 568; 13 *Id.* 259; 24 R. C. L., pp. 666-685, §§ 1-2-12-25. Having jurisdiction for one purpose, it was proper to assume jurisdiction for all purposes. 1 Pom., Eq. Jur., pp. 218-258; 10 R. C. L. 265-288. See, also, 5 Pom., Eq. Jur., pp. 5087-5140, §§ 871-2-6-9-882, 890-1-5; 8 R. C. L., pp. 2-35; §§ 4-5, 1123-4-5-9 and 38; 32 Ann. Cas. 942, 945, 953.

2. The money was tendered in court and is now on deposit. 28 Am. & Eng. Enc. Law (2 ed.), p. 15; 26 R. C. L. 648-650.

Upon the question of appearance, see 2 Ark. 26; 2 R. C. L., pp. 322, 335, §§ 7 and 16; 2 A. & E. Enc. Pl. & Pr., pp. 632, 644-6; 16 L. R. A (N. S.) 177; 15 Mont. 503.

3. Newman was not an innocent purchaser, as he purchased with full knowledge.

4. On the question of *lis pendens,* see 57 Ark. 230; 75 *Id.* 230; 118 *Id.* 139; 98 *Id.* 105; 38 L. R. A. 772.

On question of *bona fide* purchaser, see 1 Words & Phrases, p. 825; *Ib.* 470.

HUMPHREYS, J. This suit was instituted in the White Chancery Court by appellant against appellees to enjoin a sale of lands by the commissioner in chancery in a suit instituted on May 5, 1919, by R. P. Neel against J. W. Matthews, Ellen Matthews, H. C. Chalkley and J. G. Howard, which was in the nature of a creditor's bill, for the purpose of subjecting the lands of J. W. Matthews to the payment of a common-law judgment which had been obtained by R. P. Neel against J. W. Matthews in

the White Circuit Court on August 2, 1916. Appellant alleged ownership of the lands by purchase from A. P. Matthews, who had obtained them from J. W. Matthews, and further alleged, as ground for the injunction, that R. P. Neel had not exhausted his remedy at law to collect his judgment, and, for that reason, a court of equity had no jurisdiction of the creditors' bill instituted by him.

The allegations of the bill were controverted by appellees, and the cause was submitted to the court upon the pleadings and an agreed statement of facts which resulted in a decree dismissing appellant's bill for injunction. From the decree of dismissal an appeal has been duly prosecuted to this court.

The agreed statement of facts, upon which the cause was submitted to the court, is as follows:

"That on the 25th of February, 1916, J. W. Matthews and Ellen Matthews, his wife, were the owners of 224 acres of land in White County, Arkansas, on which their homestead was located; that on said date they executed a mortgage to Minnie Biggs, conveying said lands to secure a note for fifteen hundred dollars, which mortgage was properly recorded.

"That on the second day of August, 1916, R. P. Neel obtained a judgment in the White Circuit Court against the said J. W. Matthews for the sum of $248.70 and ten per cent. interest from May 15, 1916, and for costs, amounting to $6.80.

"That on the 8th day of August, 1916, the said J. W. Matthews and Ellen Matthews, his wife, executed a second mortgage to Minnie Biggs, conveying the said lands to secure notes amounting to six hundred dollars, which deed of trust was also properly recorded.

"That thereafter, default having been made in the payment of said notes, as aforesaid, judgment was obtained in the White Chancery Court, and a lien was declared on the said land, and, in order to pay said judgment and prevent foreclosure of said lien, the said J. W. Matthews and Ellen Matthews, his wife, on November 22, 1918, borrowed from H. G. Chalkley, through his agent,

J. P. Howard, four thousand dollars and executed a mortgage to secure same, conveying the 224 acres which they then owned and 200 acres which was then being purchased by them from D. G. Pence.

"That the said four thousand dollars was used in satisfying the judgment of Minnie Biggs and part of the purchase money due Pence on the 200 acres as aforesaid; that, after the said four thousand dollars was so used, the said J. W. Matthews and Ellen Matthews, his wife, on the 15th day of March, 1919, executed a warranty deed to J. G. Howard, conveying to him all of the lands owned by them, consisting of 424 acres, which deed was intended as an equitable mortgage to secure the said J. G. Howard for the remainder of the purchase money due Pence and such other indebtedness as the said J. G. Howard might pay, or be compelled to pay, for the said J. W. Matthews, not to exceed, however, the sum of twelve hundred dollars, and said deed was also properly recorded.

"That, at the time of the execution of the aforesaid warranty deed, the said J. G. Howard and J. W. Matthews entered into the following written contract:

" 'This agreement made and entered into by J. W. Matthews of Romance, Arkansas, and J. G. Howard of Searcy, Arkansas, whereby said J. W. Matthews has on this 15th day of March, 1919, deeded to said J. G. Howard 424 acres of land in White County, Arkansas, fully described in said deed of said date; the consideration of same being $1,200 and acceptance of $4,000 mortgage made payable to H. G. Chalkley.

" 'It is understood that said J. W. Matthews shall have the right to redeem said land upon the payment of all expenses, commission on loan of $4,000, interest, costs and judgments and taxes on said land that are at present date a lien on said property with 10 per cent. interest on all amounts paid by said J. G. Howard.

" 'The redemption of said property shall be made on or before December 1, 1919, and if not redeemed by that date the said deed to remain in full force and effect. In case said land is redeemed before December 1, 1919,

said J. G. Howard agrees to quitclaim all his interest in said property to any person designated by said J. W. Matthews, and to deed the land in lots or parcels as may be requested by said Matthews.

"'J. W. Matthews.
"'J. G. Howard.'"

And at the time said deed was executed. the said J. W. Matthews and A. P. Matthews, his son, entered into a written contract, on the opposite side of the paper on which the contract was written, as follows:

"As a part of this contract it is understood that A. P. Matthews has an interest in the following lands described in the within-named contract on opposite side of this sheet, viz.: In the Pence 200 acres, and when said land is released, as set out in the within contract, then the said J. G. Howard is instructed, and it is agreed that he shall deed to said A. P. Matthews the following described lands, viz.: The southeast quarter of the southwest quarter of section 4, and the north half of the south half of the southeast quarter and the north half of the south half of the south half of the southeast quarter of said section 4, all in township 7 north, range 10 west, as the owner of said 100 acres, and the remainder of said Pence land to A. P. Matthews, be conveyed by said J. G. Howard to Dorris Matthews, the following land: The east half of northeast quarter, section 4, 84.55 acres, and also the south half of the southwest quarter of the southwest quarter of section 34, all in township 7 north, range 10 west, White County, Arkansas.

"This the 15th day of March, 1919.

"J. W. Matthews."

"That the said R. P. Neel had no knowledge of the warranty deed from Matthews to Howard being given as an equitable mortgage, neither did he have knowledge of the aforesaid written contract, until pleaded by Howard on May 19, 1919, in a suit filed by said Neel as hereinafter set forth.

"That prior to the first day of December, 1919, A. P. Matthews redeemed the said land from the said J. G.

Howard and received a quitclaim deed from Howard to J. W. Matthews; and on the 15th day of December, 1919, the said J. W. Matthews and Ellen Matthews, his wife, executed a warranty deed to the said A. P. Matthews, conveying all of their lands consisting of 424 acres and which included their homestead.

"That on the same day the said A. P. Matthews conveyed said land to the plaintiff, D. W. Newman, the consideration being the assumption of the four thousand-dollar mortgage through Chalkley, and the exchange of other lands then owned by Newman, and the said Newman went into possession of said land immediately under his deed made by Matthews.

"That subsequent to the execution of the warranty deed from J. W. Matthews and wife to J. G. Howard, the said J. W. Matthews and A. P. Matthews continued in possession of said land under an agreement to pay rent in the event that they failed to redeem from the warranty deed or equitable mortgage.

"That on the 5th day of May, 1919, the said R. P. Neel filed a complaint in the White Chancery Court against J. W. Matthews and Ellen Matthews, his wife, H. G. Chalkley, J. G. Howard and others, which suit was in the nature of a creditor's bill, for the purpose of subjecting all of Matthews' 424 acres of land to a lien to secure his common-law judgment hereinbefore mentioned, and prayed that his rights be investigated, determined and declared, and, finally, that he have a lien against said lands to secure the payment of said judgment, and, if said judgment be not paid within a reasonable time, that said lands be sold to satisfy same.

"That, at the time of the filing of the complaint by the said R. P. Neel, the said Ellen Matthews, the wife of J. W. Matthews, was an actual resident of White County, Arkansas, and was residing upon the lands involved herein; and that her husband, J. W. Matthews, was at the time temporarily absent from the State as a fugitive from justice, but the said J. W. Matthews was returned to White County before the submission of said cause and

no summons was ever issued on the complaint for either the said Ellen Matthews or J. W. Matthews; and service of process was attempted to be had upon them by the publication of a warning order, issued upon the following affidavit:

"Cul L. Pearce upon oath says: That he is a licensed and practicing attorney at law and solicitor in chancery, and that he is authorized to file and prosecute this action; that the statements of fact in the foregoing complaint are true and correct, according to the best of his knowledge and belief; and that he has made diligent inquiry, and that it is his information and belief that the said Minnie Biggs, J. W. Matthews, Ellen Matthews and H. G. Chalkley are nonresidents of the State of Arkansas, and that personal service can not be had upon them.

"That at the time of the making of said affidavit by the said Cul L. Pearce, the plaintiff in said suit, R. P. Neel, was not absent from the county and was not mentally incapable of making the same or was not physically unable to attend before the officer and make said affidavit.

"That the said J. W. Matthews and Ellen Matthews in no wise entered their appearance in said cause.

"That the said cause proceeded to a hearing in White Chancery Court upon the issues made by the complaint of the plaintiff, R. P. Neel, the answers of J. G. Howard and H. G. Chalkley and the testimony of witnesses, and the court on December 6, 1919, rendered a decree in which, among other things, it is said:

" 'It is therefore considered, ordered, adjudged and decreed that plaintiff, R. P. Neel, has a lien upon said lands (meaning the 200 acres purchased from D. G. Pence as heretofore set out), by virtue of the common-law judgment hereinbefore set out; that said lien is prior and paramount to any and all rights, interests, equity and claim of any of the defendants, their heirs or assigns, or any one claiming or holding under them, except as to the amount of purchase money advanced by the defendants, Chalkley and Howard, with the interest thereon, and that he is now entitled to have said land sold if necessary for

the purpose of satisfying said judgment now amounting to $358.75, with interest from this date at the rate of ten per cent. per annum.'

"That the above decree was not entered of record by the White Chancery Court until the 6th day of January, 1920, on account of the details of the same not being agreed upon by the attorneys on the 8th day of December, 1919, at which time it was formally rendered.

"That at the time of the execution of the warranty deed by J. W. Matthews and wife to J. G. Howard, in lieu of a mortgage, as aforesaid, the said J. G. Howard held back the sum of $248.70 with which to satisfy the judgment rendered in favor of R. P. Neel against J. W. Matthews, as aforesaid, which amount he later tendered into court with which to satisfy said judgment, which said tender was refused on the ground that it was only for the face of the judgment, exclusive of interest and costs.

"That on December 1, 1919, when the said J. G. Howard reconveyed said lands to the said J. W. Matthews by quitclaim deed, he required an agreement from the said A. P. Matthews to indemnify him, the said Howard, against the rendition of a personal judgment against him in the suit that was then pending, filed by the said Neel as aforesaid.

"That at the time D. W. Newman purchased said lands on December 15, 1919, he was advised that the suit of Neel as aforesaid was pending, and knew that the said J. G. Howard had required A. P. Matthews to deposit the sum of $300 in the Bank of Searcy to indemnify him (Howard) against a personal judgment as aforesaid, and he purchased said lands, relying upon said indemnity as a protection to him, and the advice of his counsel that no lien at that time existed against said lands.

"That the said R. P. Neel took no steps to renew his judgment-lien upon his common-law judgment, obtained August 2, 1916, as aforesaid, by writ of *scire facias* or other method pointed out by the statutes for the renewal of judgment-liens, and filed no *lis pendens* at the time,

or subsequent thereto, of the filing of his suit in the chancery court to subject said lands to the payment of his judgment.''

Appellant insists that, under the agreed statement of facts, R. P. Neel had a complete and adequate remedy at law, by execution, to enforce his judgment against the equity of J. W. Matthews in said lands, during the continuance of the lien of said judgment, and ample remedy by *scire facias* to renew the lien of said judgment from time to time, and that it was unnecessary, in order to reach the equity of J. W. Matthews in said land, to resort to a court of equity to declare the priority of liens. According to the statement of facts, R. P. Neel obtained a judgment for $248.70 against J. W. Matthews in the circuit court of said county on the 2d day of August, 1916. At that time, there was only one mortgage antedating the judgment upon the 224-acre tract in said county owned by J. W. Matthews. The validity of that mortgage was not questioned in the creditors' bill filed by R. P. Neel on May 5, 1919, against J. W. Matthews and others in the White Chancery Court. Any mortgages or conveyances of that tract of land, or land subsequently acquired by J. W. Matthews, were necessarily made subject to the judgment-lien in favor of Neel for $248.70 during its life as a lien. The equity of J. W. Matthews in all the lands could have been sold under execution on the judgment without reference to subsequent conveyances or incumbrances. All subsequent grantees stood in the place of J. W. Matthews, and their rights could not rise to a higher level than his during the existence of the judgment-lien. It was not necessary, before the expiration of the judgment-lien, to go into equity to set aside subsequent incumbrances or conveyances in order to reach the equity of Matthews. The remedy being complete at law, it was improper for a court of equity to assume jurisdiction of the cause for the purpose of declaring priorities of liens. The court of equity, having no jurisdiction for this purpose, could not assume jurisdiction to extend the lien of the judgment upon the theory that,

having taken jurisdiction for one purpose, it would exercise jurisdiction for all purposes. The remedy to extend the lien beyond the three-year period from the date of the rendition of the judgment under the statute was by *scire facias*. This court, in the recent case of *Waldstein* v. *Williams,* 101 Ark. 404, said: "The lien of a judgment upon real estate commences upon the day of the rendition of the judgment and continues for three years, subject to be further continued or revived by suing out a *scire facias* and taking judgment for that purpose." Having ruled that the chancery court had no jurisdiction of the suit instituted on May 5, 1919, in the nature of a creditors' bill to enforce a common-law judgment against the equity of J. W. Matthews in said lands, it is unnecessary to determine the other questions urged for reversal of the decree dismissing appellant's bill for injunction.

For the error indicated, the decree of the chancellor dismissing appellant's bill is reversed and the cause remanded with instructions to reinstate it and to enter a decree in conformity with the prayer thereof.

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## McKEE v. ENGLISH.

Opinion delivered February 21, 1921.

1. HIGHWAYS—POWER TO CREATE SEPARATE DISTRICTS BY ONE STATUTE.—It was competent for the Legislature by one statute to create three separate road districts in one county.
2. STATUTES—CONSTRUCTION OF AMENDATORY AND REPEALING ACT.—Where the Legislature, in amending a statute, adopted the form of rewriting the sections amended and repealing the original sections, it can not be contended that the Legislature intended to repeal the sections as amended.
3. STATUTES—SPECIAL SESSION OF LEGISLATURE—GOVERNOR'S CALL.—Where the Governor called an extraordinary session of the Legislature for "ratifying, confirming and validating special or local improvement districts," etc., a statute attempting to cure irregularities in proceedings for the formation of certain road improvement districts was authorized.

4. HIGHWAYS—INVASION OF COUNTY COURT'S JURISDICTION.—2 Road Acts 1919, p. 2034, creating a road improvement district, as amended by acts extraordinary session 1920, No. 520, § 6, subjecting the district to the general supervision and control of the county court, *held* not void as invading the jurisdiction of such court.

5. HIGHWAYS—ASSESSMENTS—LIMITATION TO ATTACK.—Landowners in a road improvement district can not attack as invalid for failure to assess telephone lines in the district where they have not brought action for that purpose within the time expressed in the statute creating the district.

6. HIGHWAYS—LIMIT OF ASSESSMENTS.—Where the assessments of the road tax on lands within a specail road improvement district is within the 30 per cent. maximum fixed by the statute creating the district, it is immaterial that the benefits are appraised at a sum in excess of that amount.

7. HIGHWAYS—EFFECT OF EXCESSIVE ASSESSMENT.—If an assessment of road tax exceeds the maximum prescribed by a statute, it would not avoid the whole assessment, but would merely result in a proportionate reduction down to the maximum prescribed by the statute.

Appeal from Washington Chancery Court; *B. F. McMahan,* Chancellor; affirmed.

*E. P. Watson,* for appellants.

1. Act 529, Acts 1919, named three persons as commissioners for each of the three districts. The curative act did not amend this act by declaring that three commissioners should constitute the board in the future of district No. 3. The court erred in holding the curative act constitutional and the organization of district No. 3 valid.

2. The contracts for building the roads in district No. 3 were illegally entered into by this pretended board of commissioners. No legal notice was given, and all advertisements for bids were without authority of law. Full thirty days' notice is required, and time is essential in such matters. Page & Jones on Assessments, § 777-821, act 527, Acts 1919, p. 2048, § 9.

3. The district is laid off without regard to benefits to a large portion of the district. It is arbitrary and unjust. The act is unconstitutional, arbitrary and unjust.

4. Section 7 of this amendatory act expressly repeals sections 6, 8 and 27 of the original act No. 529. Black on Construction of Laws, §§ 130-1. If an act be passed subsequent to the amendatory act repealing the original act, the amendment incorporated in the original act is repealed. 21 Mo. App. 587; 73 Mo. 88; 22 Tex. 588; 90 Mo. St. 627; 36 Ill. 162. By repealing sections 6 and 8 of the original act the heart of it was cut out, and the entire act became inoperative.

5. But, if not repealed, sections 6, 8 and 27 are in full force, and the assessments are invalid, as property required to be assessed was left off the assessment rolls and the assessments are discriminatory and void. Page & Jones on Assessments, §§ 880-4; *Ib.*, §§ 639 to 645.

6. Under the original act creating district No. 3, the assessors were not limited as to the amount of benefits; the amendatory act, § 8, limits the assessment to 30 per cent. of the assessed value, and it is a legislative determination of benefits. Page & Jones on Assessments, §§ 668 and 728, p. 1263. See, also, § 777. A failure to object to an assessment which is void is not a waiver of such defense. Page & Jones, § 918; 34 Pac. Rep. 691. The statute is void, and the assessments exceed the maximum limit provided by statute and laying out the road is arbitrary and void.

*Hill & Fitzhugh,* for appellees.

1. The act provides for only three commissioners. Even if nine commissioners had been appointed by the original act, and the district had acted through three commissioners, their acts would be validated by the act February 23, 1920, which ratifies and confirms all acts, proceedings and contracts of the commissioners. Section 5, act February 23, 1920; 134 Ark. 30.

2. More than thirty days' notice was given of the letting of the contracts, and all irregularities were cured by the amendatory act. 134 Ark. 30.

3. The roads were not laid off in an arbitrary manner. Authorities need not be cited as they are numerous.

4. There was no unconstitutional interference with the jurisdiction of the county court. Both the original and amended acts fully recognize the jurisdiction of the county court. 130 Ark. 507; 125 *Id.* 375; 137 *Id.* 362.

5. The amended act does not repeal itself.

6. Failure to assess telephone and telegraph lines in the district does not render void the assessment on the balance of the property. The presumption is that the assessors did their duty, and the burden of proof was on appellants and they have failed to meet it, and (2) the presumption is that if these companies owned any real property that the same would have been assessed if they were benefited. 83 N. W. 183; 1 Page & Jones on Assessments, § 593.

7. Benefits in excess of 30 per cent. have not been levied as the proof shows.

8. All prior defects and irregularities were cured by the amendatory act of February 23, 1920.

9. Plaintiffs are barred by limitation, as the suit was not brought until after the twenty days' limit had expired.

McCulloch, C. J. Appellant owns real estate situate within the boundaries of Road Improvement District No. 3 of Washington County, an improvement district which was created by special act of the General Assembly of 1919, at the regular session (Vol. 2, Road Acts, 1919, p. 2034), and they instituted this action against the board of commissioners of said district attacking the validity of the statute, as well as certain proceedings of the board of commissioners.

The statute in question created three separate and distinct road improvement districts in Washington County numbered, respectively, 3, 4 and 5, and named three commissioners for each district, described the separate improvements to be constructed in each district and authorized the construction of the same and the assessment of benefits and levy of assessments, issuance of bonds, etc.

It was competent for the Legislature to adopt this form of creating by one statute numerous separate and distinct districts. *Cumnock* v. *Alexander*, 139 Ark. 153; *White* v. *Ark. & Mo. Highway Dist., ante* p. 160. This statute does not in express terms declare that each of the districts shall be separate and distinct, but such is the necessary effect of the language used in conferring authority on the commissioners to proceed with the construction of the improvements.

There was an amendatory statute enacted at the extraordinary session of the General Asesmbly in February, 1920 (unpublished act No. 529), which attempted to cure irregularities in the proceedings and also amended sections six, eight and twenty-seven in the original statute. The form adopted was to rewrite those sections anew, and the old sections were repealed. It is contended that the amendatory statute repealed itself as well as the three sections mentioned in the original statute. The statement of the argument affords the best answer, for we can not assume that the lawmakers intended to do the absurd thing of expressly re-enacting certain sections with the intention at the same time to repeal them. What was clearly meant was to repeal the old sections as originally written and to substitute the new sections as rewritten.

It is also contended that the amendatory statute is void for the reason that such legislation was not embraced within the call of the Governor in convening the General Assembly in extraordinary session. If it be conceded that we are at liberty to go behind the action of the Legislature for the purpose of determining whether or not the statute in question fell within the scope of the call of the Executive, we find by examination of the Governor's proclamation that it was sufficiently broad in its language to cover this statute. The purposes of the call, among other things, was for "ratifying, confirming and validating special or local improvement districts, organized under general laws or special or local laws, and enlarging the powers thereof."

It is next contended that the statute is void because the authority to construct the improvement constituted an invasion of the jurisdiction of the county court. Section 6 of the section as amended contained the following provision: "Subject only to the general supervision and control of the county court of Washington County, Arkansas, as provided by the Constitution of said State, said boards of commissioners shall have exclusive jurisdiction over the construction and maintenance of the improvement herein provided for."

We think that the language of this particular statute constitutes much stronger recognition of the jurisdiction of the county court and affords less ground for holding that it is an invasion of the jurisdiction of that court than does the statute under consideration in other cases where we held that there was no such invasion. *Sallee* v. *Dalton,* 138 Ark. 549; *Cumnock* v. *Alexander, supra; Reitzammer* v. *Desha Road Imp. Dist.,* 139 Ark. 168; *McClelland* v. *Pittman,* 139 Ark. 341; *Bush* v. *Delta Road Imp. Dist.,* 141 Ark. 247.

This statute declares in express terms that the authority of the commissioners over the construction and maintenance of the improvements shall be subject to the jurisdiction of the county court. That is to say, that the county court shall have the supervision and control of the action of the commissioners. We can scarcely see how the authority of the county court could be more emphatically expressed.

The proceedings of the board of commissioners are attacked in several particulars, some of which are barred by the period of limitation provided in the statute for bringing suit to invalidate the assessment of benefits. It is contended that the assessments are invalid because of the failure to assess telephone lines in the district. It is not alleged in the complaint that the telephone companies owned property in the district subject to assessment. There is an allegation that there are telephone lines in the district, but it does not allege that they constitute property of the character which is subject to assessment. However, this is a matter of which appellants are barred

by the failure to bring an action within the time expressed in the statute.

There is also an attack on the validity of the assessments on the ground that they exceed the maximum limit provided in the statute. The statute provides that the "entire assessments levied upon the property of the districts for the construction and completion of the improvements herein provided for shall not exceed 30 per cent. of the assessed valuation of the real property within the districts according to last assessment for taxation, exclusive of interest on bonds, and overhead or contingent expenses."

It is neither alleged nor proved that the commissioners are about to levy assessments in excess of the maximum limit prescribed by the statute. According to the undisputed evidence, the valuation of the real property in the district for general taxation purposes aggregates $1,852,566, and $539,000 is the contract price for the cost of construction of the improvements. This is within the limit of thirty per centum prescribed by the statute. It is true that the assessors have appraised the benefits in excess of this amount, but the thing prohibited by the statute is the levying of assessments in excess of the prescribed maximum—that is to say, the imposition of a tax in excess of that per centum. There is a difference between the appraisement of benefits and the levy of assessments, and the fact that the benefits are appraised in excess of the prescribed maximum does not affect the validity of the assessments if there is no levy in excess of the statutory maximum. Moreover, if it be conceded that the assessment of benefits exceeded the maximum, it would not avoid the whole assessment, but would merely result in a proportionate reduction down to the maximum prescribed in the statute.

It is also contended that laying out the road to be improved as prescribed in the statute is arbitrary, and that this renders the statute void, but this constituted a legislative determination as to the feasibility of the prescribed route of the road or laterals, and there is no

showing in the pleadings or proof that this determination was arbitrary and unreasonable.

Lastly, it is contended that the contract for the construction of the improvement was void for the reason that notice was not published for thirty days as provided by the original statute. It does not satisfactorily appear from the record that the notice was not published for a sufficient length of time before the letting of the contract; but, even if such were true, that is one of the irregularities which was cured by the amendatory statute.

Our conclusion is that none of the attacks upon the validity of the statute or the proceedings thereunder is well founded, and the decree of the chancery court is therefore affirmed.

Hart, J. (dissenting). There is no use in threshing over old straw, and while it must be admitted that there is a far cry from *Road Improvement District No. 1* v. *Glover,* 89 Ark. 513, where it was held that the county court might form improvement districts in parts of the county for the purpose of improving the public roads and then taking over the roads to be maintained as part of the highway system of the county, to *Dickinson* v. *Reeder,* 143 Ark. 228, where it was held that a statute authorizing the perpetual continuance of the board of commissioners for the purpose of repairing and maintaining the road after its improvement was not violative of the Constitution, and other cases holding valid statutes providing for the organization of the whole county in separate improvement districts and the inclusion of the same land in several districts. Judge Wood and myself think that the present case is another attempt by the Legislature to wrest from the county courts the jurisdiction over roads conferred upon them by our Constitution.

The statute under consideration provides that, subject only to the general supervision and control of the county court, as provided by the Constitution, the board of commissioners shall have exclusive jurisdiction over

the construction and maintenance of the improved road. The use of the words, "exclusive jurisdiction," conferred upon the commissioners was an evident attempt to arrest any active participation by the county court in the matter. By the use of the words, "general supervision and control of the county court," the Legislature evidently intended to define what the framers of the Constitution meant by giving the county courts exclusive original jurisdiction in all matters relating to roads, bridges, etc., in section 28, article 7 of the Constitution of 1874. This is shown, not only by the language used in the section just referred to, but in the other sections of the act.

Other sections of the act confer upon the commissioners power to make the improvements, to levy assessments for the construction of the same, and also to levy assessments for the maintenance of the roads after the improvements are finished. To give the commissioners exclusive jurisdiction over the construction and maintenance of the improvements, subject only to the general supervision of the county court, as provided by the Constitution, is an attempt on the part of the Legislature to take away from the county court all its jurisdiction except to approve the action of the commissioners, and, in exercising its power of approval or supervision, the county court could only say, "Well done, thou good and faithful servant," regardless of its better judgment. If the commissioners can exercise exclusive jurisdiction to construct and maintain the road, what is left for the county court to supervise?

The framers of the Constitution did not confer upon the county courts power to supervise the action of other tribunals in all matters relating to roads, but it conferred exclusive jurisdiction in the county courts in all matters relating to roads. They evidently meant by the exercise of jurisdiction that the county court should act in the matter, and did not intend that exclusive jurisdiction to act should be given to another body or tribunal, and that the mere supervision over that body should be left to the

county court. There is a marked difference between jurisdiction over a matter and supervision over the same matter. Jurisdiction confers the power to act, and supervision the power to inspect or approve merely. The difference is vital.

Where the county courts have exclusive jurisdiction in matters relating to roads, the public roads of a county would be laid out, vacated, improved and maintained by one tribunal. The whole system would be under one head. That the people understood this to be the meaning of the Constitution is shown by them adopting an amendment to the Constitution giving the county courts of the State, together with the majority of the justices of the peace, in addition to the amount of county taxes allowed to be levied, the power to levy not exceeding three mills on a dollar on all taxable property to be known as the county road tax and to be used for the purpose of making and repairing public roads and bridges.

A county road is devoted to the public use and may be used by the general public as well as by the adjacent landowners. Indeed, it is a matter of common knowledge that roads are used for the purpose of hauling freight by persons who own no land, and that such use is more injurious to the roads than the use of them by the landowners in carrying their products to the nearest market town. Hence the necessity of placing the jurisdiction over all matters relating to roads in one body or tribunal, to the end that the public interest should be best served, is apparent.

The evils of placing the jurisdiction over public roads in different tribunals or bodies are manifest. Interested parties may organize road improvement districts and impose the expense thereof upon the adjoining landowners. It is comparatively easy to organize such improvement districts ostensibly for the special benefits to be derived by the landholders from the enhanced value to their lands, when in reality the purpose of the organization is for the gain of the promoters, and the local taxes

imposed, in many instances, amount to practical confiscation of the landowners' property. To illustrate: A promoter may organize a road improvement district and put lands in it situated miles away from the road, knowing that the traffic from the lands will never go over the road, and a special tax is thus levied upon the lands upon the theory that the lands will be ultimately enhanced in value by the proposed improvement. Again and again the same lands may be placed in road improvement districts where the roads are miles away from the lands and do not afford any passageway to and from them to the lands. The sum total of these special taxes will eventually amount to so much that they will be very burdensome.

It will be remembered that each improvement district may be organized by different people, and that no regard for the relation between the proposed improvement will be considered. Even if they were considered and projected at the same time, the divergent views of honest promoters and the selfish views of dishonest ones would place local taxes upon the lands which would be very burdensome to the owners.

Finally it may come to pass that the road next to the landowner's farm, and which he uses to market his produce, will be made the subject of an improvement district. By that time the owner has reached almost the limit of his endurance in paying the special taxes; and, as the improvements may all be separate improvements, there is no provision for adjusting the assessments between the several separate districts and the landowners. Indeed, vested rights have sprung up in the meantime which would prevent this. Therefore, the landowner of small means must of necessity sacrifice his land and move away to another place where the taxes are less burdensome. Of course, it is well settled in law that a local improvement is one that shall benefit the property on which the cost is assessed in a manner local in its nature, and that such assessments should be limited to the amount of ben-

efits received. The question of benefits has been construed to be so much a matter of opinion that a local improvement system of constructing, improving and maintaining roads in this State has proved exceedingly burdensome to property owners and in numerous instances has reached a point well nigh to confiscation. In such cases the property is sold to pay special taxes and will be purchased by speculators at a price which amounts to no more than the special taxes imposed and the costs and penalties which have accrued. As has been said by an eminent judge, "The victim of this vicious system of taxation will be left houseless and homeless, with the miserable consolation that, although without home or shelter, he is rich in supposed benefits, which never were and never could have been reasonably expected to be realized."

Our present Constitution was written at a time when extravagant taxation was prevalent in the State, and doubtless the framers of it had in mind to prevent a system so readily open to abuses when they declared that the county courts should have exclusive original jurisdiction in all matters relating to roads. This was an express and unequivocal mandate of the people that only one tribunal should exercise jurisdiction over the public roads. It was not intended that other bodies with divergent minds should actively exercise the jurisdiction, and that the county courts should only have supervision over their actions.

The present system has destroyed the freedom of action guaranteed the county courts under the Constitution. The whole system is opposed to every principle of equitable apportionment of taxes and has been well said in many instances "to be arbitrary exaction in its most odious form."

Therefore we respectfully dissent.

## STATE v. GLOSTER LUMBER COMPANY.

Opinion delivered February 21, 1921.

1. TAXATION—CORPORATE PROPERTY IN ANOTHER STATE.—Where a domestic corporation is actively engaged in business in this State, having its tangible property situated partly in this and partly in another State, in the estimate of value of its stock for taxation in this State the value of the tangible property in another State should be included; the above rule not being changed by Acts 1917, p. 1355.
2. TAXATION—CORPORATE PROPERTY IN ANOTHER STATE.—In assessing under Kirby's Dig., § 6910, the stock of a domestic corporation operating its business and having all of its tangible property in another State, the value of such tangible property should be included in fixing the taxable value of its corporate stock.
3. TAXATION—DOMESTIC CORPORATION.—Under Kirby's Dig., § 6910, providing that the aggregate value of the stock of "all corporations doing business in this State," after deducting the assessed value of its real estate and other tangible property, shall be "listed and assessed by the corporation as agent for its shareholders, such tax is assessable against domestic corporations not actively operating business in this State.

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

*John D. Arbuckle,* Attorney General, and *George Vaugham,* Special Counsel, for appellant.

The sole question presented grows out of the fact that the *active business* of the defendant corporation is carried on *outside* of the State of Arkansas. The court erred in holding that the complaint was without equity and in dismissing it. The complaint was sufficient and stated a cause of action and sufficiently alleged that defendant corporation was "doing business" in Arkansas.

Although appellee's tangible property situated in another State where its active business is being conducted can not be taxed in this State, its shares of stock can and should be taxed here, and the value of its tangible property in another State can be included in the estimate of the value of the stock to be taxed here. The law is settled. 128 Ark. 505; 198 S. W. 692, see page 515, also

517-18. See, also, *Ib.* § 6396; Acts 1919, p. 244; 105 Ark. 370; 106 *Id.* 552; 131 *Id.* 40.

The Arkansas law does not seek to assess both the *property* of the corporation and the *shares of stock.* It reaches out only for the latter in the hands of the shareholder—*in solido* at the corporation's domicile. Since there is no tangible property of the corporation which the State can reach in Arkansas, there is no deduction permissible from the share value.

The State in which a corporation is organized may provide in creating it for the domestic taxation of all the corporation's shares, whether owned by residents or nonresidents. 232 U. S. 1; Am. Cas. 1916 C 842; 204 Mass. 138; 90 N. E. 415; 196 U. S. 466; 53 Atl. 942; 64 U. S. (Law. Ed.) 572; 40 Sup. Ct. Rep. 558.

This is a property tax, not a privilege tax. See Joyce on Franchises, §§ 6-8; 2 Fletcher, Cyc. of Corp., § 1149. It is property, and its taxation *as property* is specifically provided for by statute. Kirby's Dig., § 6936 *et seq.;* act 262, Acts 1917, pp. 135-9.

The shares are within the jurisdiction and taxable. 1 Dewing, "The Financial Policy of Corporations" (1920), page 7.

Corporate shares are property, and the State has power to tax. 150 N. Y. 1; 44 N. E. 707; 54 L. R. A. 238; 55 Am. St. 632. See, also, 145 Ia. 1; 123 N. W. 743; Gleason & Otis on Inheritance Taxation, p. 318; Ross on Inheritance Taxation, 246, § 182; *Ib.,* pp. 246-8; 186 N. Y. 220; 78 N. E. 939; 10 L. R. A. (N. S.) 1010; 173 Miss. 375-7; 76 N. E. 16.

Arkansas has jurisdiction over the corporation and the property of its shareholders and can levy a valid tax. 64 N. Y. 542; 51 Hun 312; 21 Utah 324; 56 L. R. A. 346; 186 U. S. 556; 129 N. Y. 558; 122 Tenn. 279.

As illustrative cases from other States, see 170 N. W. 863; 40 Sup. Ct. Rep. 558; 21 Utah 324; 61 Pac. 560; 182 U. S. 556; 153 Cal. 549; 156 *Id.* 617; 10 N. E. 442; 102 Kan. 334; 170 Pac. 33. These authorities sustain the

*Bodcaw* decision of this court. The true construction of the act comprehends all corporations. The intention and purpose of the act was to tax all intangible property. Kirby's Dig., § 6936, was expressly repealed by the act, and its plain purpose was to substitute a more efficacious and working formula for segregating intangible property. There certainly was no intention to reach and tax intangible property. Words in a statute which have previously been judicially interpreted are presumed to be used in that sense in the absence of anything to indicate a contrary intent. 36 Cyc. 1118; 72 Ark. 601, 610; 84 S. W. 224; 84 Ark. 316-320; 21 Ark. 5-8; 138 *Id.* 549. The phrase, "doing business," has been often defined. 60 Ark. 120; 114 *Id.* 155; 125 *Id.* 413; 128 *Id.* 211; 136 *Id.* 417; 217 S. W. 1. The phrase "doing business" is employed in our Constitution in only one place. Art. 12, § 11. The Legislature in passing the act used the phrase as a limitation applicable only to foreign corporations, and section 2 of the act only applies to foreign corporations, leaving section 6936, Kirby's Digest, to take care of domestic corporations, and only that part of section 6936 which is in conflict, viz., that portion which relates to foreign corporations, will be held repealed. 11 Ark. 481, 490-8, 502; 80 *Id.* 203; 85 *Id.* 346; 86 *Id.* 343; 97 *Id.* 322; 112 *Id.* 101. An act should be construed so as not to conflict with the Constitution. 58 Ark. 407, 438; 69 *Id.* 376-8, etc. Technical terms used in a technical sense. 4 Crawford's Digest, p. 4682, col. 2. Statutes must be construed *as a whole.* Black on Int. Laws, § 99; Endlich Int. of Stat. 258; Potter's Dwarris on Stat. 197, 201; 2 Ark. 229, 250; 115 *Id.* 194; 140 *Id.* 398.

The annulment of section 2 of the act upon constitutional grounds does not necessarily destroy the validity of section 1, which, it is conceivable, would have been enacted alone. Cooley, Const. Lim. (7 ed.), p. 246; 130 Ark. 70; 138 *Id.* 381; 216 S. W. 289.

The title of the act and its context should be construed together as determining the meaning. 82 Ark.

302; 124 *Id.* 61, 20, 24. Any interpretation of act 262 tending to the unlawful result of relieving corporate property from its just burden of taxation *ipso facto* destroys the act and renders it invalid. Hence this court will not give the act such construction as to bring about an unconstitutional result, but will construe section 2 so as to include within its purview "*all domestic corporations* whatever and *all foreign* corporations doing business in this State," etc. 37 Ark. 356; 53 *Id.* 490. If section 6396 is applicable, it was repealed by act 262 of 1917.

*Gaughan & Sifford,* for appellee.

Under act 262 of 1917 the shares of stock of a corporation, after allowing credit for the assessments of all tangible property in the State of Arkansas of the corporation, shall be assessed against the corporation and shall be paid by it *as the agent for its shareholders.* There is no other authority or power from the legislative branch of our government which authorizes a corporation to pay taxes on the shares of stock except this act. This act applies to no other corporations, whether foreign or domestic, except those *doing business in this State;* and if a corporation is not doing business in this State, it does not come within the terms of this act. The statute is plain and unambiguous and needs no construction. 93 Ark. 42; 65 *Id.* 521; 46 *Id.* 159; 59 *Id.* 237; 11 *Id.* 44; 56 *Id.* 110; 74 *Id.* 302. The *Bodcaw* case does not decide this case. Our construction of the statute does not violate our Constitution. The repeal of section 6396 has the effect of nullifying the law as if it had never existed. 36 Cyc. 1224. The repealed statute is considered as a law that never existed except for the purpose of those suits which were commenced whilst it was an existing law. 30 Ark. 184. See, also, 134 Cal. 316; 66 Pac. 322. The repeal of a statute giving a right destroys the remedy.

McCULLOCH, C. J. Appellee is a domestic business and manufacturing corporation organized under the laws

of the State in the year 1914, and is domiciled at Camden, Arkansas. It owns no tangible property of any kind situated in the State, and its assets consist of a sawmill, lumber, logs, merchandise, standing timber and timber lands situated in the State of Mississippi, where it operates the business of manufacturing and selling lumber. It has paid no property tax in the State of Arkansas since its organization; none has been assessed against it in this State; and the present action is one instituted by the Attorney General to recover taxes on the stock of said corporation, which, it is alleged, has thus far escaped taxation. The case was tried below on an agreed statement of facts, in which it is stipulated that if appellee is liable at all the sum of $500 is the proper amount to be recovered.

The contention of the Attorney General is that, although appellee's tangible property situated in another State where its active business is being conducted, can not be taxed in this State, its shares of stock can and should be, under the statutes of this State, taxed here, and that the value of its tangible property in another State can be included in the estimate of value of the stock to be so taxed here.

In the case of *State* v. *Bodcaw Lumber Co.,* 128 Ark. 505, where the corporation involved was actively engaged in operating business in this State and its tangible property was situated partly in this State and partly in another State, we held that in the estimate of value of the stock of the corporation for taxation in this State the value of the tangible property in another State should be included. In the opinion in that case we said: "The valuation of the property outside of the State must be omitted when the property of the corporation itself is sought to be taxed; but when the effort is to assess the values of the shares of stock, it should not be deducted, for those shares of stock have a separate valuation existing here within the jurisdiction of the State, and upon which the State has a right to take its toll of taxation."

That decision was rendered on March 12, 1917, and another statute on the subject was enacted by the Gen-

eral Assembly and approved by the Governor on March 17, 1917 (Acts 1917, p. 1355, Crawford & Moses' Digest, § 9965), which, it was contended in another case (*Crossett Lumber Co.* v. *State,* 139 Ark. 397) changed the rule announced with respect to the taxation of stock of corporations; but we held that this statute did not change the rule announced in the *Bodcaw* case, *supra.*

The contention of learned counsel for appellee in this case is that the statute referred to which authorizes the taxation of shares of stock in a corporation against the corporation itself as the representative of the shareholders applies only to a corporation conducting its visible and overt business activities in this State, and that it does not apply to a domestic corporation which operates its business in another State where all of its property is situated. The statute applies in express words to "all corporations doing business in this State" (except certain ones enumerated); and requires them to annually file with the tax assessor "of the county wherein its principal office is situated" a list or statement showing the number of shares of stock and face value thereof, the market value of each share, the aggregate market value or actual value of all stock, the total bonds of the corporation secured by mortgage on the corporation's property and the value of such bonds, the assessed value of all real estate owned by the corporation, and the assessed value of all tangible personal property owned by the corporation and assessed under Kirby's Digest, § 6910 (Crawford & Moses' Digest, § 9904).

The statute further provides that the aggregate value of all the stock of the corporation and its bonds, after deducting the assessed value of its real estate and other tangible property, shall be "listed and assessed by the corporation as agent for its shareholders, under the heading, 'intangible property.' "

The theory of counsel for appellee is that a corporation organized under the laws of this State and domiciled here does not come under the requirement of the statute if it has no tangible property here and is not visibly operating some kind of business here in this State. That

is not, we think, the correct interpretation of the statute. The words used in the statute are very broad. "All corporations doing business in this State" is the language used. A corporation organized and domiciled here is necessarily doing business here if it is doing business at all. Its life and existence are here, and all of its business activities necessarily emanate here primarily, if it functions at all. Its domicile is the fountain head of all its activities. We are speaking now of a domestic corporation, for none other is dealt with in this case.

The obvious purpose of the statute makes it very clear that the meaning of its framers was to include all corporations whose corporate stock is within the jurisdiction of this State in the exercise of its taxing power. To exclude a corporation situated as appellee is would be to make an exception which the law makers did not intend. It can not be doubted that it is within the power of the State to tax, against the corporation itself, the shares of stock of a corporation circumstanced like appellee. The fact that all of the tangible property of the corporation is situated outside of this State does not differentiate the case from prior decisions in which the tangible property of the corporations involved was situated partly in this State and partly outside.

Counsel for appellee argue that since the purpose of the statute was to tax the shares of stock against the corporation as the representative of the shareholders, it is not unreasonable to assume that the law makers meant to omit all corporations not actively operating business here, leaving the shares of stock in all other corporations to be taxed against the individual shareholders. But this interpretation is against the policy obviously adopted by the framers of the statute to assess the shares of stock against all corporations existing here as the representatives of their respective shareholders. No reason is discernible for providing a different method of taxation merely because the corporation conducts its business elsewhere.

The conclusion is that the State is entitled to recover the taxes on appellee's shares of stock. The decree of

the chancery court is therefore reversed, and judgment will be entered here for the amount stipulated in the event of recovery.

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PETTIT v. ANDERSON.

Opinion delivered February 21, 1921.

NEW TRIAL—VERDICT AGAINST PREPONDERANCE OF EVIDENCE.—Where, in overruling a motion for a new trial, the trial judge announced that he would not disturb the verdict though it was against the weight of the evidence, the cause will be reversed and remanded for a new trial.

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

*Pope & Bowers,* for appellants.

1. The court erred in refusing to give appellants' instructions. 89 Ark. 24; 97 *Id.* 438; 110 *Id.* 571; 171 S. W. 869. The evidence clearly established adverse possession in appellants.

2. The statements of the trial judge show that the verdict was contrary to the evidence and that a new trial should have been granted. 126 Ark. 427; 129 *Id.* 448; 130 *Id.* 374; 132 *Id.* 45.

McCULLOCH, C. J. Appellee was the plaintiff below, and instituted this action against appellants to recover possession of a small tract of land in Randolph County. Appellee pleaded adverse possession for the statutory period of seven years, and that presented the sole issue for the trial before a jury, which resulted in a verdict in favor of appellee. There was a conflict in the testimony, but there was testimony on each side of the case legally sufficient to warrant a submission of the issue to the jury.

One of the grounds for the motion for new trial was that the verdict was not supported by sufficient evidence, and it therefore became the duty of the court to set aside the verdict if he concluded that the verdict was against the preponderance of the testimony. In passing on the

motion for a new trial, the trial judge made the following announcement: "I will state to you frankly, gentlemen, that I do not understand how the jury arrived at their verdict in this case. It seemed to me that the evidence in the case clearly showed adverse user of the tract of land in controversy for the statutory period of time before the filing of the complaint. But I have a very great respect for the finding of a jury on a question of fact, and am not disposed to overturn the verdict of the jury. I will not disturb the verdict of the jury, and the motion is overruled."

The language thus used necessarily constituted a finding by the court that the verdict of the jury on the issue of adverse possession was against the preponderance of the evidence. If the testimony "clearly showed adverse user of the tract of land in controversy for the statutory period," as stated by the court, then the verdict was necessarily against the preponderance of the evidence, and a new trial should have been granted. *Twist* v. *Mullinix,* 126 Ark. 427; *Spadra Creek Coal Co.* v. *Callahan,* 129 Ark. 448; *Spadra Creek Coal Co.* v. *Barger,* 130 Ark. 374; *Mueller* v. *Coffman,* 132 Ark. 45.

There are other assignments of error, which we deem it unnecessary to consider, in view of the fact that the failure of the court to grant a new trial necessarily results in a reversal of the judgment.

The judgment is therefore reversed and the cause remanded for a new trial.

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## SIKES v. DOUGLAS.

Opinion delivered February 21, 1921.

1. HIGHWAYS—DESCRIPTION OF ROAD.—Where 1 Road Laws 1919, p. 400, as amended by unpublished act of 1920, No. 228, described the road as a public road beginning at a point in a certain section of land where the road intersected an existing road, and running in a southwesterly direction through certain towns and to the south county line, and provided that the improvement is to be made upon the described route, or substantially so, "as the same may be designated and determined by the board of commis-

sioners of said road improvement district and the county court," the commissioners were authorized to adopt substantially the route indicated, when approved by the county court.

2. HIGHWAYS—GENERAL DIRECTION OF ROAD—DEVIATIONS.—Where a statute creating a road improvement district described the termini and general direction, and authorized the commissioners to make the improvement upon the described route or substantially so, the commissioners, with the consent of the county court, were authorized to adopt the most practical route between the points designated, though it involved deviations from the general direction.

3. HIGHWAYS—NOTICE OF ASSESSMENT.—Under 1 Road Laws 1919, p. 400, creating a road improvement district, and providing in § 11 that, after the assessors shall have delivered to the president of the board of commissioners their report or list of assessments, the president shall cause a notice to be published describing the land assessed and calling on the landowners aggrieved by reason of the assessments to appear on a day therein named, etc., notice is sufficient though signed by the president, nor is it material that the land is not described as the same was described in the report of the assessors, nor that the amount of the assessments was not stated in the notice.

4. HIGHWAYS—VALIDITY OF ASSESSMENT—FAILURE TO SHOW ADJOURNMENT.—An assessment on a road improvement district is not void because there is no record showing the final adjournment by the board of commissioners after the completion of hearings on the assessments.

5. HIGHWAYS—ATTACK ON ASSESSMENTS—LIMITATION.—An attack on the assessment of benefits in a road improvement district, on the ground that the asssessments were unjust and made on the wrong basis, must be made in a suit instituted within the time allowed by statute.

6. HIGHWAYS—UNREASONABLE COMPENSATION TO ENGINEER—ATTACK BY PROPERTY OWNER.—A landowner within a road improvement district may sue to prevent the enforcement of a contract made by the road commissioners to pay the engineer of the district a grossly excessive and unreasonable compensation; and a paragraph of the complaint alleging that the contract allowed the engineer 5 per cent. of the contract cost of $1,000,000, when 1 per cent. would have been adequate, is not demurrable.

7. HIGHWAYS—AMENDATORY ACT—RATIFICATION OF CONTRACT.—Act of January, 1920, No. 228, amending 1 Road Laws 1919, p 400, creating a road improvement district, in ratifying "all proceedings of the commissioners," referred merely to the regularity of the proceedings; the question of the fairness of the contract of employment of an engineer not being ratified.

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

*E. P. Watson, W. W. Sikes* and *W. O. Young,* for appellant.

1. Act No. 149 creating Road District No. 2, Acts 1919, p. 400, is unconstitutional and void. None except public roads can be improved under the powers given road improvement districts, and these roads must be in existence at the time the district is created, and such roads must be well defined in the act or power given the commissioners to lay out the road and that by consent of the county court, and the facts alleged in the complaint entitle appellant to relief. The Legislature could not pass a special act laying out a road from Garfield to Brightwater. Const., art. 5, §§ 24-5.

2. The act does not describe the road specifically.

3. The proclamation of the Governor calling the special session did not specify that one of the purposes for which it was convened was to amend the special act, nor to ratify and validate the illegal acts of the commissioners.

4. The act takes from the county court jurisdiction over county roads and is void.

5. Notice to the landowners was not given as required by law, and it was signed by proper authority. Page & Jones on Special Assessments, § 752. Nor did the notice specifically describe the tracts of plaintiff's lands that benefits had been assessed against. See section 11 of the act.

The commissioners did not, prior to September 30, 1919, provide by resolution and place of record a resolution that the assessments should be paid in consecutive annual installments and fix the per centum of benefits to be paid for the year 1920. Assessment statutes and proceedings thereunder must be strictly construed and followed. Page & Jones on Taxation, §§ 229, 776.

Plaintiff's lands were not assessed according to the benefits and is arbitrary and void. Page & Jones on Tax-

ation by Special Assessments, §§ 665-7. The assessment is void. *Ib.*, § 665. The contract for engineers' fees was exorbitant and void. Upon the facts alleged in his complaint, appellant was entitled to be heard upon the merits of the case and the chancellor erred in dismissing the complaint.

*Duty, Duty & Nance* and *Tom Williams* and *McGill & McGill, Lee Seamster* and *Sam Peasley,* for appellees.

1. The validity of these two improvement districts is settled in 218 S. W. 381. Act No. 28 validated and cured all defects and irregularities in the formation and organization of the districts attacked. The notice was sufficient. 103 Ark. 452. It was properly signed. 26 R. C. L. 346; 186 U. S. 458; 111 *Id.* 701; 201 *Id.* 245.

2. The suit was brought in time. 3 Sup. Ct. Reporter 863; 213 S. W. 733; Act 149, § 18. See, also, 218 S. W. 381; 130 U. S. 177; 265 Ill. 39; 26 R. C. L. 355 (§ 312); Ann. Cases 1916 A 707.

All other irregularities were cured by the validating act. 83 Ark. 344; *Ib.* 54; 98 *Id.* 113; 112 *Id.* 357. The remedy provided by the statute must be followed. 134 Ark. 292; 137 *Id.* 587; 220 S. W. 56. See, also, 139 Ark. 424; 224 S. W. 622. Appellant can not question the validity of the contract. 222 U. S. 251; 89 Ark. 522. The contract was entered into long before the passage of the curative act and all irregularities were validated. 217 S. W. 258; 134 Ark. 30. As to the manner of assessments the contention of appellant has been adversely decided against him. 125 Ark. 325.

The curative act amounted to a legislative determination that the assessment was fair. Appellant was given his day in court and his remedy was clear under the statute. 139 Ark. 277; 186 U. S. *supra.*

McCULLOCH, C. J. Appellant is the owner of real estate in a road improvement district in Benton County, designated as Road Improvement District No. 2 of Benton County, created by a special statute enacted by the Gen-

eral Assembly of 1919, at the regular session (vol. 1, Road Acts 1919, p. 400) and he instituted this action in the chancery court of that county against the board of commissioners of the district, and against the engineer of the district and the tax collector, to restrain proceedings under the statute. He attacks the validity of the statute itself and also the regularity of the proceedings thereunder in assessing benefits and in the employment of the engineer.

This is one of the districts, the validity of which was assailed in the case of *Easley* v. *Patterson,* 142 Ark. 52, wherein we upheld the statute. Most of the points of attack made by appellant on the validity of the statute were determined adversely to his contention in that case. The complaint, to which the chancery court sustained a demurrer, contains twenty-six (26) paragraphs, each attacking the statute or proceedings thereunder on various grounds. Many of the points of attack are abandoned here by failure to argue them in the brief. We will discuss only those points not deemed to have been expressly determined in the former case cited above.

It is first contended that the statute is void because the road to be improved is not definitely described, and because it was not, as alleged, a public road at the time of the enactment of the statute. This point was decided against appellant's contention in *Easley* v. *Patterson, supra.*

The amendment enacted at the extraordinary session in January, 1920 (unpublished act No. 228), described the road as a public road beginning at a point in a certain section of land "where said road intersects the Eureka Springs-Seligman road and running in a general southwesterly direction through Garfield, Brightwater, Avoca, Rogers, Lowell and to the south county line" on the line between two described sections of land. The statute further provides that the improvement is to be made upon the described route or substantially so as to the same may be designated and determined by the board of commissioners of said road improvement district and the

county court of Benton County, Arkansas, and upon the most practical route between the points designated."

This gives authority to the commissioners to adopt and follow substantially the route indicated and calls into action the judgment of the county court in approving it.

But it is alleged that there is no public road running in a southwesterly direction from Garfield to Brightwater; that the public road from Garfield runs in a westerly direction north of west from Garfield and connects with a public road at Elk Horn Tavern, north of Brightwater; and that the county court has not opened a public road running in a southwesterly direction from Garfield to Brightwater. It will be observed that the statute does not describe the specific direction of the road from Garfield to Brightwater nor any other section of the road, but it describes the general direction of the road from one terminus to the other. There may be deviations from the general direction which would not nullify the description. The commissioners are authorized, with the consent of the county court, to adopt the most practical route between the points designated. There is no allegation that the commissioners have, without the approval of the county court, adopted a route along which they are about to construct a road not opened as a public road. The contention of appellant on this point is therefore unfounded.

It is next contended that the assessment of benefits is void because proper notice was not given so as to afford property owners an opportunity to object thereto. Section 11 of the statute creating the district provides that, after the assessors shall have delivered to the president of the board of commissioners their report or list of assessments, "the president shall cause a notice to be published in a newspaper published in said county of Benton, for two weeks, describing the land assessed and calling on the landowners aggrieved by reason of the assessments to appear on a day therein named," etc.

It is alleged that the notice was signed by the president himself, and the contention is that under the statute

the notice should have been signed by the assessors—that the president was merely authorized to "cause it to be published." This contention is not sound. The statute does not require the assessors to do more than to "place in the hands of the president" the list or report of assessments. The president is required to "cause a notice to be published," which means that he shall give notice by publication in the manner prescribed. It is also alleged that the published notice "did not describe the lands assessed as the same was described in the report of the assessors" and that the notice "did not set forth the amount assessed against each particular tract or parcel of land." The statute requires merely that the land assessed shall be described in the notice. No form of description is prescribed, and it is not essential that the description be in the form adopted by the assessors. All that the statute requires is that there be such description of the land in the notice as is reasonably sufficient to put the owners on notice that their lands have been assessed. The statute does not require that the amount of the assessments be stated in the notice.

It is next argued that these assessments are void and unenforcible because there is, as alleged in the complaint, "no record showing the final adjournment by the board of commissioners" after the completion of hearings on the assessments. The absence of a record of the adjournment does not prevent the assessment from becoming final and complete. In the absence of fraud or concealment, the mere fact that no record of the adjournment was entered on the minutes of the board would not affect the validity of the assessments.

The assessments of benefits are attacked on the ground that they are unjust and were made on the wrong basis; that the assessments on certain railroad property were reduced by the assessors to a sum which operated as discrimination against other property owners and that the amounts exceed the true benefits. These are matters which could only be raised in a suit instituted within the period of time prescribed by the statute. It is too late

now to challenge the correctness of the assessments on those grounds.

In paragraph 25 of the complaint an attack is made on the contract with the engineer, and one of the prayers of the complaint is that the contract be canceled. That paragraph reads as follows: "That part of the overhead expenses for which said excessive assessments of benefits were made to pay, said board of commissioners of district No. 2, on March 7, 1919, at its first meeting and before any plans, specifications or estimates of costs of the proposed improvements had been made, and before said board fully understood the costs of said improvements, said board entered into a written contract with defendant, R. D. Alexander, by which they employed him, as chief engineer of said district, and agreed to pay him five per cent. of the actual cost of constructing the improvements aforesaid, not exceeding the cost of $1,000,000, and four per cent. on all cost of improvements in excess of $1,000,000. That said sum so agreed to be paid said engineer was an exorbitant price. That one per cent. of the amounts aforesaid would be an ample sum for his labor, material and skill."

We are of the opinion that this paragraph states a cause of action to which objections, if any, should have been made by a motion to make more definite and certain, rather than by demurrer. It is stated, in substance, that the contract is for the payment of a grossly excessive fee—that the contract is for payment of five per centum on the contract cost of $1,000,000, whereas, a reasonable fee would be one per centum of such cost.

Appellee, as a taxpayer, has a right of action to prevent the performance of such a contract if it be found to be grossly excessive and unreasonable. *Seitz* v. *Merriwether,* 114 Ark. 289. The commissioners had no authority to enter into a contract for payment of an unreasonable fee to an engineer. *Sain* v. *Bogle.* 122 Ark. 14; *Bayou Meto Drainage Dist.* v. *Chapline,* 143 Ark. 446.

Learned counsel for appellee contend that the special statute (act No. 228) constituted a ratification of the contract with the engineer and a determination by the

Legislature of the fairness and validity of the contract. Not so. The statute only purports to ratify and confirm "all proceedings of the commissioners of road improvement districts." The question of fairness and providence of the contract does not fall within the term "proceedings of the commissioners," which refers merely to the regularity of the proceedings—to the thing which the lawmakers in the first instance might have dispensed with. If it had been intended to approve the substance of the contract made by the commissioners, more appropriate words would have been used.

The demurrer to this paragraph should have been overruled, and, upon answer filed putting in issue the question of reasonableness of the contract, the court should have tried that issue on the testimony presented. For the error indicated in sustaining the demurrer to paragraph No. 25 of the complaint, the decree is reversed and the cause is remanded with directions to overrule the demurrer. In all other respects the decree is affirmed.

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## GREENING v. PLANTERS' BANK & TRUST COMPANY.

Opinion delivered February 21, 1921.

**GARNISHMENT—TRUST FUNDS.—Funds advanced to a trustee by the government to be applied to the operating expenses of a railroad, which the government had undertaken to guaranty, are not subject to garnishment by the railroad's judgment-creditor, under the rule that a trustee can not, during the pendency of the trust, be held as a garnishee in an action to collect a debt which the *cestui que trust* owes.**

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

*Jas. H. McCollum,* for appellant.

Appellant had the right to subject the earnings of the railroad company in the hands of the bank to the garnishment. The money earned by the railroad company, after its property was returned by the government, belonged to the company, and the Director General had no

authority over it. The following case supports the contention of the appellant: 140 Ark. 572. The money belonged to the railroad company and was subject to garnishment.

*J. G. Sain,* for appellee.

The finding of the lower court to the effect that the garnishee had no funds in its hands at the time and after the garnishment was served was a question of fact, and there is nothing here for this court to review.

McCULLOCH, C. J. Prior to March 1, 1920, the date on which the Government of the United States returned the railroads to their respective owners, appellant obtained judgment in the circuit court of Howard County in the sum of $1,241.55 against the Memphis, Dallas & Gulf Railroad Company for damages on account of the negligent loss of cotton delivered to said company for transportation; and on July 20, 1920, appellant sued out a writ of garnishment against appellee, Planters' Bank & Trust Company, a corporation doing a banking business at Nashville, Arkansas. Appellee filed its reply, denying that it was indebted to the principal defendants in any sum, or that it had in its hands any funds or other property belonging to said defendant. Appellant filed a reply to this answer, raising an issue as to whether or not appellee had funds in its possession belonging to said defendant. There was a trial of the issue before the court, which resulted in a judgment in favor of appellee, as garnishee.

The material facts are undisputed. When the Government returned to the defendant, Memphis, Dallas & Gulf Railroad Company, its property which had theretofore been operated under government control, the Director General of Railroads caused to be delivered to Geo. H. Bell, as trustee, the sum of $12,467.87, which had accrued from the earnings of such operations while under government control. This fund, as well as the funds which subsequently came to the hands of the trustee, was held by him under directions given in a general order

issued by the Director General of Railroads upon the return of railroad property to their owners. Pursuant to the statutes of the United States extending to the railroad corporations the government's guaranty for a period of six months for reimbursement of expenses of operation, the government, acting through the Director General of Railroads, advanced to some, if not all, of the railroads sufficient funds to use in operating expenses, with directions that the same should be deposited in the name of the trustee named by the Director General and used exclusively in operating expenses of the railroad. Under this arrangement the government advanced to the Memphis, Dallas & Gulf Railroad Company the sum of $90,000, which was paid over to Bell, as trustee and deposited by Bell in appellee bank in his name as such trustee. The revenues of the railroad were also paid to Bell as trustee from time to time and were, under the instructions of the Director General, deposited in his name.

This fund received by the trustee from the earnings of the defendant company was also paid out with the other funds on the operating expenses of the railroad. According to the undisputed testimony, the earnings of the railroad company, after restoration to the owner, were less than the operating exepnses paid out of the funds in the hands of the trustee, and on the date of the garnishment the trustee had in his hands and on deposit with appellee bank forty thousand nine hundred sixty-eight dollars and fifty-six cents.

Bell was the treasurer of defendant company and also cashier of appellee bank, but the funds were, as before stated, paid over to him as trustee and were deposited by him in that capacity with appellee bank.

The question presented in this case is whether or not the funds in the hands of appellee deposited to the credit of Bell as trustee were subject to garnishment. This question is not difficult of solution. It is an elemental principle of the law that "a trustee can not, during the pendency of the trust, be held as a garnishee in an action

to collect a debt which the *cestui que trust* owes. The creditor has no better claim to the fund or property than the beneficiary had; and when the latter has no right to maintain an action for it or any part of it, garnishment against the trustee will be unavailing." 2 Shinn on Attachment and Garnishment, § 531; *State Nat. Bank* v. *Wheeler-Motter Merc. Co.*, 104 Ark. 222.

The funds advanced by the government to be expended in the operation of the railroads did not become the property of the railroad company, except to the extent permitted by the government authorities, and the funds were held in trust by the trustee for the use to which the funds were dedicated. The authority for the use of the funds expressly excluded the application thereof to anything except the current operating expenses which the government had undertaken to guaranty. Neither the railroad company nor its creditors could compel the appropriation of that fund to any other use. But it is contended that appellant was at least entitled to relief by garnishment process out of the funds on deposit which were derived from the earnings of the company in its operation of the railroad after the return to the owner from government control. These earnings, it appears from the testimony, were paid to Bell as trustee and mingled with the other funds which he had received from the government. It is unnecessary to decide whether or not the assumption by the Director General of Railroads of authority to direct and control the use of the funds received from the operation of the road after the return of it to the owners was wrongful. It does not appear from the proof that there were funds on deposit in the appellee bank which had been derived from the earnings of the company. On the contrary, the undisputed testimony establishes the fact that the earnings from the operation of the road were far less than the operating expenses, and that the funds were exhausted before they went into the hands of Bell, as trustee. Therefore, there were never any funds on hand from that source to be reached by garnishment if they were, under the circumstances, subject to that process.

The circuit court was therefore correct in rendering judgment in favor of the garnishee.

Affirmed.

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## RUNYAN v. GOODRUM.

Opinion delivered February 21, 1921.

1. PHYSICIANS AND SURGEONS—LIABILITY FOR NEGLIGENCE OF X-RAY SPECIALIST.—Where defendant surgeons maintained an x-ray department in their hospital, and employed a competent and skilled specialist in that department, over whom they had no control as to the method used in doing x-ray work, the defendants were not liable for the negligence of such specialist.
2. PHYSICIANS AND SURGEONS—DEGREE OF CARE IN USE OF X-RAY MACHINE.—Surgeons maintaining an x-ray department at their hospital are bound to exercise ordinary care to see that this department is equipped with such apparatus as is generally approved by roentgenologists as best adapted for the proper diagnosis and treatment of diseases, and to provide competent specialists to do the work in the department; ordinary care in such case meaning a very high degree of care.
3. EVIDENCE—SUFFICIENCY.—A jury should not be allowed to speculate on probabilities of an instrument being defective in the face of positive testimony that the instrument was not defective or unsafe.
4. PHYSICIANS AND SURGEONS—NEGLIGENCE IN X-RAY EXPOSURE.—The doctrine of *res ipsa loquitur* does not apply to a case of alleged negligence on the part of surgeons by burning a patient in the application of an x-ray machine; it being shown that on account of the idiosyncracies of that machine one person of a certain type and temperament would be susceptible to a burn while another person of a different type under the same circumstances would not be burned, and that burns do occasionally occur in the ordinary course of the exposure, in spite of the highest diligence and skill to prevent them.
5. PHYSICIANS AND SURGEONS—BURDEN OF PROVING NEGLIGENCE.—The burden of proof was on one suing surgeons for burns during x-ray exposure by their operator to show negligence on the part of the operator, and that such negligence was the proximate cause of plaintiff's injury.
6. PHYSICIANS AND SURGEONS—X-RAY BURNS—PROXIMATE CAUSE.—In an action against surgeons for x-ray burns received by plaintiff, evidence *held* to show that the proximate cause of plaintiff's injuries was not a defect in defendants' x-ray machine, but was the negligence of an independent operator of the machine.

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

*Buzbee, Pugh & Harrison,* for appellants.

1. It is well settled that a physician or surgeon may recommend or employ another physician or surgeon to treat a patient for him or assist him in treating a patient, and in the absence of negligence in such selection he will not be liable for the negligence or lack of skill of the physician or surgeon so recommended or employed by him. 30 L. R. A. 345; 65 Ark. 578; 132 *Id.* 18; L. R. A. 1918 C 132; 199 Fed. 760; 211 S. W. 214; 218 *Id.* 924.

2. It is also well established that a physician or surgeon may be liable for damages caused by the negligence or default of his employee or servant under his direction. 64 L. R. A. 969; 180 Mo. 322; 87 Ohio St. 401; 45 L. R. A. (N. S.) 640; 46 *Id.* 611; 239 Pa. St. 351. The liability of appellants is governed by the rule laid down with reference to the employment by a physician or surgeon of another physician or surgeon rather than by the rule established in reference to the employment of a nurse or similar assistant, but the court declined to adopt our theory and hence this appeal, as the court refused to give the instructions requested, which was error. 30 L. R. A. 345; 65 Ark. 578.

Appellants were not liable for the negligence of Miss Green, if any there was. The relation of master and servant did not exist between appellants and Miss Green, and the doctrine of *respondeat superior* does not apply. One who employs a person who follows a distinct and independent occupation of his own is not responsible for the neglect or improper acts of the other. 98 Ark. 399; 51 Tex. 510; 211 S. W. 214; 2 Mich. 369.

X-ray work is a distinct and independent occupation and a profession, and appellants were not liable for the negligence of either Doctor McGill or Miss Green and the case should be reversed.

3. The verdict is outrageously excessive under the evidence, and the argument of counsel for appellee to the

jury was prejudicial. 100 Ark. 526; 78 *Id.* 56; 92 *Id.* 569; 59 *Id.* 105; 58 *Id.* 454; 65 *Id.* 619; 70 *Id.* 179; 188 S. W. 838.

*Lewis Rhoton* and *J. C. Goodrum,* for appellee.

1. The complaint and amendments allege negligence on the part of Miss Green, the admitted agent, servant and employee of defendants, and that defendants were negligent in not using reasonable care in furnishing a reasonably safe x-ray machine. The evidence shows negligence for which appellants were responsible and the jury so found, and the verdict is sustained by the evidence and should not be disturbed.

2. The verdict is not excessive. 122 Ark. 305; 35 *Id.* 492; 278 S. W. 924; 2 Bingh. 156. This case is controlled by the principles announced in 208 S. W. 924; 108 Mo. 322; 45 L. R. A. (N. S.) 640; 46 *Id.* 611. See, also, 106 Ark. 91. The instructions were really too favorable to appellants. Appellee was seriously and permanently injured, and appellants were clearly liable.

WOOD, J. The appellee brought this action against the appellants to recover damages for personal injuries. She alleged in substance that the appellants were partners in the general practice of medicine and surgery; that they owned and operated St. Luke's Hospital in the city of Little Rock, Arkansas; that she became a patient of appellants and under the advice of appellant Kirby went to St. Luke's Hospital, where a Miss Green, an employee, servant and agent of appellants, made an exposure of appellee's body to an x-ray machine; that, through the negligence and ignorance of Miss Green in exposing the body of appellee to the x-ray machine for an unreasonable length of time in the morning and again in the afternoon of the 3d day of December, 1918, and again on the following day, she was seriously burned and permanently injured. Appellee also alleged that appellants permitted Miss Green to use an old and defective screen, which, in order to obtain proper reflection for fluoroscopic examination, required a current dangerous in strength

and a dangerous and excessive length of time in making the exposure. Other acts of negligence were alleged, but all except the above were abandond at the hearing. The appellee alleged that she had been damaged through the negligence of appellants as above set forth in the sum of $25,000, for which she prayed judgment.

The appellants answered, denying the allegations of the complaint. They set up that the injury resulted without any fault on the part of the operator and without any defect in the machine itself, and by reason of the uncontrollable nature of the x-rays.

Over the objection of appellants, the court gave instructions to the jury in which it was assumed that under the evidence the relation of master and servant existed between the appellants and Miss Green, and told the jury in effect that if they found that Miss Green was negligent in the use of the machine and that the injury to the appellee was the result of such negligence, the appellants were liable. The court further instructed the jury, over the objection of appellants, that appellants were liable if they failed to exercise ordinary care to furnish reasonably safe appliances, provided such failure was the proximate cause of the injury to the appellee. The appellants prayed the court to instruct the jury to the effect that if the appellants exercised ordinary care in employing Miss Green to operate the x-ray machine in question, they were not liable for her negligence, if she was negligent. Appellants also asked the court to tell the jury in effect that if the appellants failed to furnish a machine that was in good condition, and if such failure resulted in injury to the appellee, appellants would not be liable for such injury, provided they exercised that care which ordinarily prudent physicians and surgeons would have exercised in the circumstances. The court refused these prayers, to which the appellants duly excepted. The trial resulted in a judgment in favor of the appellee in the sum of $25,000, from which is this appeal.

1. The first question is, Did the relation of master and servant exist between the appellants and Miss Green? The facts concerning this are substantially as follows: The appellants are partners in the general practice of medicine and surgery. They maintain a hospital in the city of Little Rock, known as St. Luke's. At this hospital they have various departments, and among them a laboratory and x-ray department, which in December, 1918, was in charge of Dr. A. C. McGill, who was in the employ of the appellants as a specialist in laboratory and x-ray work. Doctor McGill was a graduate in medicine of Tulane University, and had made special preparation for x-ray work at Battle Creek, Michigan, and also at the Presbyterian Hospital, Chicago, Illinois. He had been doing the x-ray work at St. Luke's Hospital since 1913, and was an experienced and skillful operator of the x-ray machine, familiar with all of its parts and accessories. Appellants Kirby and Sheppard became associated with appellant Runyan about 1916 or 1917. Thereafter there was a great increase in the x-ray work at St. Luke's, and Miss Green was employed by appellants to assist Doctor McGill in that work. She began to work under Doctor McGill early in 1917, and continued for about two years, and was operating the x-ray machine at the time of the injury to appellee.

Concerning the qualifications of Miss Green as an x-ray specialist, Doctor McGill, a witness for the appellee, testified that she was as competent as he; that he had given her the same instructions that he had received. "She was very careful and very efficient and had x-rayed hundreds of patients," which he estimated all the way from six hundred to a thousand. She was not a graduate of medicine, but the testimony both for the appellants and for the appellee shows that this was not essential in order to make one an x-ray specialist. Doctor McGill testified that "one of the best x-ray men he knew of on the face of the earth was not a doctor." He referred to the person who operated the x-ray machine for the Mayos, "whose x-ray department was something enormous." Doctor Kirby testified that when he was pur-

suing his medical studies in St. Louis, the man in charge of the x-ray department in the St. Louis City Hospital, and who was considered one of the best x-ray men in that city, was not a doctor.

Doctor McGill testified that the x-ray business or profession is a distinct and separate profession from that of surgery; that "it is a true specialty, as much so as surgery." He and Doctor Bathurst, another witness for the appellee, testified that in the vicinity of Little Rock it is rather the rule than the exception that the x-ray work is done by some other person than the surgeon himself; that, while a few surgeons here do their own x-ray work, it is not the rule. The testimony of appellants Kirby and Runyan was to the same effect, and further that, with the amount of surgery done by them, it would be impossible for them to personally do their own x-ray work. Moreover, none of the appellants were x-ray specialists. They were entirely ignorant of x-ray work, and were wholly dependent for such work on their x-ray department, which was under the supervision and full control of Doctor McGill and operated by him and his assistant, Miss Green.

The testimony of appellants Runyan and Kirby and of their business manager, King, shows that the x-ray department at St. Luke's Hospital is separate and distinct from the other departments of the hospital work and used for x-ray purposes by the doctors in attendance at the hospital. During the progress of the trial, when evidence concerning the competency of Miss Green was being adduced, counsel for the appellee made the following statement: "There is an allegation that Miss Green was incompetent, but I think it has been shown here that she is competent, and there will be no argument on my part that she wasn't." Therefore, it is thoroughly established by the undisputed testimony in this record that x-ray work is a specialty, and that this work at St. Luke's Hospital was maintained and operated as a separate and distinct department in charge of competent x-ray specialists. The appellee does not now controvert this, and we have only set forth the above facts because we have found

them helpful in the solution of another question, namely: In an action by a patient against physicians and surgeons to recover damages for their alleged malpractice, caused by the alleged negligence of an x-ray specialist whom they had employed to assist them, does such specialist stand in the same relation to the physicians who employed him as if he had been another physician employed to give the patient necessary attention in their absence?

The question is a most interesting and important one, and it has given us the greatest concern. It is one of first impression in this State, and counsel have not cited, nor has our own research discovered, any case elsewhere that decides the exact question. A correct answer to the question requires a brief resume of the history of the x-ray, the field it occupies, and what it has accomplished in the realm of modern science.

In 1895 Professor Roentgen, a celebrated German physicist, discovered the x-rays, or, as they are sometimes designated, "Roentgen" rays. Roentgenology, so called in honor of Professor Roentgen, is the science which treats of the x-ray and its uses and the art of applying it. Those who devote themselves to the study and practice of this specialty as a profession are called Roentgenologists. The use of the x-ray other than in the sciences of medicine and surgery is practically negligible. While yet comparatively in its infancy, nevertheless giant strides have been made in the development of Roentgenology. The apparatus necessary for the application of the x-ray to the human body in the diagnosis and treatment of diseases has been brought up from a crude beginning to seemingly the highest perfection and standardization. So that now, through the work of the x-ray specialist, or Roentgenologist, the mysteries of numerous diseases hidden beneath the tissues of the human body have been uncovered. Many of these are diseases of the most malignant type, which had hitherto baffled the skill of the best physicians and surgeons. Today they are able to correctly diagnose and successfully treat them solely because of the aid given by the x-ray specialist. Even in the last quarter of a century, wonderful

progress has been made in the sciences of medicine and surgery, and the science of roentgenology has been their most helpful ally.

Dr. Sinclair Tousey of New York City, in an article on the x-ray, 29 Americana, page 595, said: "The x-ray has led to one of the most important discoveries in modern science. It has shown that many diseases of the type of rheumatism, arthritis, neuritis and myositis, also endocarditis, digestive troubles, including ulcer of the stomach and many other symptoms and lesions of a varied character, frequently have their origin in tooth infection. * * * Such infection is readily disclosed by an x-ray examination, and easily cured by the dentist."

Doctor Osler, one of the most eminent medical authorities in the world, mentions twenty-five diseases, some of them hitherto incurable, in which the x-ray is resorted to, both for successful diagnosis and treatment, and others in which it is most helpful. Principles and Practice of Medicine—Osler, Index, X-ray, p. 1224.

In an article by Dr. R. B. Carman of the section of Roentgenology in the Mayo clinic, is the following: "During the year 1919 the examinations made in the department of Roentgenology numbered 50,668, as follows: Kidney, ureter and bladder, 6,088; bone, 12,129; chest, 17,301, and gastro-intestinal tract, 11,825." American Journal of Roentgenology for December, 1920, p. 557. Other authority for the above observations may be found in Medical Jurisprudence, Forensic Medicine and Toxicology. Witthaus & Becker, vol. 3, p. 733, *et seq.;* Keen's Surgery, vol. 5, p. 1143; Industrial Medicine and Surgery, Mock, p. 60, *et seq.*, and p. 568 *et seq.;* Enc. Brittanica, vol. 28, p. 887; X-ray in Medicine and Surgery, New International Enc., vol. 23, p. 850; American Journal of Roentgenology for December, 1920, p. 584; 29 Americana, X-ray, p. 595; The Roentgen Rays in Medical Work, Walsh (3 ed.), Preface and Appendix 2, p. 301.

In Witthaus & Becker, volume 3, page 799, it is said: "Personal responsibility and liability to a patient for damages caused by the use or misuse of the x-ray rest upon the same principles of law as any other branch of

medicine or surgery. The same rules, so far as malpractice is concerned, must be applied as laid down in our court of last resort, to guide the medical and surgical practitioner." See also 21 R. C. L., p. 386, § 31. For the rules applicable to physicians and surgeons as announced by our court, see *Dunman* v. *Raney*, 118 Ark. 337.

We conclude, therefore, that, because the science of roentgenology is so inter-related with the sciences of medicine and surgery in the diagnosis and treatment of human diseases, it should be classed in the same category with those sciences. And the x-ray specialist, or Roentgenologist, must be placed in the same class with the physician and surgeon because of the peculiar knowledge and technic that he must possess, and because in the practice of his profession such knowledge and technic is dedicated almost exclusively to the aid of the physician and surgeon in the diagnosis and treatment of diseases of the human body. The x-ray specialist, or Roentgenologist, can not be placed in the same class with the chauffeur or elevator operator, as contended by counsel for appellee, nor even with engineers, electricians, and other employees whose employment contemplates the exercise of the peculiar skill and technic possesesd only by those who are engaged in and qualified for their line of work. Because all such employees are under contract to exercise their peculiar skill to produce certain definite and specific results which are known in advance of employment. In all such cases the employer, by virtue of the express or implied agreement "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." *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 32 Law. Ed. 440; *Bailey* v. *Troy & B. R. Co.*, 57 Vermont 252, 52 Amer. Rep. 129; Wood, Master and Servant, § 311; *DeForrest* v. *Wright*, 2 Mich. 368; 1 Labatt on Master and Servant (2 ed.), pages 9 and 222, and other authorities cited in brief for appellants. Unless expressly so provided, such employees have not the right at all times in the prosecution of their work to exercise

their own independent judgment and discretion as to the mode and manner in which it shall be done, and they are not engaged in an employment which has for its object the treatment of the manifold diseases of our human flesh and the alleviation of the physical pain and suffering of mankind. Whereas, as we have already shown, the x-ray specialist, or Roentgenologist, like the physician and surgeon, unless he expressly contracts to produce certain results, has the right to, and must at all times, act according to his independent judgment and discretion in the exercise of his skill and learning in the treatment of human diseases. The very nature of his profession and the character of his contract of employment involves this right.

Such being our conclusion, it inevitably follows under the doctrine of our own cases that the relation of master and servant can not exist between physicians and surgeons who are not x-ray specialists themselves and the x-ray specialist, or Roentgenologist, whom they employ to assist them in the diagnosis and treatment of diseases.

In *Arkansas Midland Railroad Co.* v. *Pearson,* 98 Ark. 399, we said: "A physician can not be regarded as an agent or servant in the usual sense of the term, since he is not and necessarily can not be directed in the diagnosing of diseases and injuries and prescribing treatment therefor, his office being to exercise his best skill and judgment in such matters, without control from those by whom he is called or his fees paid."

In the case of *Keller* v. *Lewis,* 65 Ark. 578, Doctor Keller was called in by Lewis to treat his son, who had sutained a dislocation of the arm. Doctor Keller attended and gave the patient temporary treatment, and, being about to leave the city of Hot Springs, recommended that the patient be taken to another physician whom he had engaged to look after his patients in his absence. Doctor Keller was sued for the alleged negligence of the other physician. In that case we held that the employment of the other doctor constituted an inde-

pendent contract, and that Doctor Keller was not responsible for the negligence or want of skill of that doctor.

In the still later case of *Norton* v. *Hefner,* 132 Ark. 18-23, Doctor Norton was called by Hefner to perform a surgical operation upon his wife. Doctor Norton performed the operation and arranged with a young physician at the hospital to look after the patient until she recovered. An action was brought against Doctor Norton to recover damages for the alleged negligence of the doctor whom Doctor Norton had selected to take charge of his patient. In disposing of that case we cited and quoted from the above cases and said: "Appellant (Norton) was not guilty of negligence in the performance of the operation, nor in the selection of a physician to continue the treatment after he left the city. Not being negligent in those respects, he can not be held responsible for the negligence of the other physician who was left in charge merely because the other physician took charge on his suggestion and arrangement." We further said: "This view of the law is based upon the theory that the doctrine of *respondeat superior* applies only in case of the negligence of a servant who acts under the direction and control of the master (*De Forrest* v. *Wright,* 2 Mich. 368), and does not apply to a physician or other professional man who, when employed, acts upon his own initiative without direction from others."

The fact that the x-ray specialist for whose negligence recovery is sought was working at St. Luke's Hospital in the x-ray department equipped by the appellants for such work, does not affect the character of employment between appellants and Miss Green, so far as the performance of her work is concerned. Under the evidence, the appellants had no more control over her as to the manner and method she used in making her investigations, interpretations and reports, than if she had maintained an office down town and had been employed by appellants to do all their x-ray work at that place with apparatus and equipment not furnished by appellants. So far as the manner and method of her work was concerned, she was no more under the control of the appel-

lants in the one case than she would have been in the other. For illustration, would the Mayos, in whose x-ray department over 50,000 patients were examined in one year, be liable to any of these patients in damages for injuries caused by the negligence of their Roentgenologists, because of the fact that they were maintaining an x-ray department at their institution fully equipped by themselves, instead of committing that work to x-ray specialists on the outside? We are convinced that they would not be liable unless they had been negligent, that is, had failed to exercise ordinary care to employ competent Roentgenologists, and to furnish the proper apparatus. The difference between the Mayos and the appellants in these respects is only in numbers. For the business of appellants had grown to such an extent as to make it necessary, in order to meet the requirements of their practice, to maintain at their hospital a separate and distinct department of Roentgenology fully equipped, and to employ for all their time two Roentgenologists for that department.

To sustain their contention that appellants are liable for the alleged negligence of Miss Green, counsel for the appellee rely upon the following cases: *Gross* v. *Robinson,* 218 S. W. 924; *Longan* v. *Weltmer,* 180 Mo. 322; *Palmer* v. *Hunnister,* 45 L. R. A. (N. S.) 640; *Davis* v. *Kerr,* 46 L. R. A. (N. S.) 611.

In *Gross* v. *Robinson,* the defendant, Gross, himself had exposed the plaintiff to the x-ray machine, two or more times, and Gross claimed to be an x-ray specialist. After failing to secure a picture, he called in another x-ray specialist, who, in the presence of Gross, made another exposure, and failing to get the desired picture, Gross continued himself to make further exposures, and also after again failing, called in another person who made no pretense to the experience and skill of an expert in the medical profession, to make another exposure. Of course, under such a state of facts, it was a question for the jury to say whether the defendant was negligent, as the Supreme Court held. The facts bear no analogy to the case at bar. In the case of *Longan* v. *Weltmer,* the

defendants "held themselves out, not as practicing physicians, but *magnetic healers,* claiming and pretending to cure all mental and physical ailments." The facts show that case has no application to the present case. The other cases were actions against surgeons for alleged malpractice in leaving sponges in wounds after an operation. One of the defenses was that the reason the sponges were not removed was because of the negligence or oversight of the attending nurses at the hospital in failing to make proper count of the number of sponges that had been placed in the wound, and in their misleading the surgeon as to the number when he came to remove the sponges. It was the custom at one of the hospitals for the head nurse in attendance at the operation to count the number of sponges that were placed in the wound. Of course, in these cases it was held that the surgeons, whose duty it was to remove the sponges, as a part of the operation, had no right to rely upon the accuracy of the count made by the nurses. The nurses had expert knowledge as physicians or surgeons and were under the immediate direction of the surgeon. To state the facts is enough to clearly distinguish all of the above cases from the case in hand.

It is necessary, according to certain distinguished professors of Roentgenology and writers on the subject, that one should possess some knowledge of the science of pathology in general, and of anatomy and physiology in particular, in order to constitute such one a competent x-ray specialist. See preface to "Roentgen Interpretation"—Doctor Holmes of the Harvard Medical School and Doctor Ruggles of the University of California Medical School. There is no express allegation that Miss Green was incompetent, and that appellants were negligent in employing her because she was incompetent. There was no proof that she was incompetent. On the contrary, as we have shown, the undisputed testimony proved that she was an excellent technician in the art of applying the x-ray machine and in interpreting the revelations of the fluoroscopic examinations. As we have stated, counsel for the appellee expressly admitted that

she was competent. Therefore, although she was not a graduate of medicine, we must assume that she was competent, *i. e.*, that she possessed all the technique and whatever knowledge of medical science was necessary to render her a proficient x-ray specialist. It therefore appears from the undisputed facts of this record and the law applicable thereto that appellants are not liable for the alleged negligence of Miss Green.

2. The next questions are: Was the screen used by Miss Green for making fluoroscopic examinations of the appellee defective, and, if so, were appellants negligent in failing to exercise ordinary care to furish a perfect screen, and was such negligence, if any, the proximate cause of the injury?

The testimony concerning these issues is substantially as follows: Doctor McGill testified that, about seven months before the injury to appellee, he discovered that the fluoroscopic screen was defective because it strained his eyes. His testimony and the testimony of Doctor Hill was to the effect that more voltage would have to be used with a defective screen, and the exposure would have to continue for a longer time. Doctor McGill testified that he was a chronic complainer, and it seemed to him he had complained a time or two of the defective screen. He was asked to whom he complained and answered: "Let me see, now, I would naturally go to Doctor Runyan or Mr. King (the business manager), one or the other." Notwithstanding the defect in the screen, he considered the machine safe, and continued to operate it after the defect was discovered and x-rayed from that time, using the same screen, about six hundred people before appellee was injured, and more than one hundred afterward before the purchase of the new screen. He would not have used it if he had considered it dangerous. He had full power to order anything he wished and was instructed to order the best.

Doctor Runyan and Mr. King both testified emphatically that Doctor McGill did not notify them of any defect in the screen, and Doctor Runyan testified that Doc-

tor McGill was expected to keep the x-ray apparatus in perfect condition. He had full authority to order anything he needed for that purpose. The appellants and their business manager did not know anything about the x-ray machine or its accessories.

The appellee and her mother and father testified that appellee was exposed three different times to the x-ray machine, two the first day, once in the morning and again in the afternoon, and again on the following morning. Each time appellee was kept exposed to the rays for thirty or forty minutes. Appellee was exposed each time both for the x-ray picture and the fluoroscopic examinations. During the first exposure her mother was present, and during the second exposure Miss Green had appellee's mother and father to come in and showed them all the parts of her body being exposed, and the third time likewise pointed out all the parts and explained them to both mother and father. During the second exposure appellee felt unpleasant sensations—an itching. She told Miss Green about it and asked her to wait until she could scratch it, but Miss Green continued to look and look, and finally after she stopped looking, appellee still had the itching and tingling in her back that felt like a thousand needles sticking in her back. She told Miss Green about it. Miss Green advised her to come back the next morning, and then exposed appellee again for thirty or forty minutes. There was the same itching as the day before, only a little worse. Appellee was burned from her neck to below her waist line, the deepest part of the burn being in the small of back, which was a very severe burn.

Mrs. Chamberlain, formerly Miss Green, the operator, and only other eye witness, testified: That the usual method was to darken the room and wait until the eyes became accustomed to the darkness, which sometimes takes several minutes: then turn the current on and look through the patient standing; then have them recline to make the plates for the pictures. Before the current is turned on, and while patients are standing, they frequently complain that they are being burned.

Witness had been x-rayed many times herself and knew personally, from her experience in the x-ray business, that one feels no burning sensations when the current is turned on. She did not remember whether appellee complained of sensations of pain while she was being exposed to the x-ray, but if she had witness would have given it no attention because it was purely imaginary. Witness had x-rayed so many people she could not testify definitely as to exactly what she did in Miss Goodrum's case. The usual method was to turn the current on only for a few minutes, and witness was satisfied that she had treated Miss Goodrum just as she did all the other patients in that respect. Doctor McGill, who had examined appellee's back after the burn, said that taking into consideration appellee's size, if the machine had been in proper condition and had been properly operated one couldn't see any reason why she should have been burned. He further stated that he had seen some of the finest experts who, in using the best machines, had not only burned themselves, but other people. Doctor Bathurst also testified that the people who are the most experienced are the people who sometimes have trouble; that is one of the unfortunate things to deal with, but only one in ten thousand will come up with trouble. Doctor Hill testified that he had x-rayed over 7,000 patients and had never burned any one, and that there was no excuse now for burning a person during an x-ray exposure.

To get the best results the time required for the exposure is from two to four seconds. Both Doctors Hill and McGill, especially the latter, explained in detail the x-ray machine and its accessories, and their testimony shows that, in a properly equipped machine, the operator can increase or diminish at will the current that produces the rays with which the fluoroscopic observations and the pictures are made. The electricity that goes into the body is measured, not by volts, but millamperes. They are measured accurately and can be turned on or off instantly. Doctor McGill selected the machine that was in use, and "it was first class in every respect, except the screen."

The principles of law applicable to the facts stated are well established. Since appellants maintained an x-ray department at St. Luke's Hospital, it was their duty to exercise ordinary care to see that this department was equipped with such apparatus as was generally approved by Roentgenologists as best adapted for the proper diagnosis and treatment of diseases; also, to exercise such care to provide competent specialists to do the work in that department. Ordinary care for the successful management of such institution means a very high degree of care because it has to do with the lives and health of human beings. The x-ray machine, of the highest type and manipulated by a competent expert, is of inestimable value to mankind, but otherwise it is an exceedingly dangerous agency. This duty of appellants to exercise ordinary care to employ competent Roentgenologists and provide safe apparatus for their x-ray department could not be delegated to another. If, therefore, there was in use in appellant's x-ray department a defective screen, which appellants or their chief Roentgenologist, Doctor McGill, knew to be defective, or by the exercise of ordinary care should have known to be defective, and if the use of such defective screen was the proximate cause of the injury to appellee, then appellants were liable to her in damages. Doctor McGill, so far as the duty of furnishing the necessary apparatus was concerned, was the agent, the *alter ego,* of the appellants, and his knowledge was their knowledge. For this purpose he was at all times under the immediate control of the appellants and could not exercise his independent judgment and discretion. While the testimony of Doctor McGill tends to prove that the use of a defective screen would result in an imperfect fluorescence and would probably cause a longer exposure and an increase of current, yet his testimony further shows that he did not consider that the defect in the screen in use was one that could in any manner cause or contribute to the injury of which the appellee complained; for he further states most emphatically that, if he had considered the machine unsafe or dangerous, he would not have used

the same, and, to show that this was his sincere belief, after the discovery of the defect, he used the same screen in making 600 or 1,000 exposures. To further show that he did not have knowledge of any defect which he considered dangerous or unsafe, he stated that the defect might cause a second or third exposure; but, in view of the fact that these exposures were from two to four seconds, witness manifestly did not regard the screen unsafe or dangerous, even though it might cause such additional exposures. The jury should not be allowed to speculate on probabilities, in the face of the positive testimony of the witness himself that he did not consider the machine unsafe or dangerous. *St. L., I. M. & S. Ry. Co.* v. *Owens,* 103 Ark. 61-64. Therefore, it occurs to us that all reasonable minds must reach the conclusion that there was no unsafe or dangerous condition of the screen. But, if we are mistaken in this, we are of the opinion that, whatever may have been the defect in the screen, it was not the proximate cause of the injury to the appellee.

This brings us to a consideration of the question as to whether or not Miss Green was negligent and, if so, whether such negligence was the proximate cause of the injury. The doctrine of *res ipsa loquitur* does not apply in such cases because the testimony shows that, on account of the idiosyncracies of the x-ray machine, one person of a certain type and temperament would be susceptible to a burn while another person of a different type, under the same circumstances, would not be burned. Moreover, it is shown that burns do occasionally occur, in the ordinary course of the exposure, in spite of the highest diligence and skill to prevent them. 4 Labatt's Master and Servant, p. 4864, §§ 1601 (834) and cases in note; *Sweeney* v. *Erving,* 35 App. D. C. 57, 43 L. R. A. 734 (N. S.); *Wilkins* v. *Brock,* 81 Vt. 333, 70 Atl. 572.

The burden of proof was upon the appellee to show negligence on the part of Miss Green and that such negligence was the proximate cause of appellee's injury. Appellee has fully met this burden. While Miss Green testified that she was satisfied she followed the custom of the office, which was to expose a patient only a few mo-

ments at a time, she did not remember specifically what she did in appellee's case. She did not remember whether appellee complained of burning sensations during the exposure or not, but, if appellee had done so, she would have paid no attention to it because she regarded such sensations as imaginary. On the other hand, the testimony of appellee, her mother and father, showed that appellee was exposed continuously for thirty or forty minutes, and that she complained of itching and burning sensations. The testimony of Doctor Hill showed that the operator should immediately respond to such complaints on the part of the patient and disconnect the current, and that subsequent exposures in such cases should not be had until some weeks afterward. The proof was abundantly sufficient to sustain the verdict as to the negligence of Miss Green. No doubt, the jury believed, and they were justified in believing, that Miss Green became interested and absorbed in explaining the mysteries of her science and art to the mother and father of Miss Goodrum and thus unconsciously let the time go by for thirty or forty minutes while, with disastrous effect, the rays were penetrating the back of the appellee. That this negligence of Miss Green was the proximate cause of appellee's injury there is not the shadow of a doubt. Even if there had been a defect in the screen which caused a longer time of exposure and greater current than, in the usual course, the undisputed testimony shows that this would have only necessitated a second or third exposure of two to four seconds each, but Miss Green, according to the evidence, exposed the appellee for eighteen or twenty-four hundred seconds. Besides, she failed to heed the warning and shut off the current when the first danger signal was given by the appellee. The occurrence was most unfortunate and deplorable, but it follows from what we have said that the appellants are not liable, and, inasmuch as the testimony seems to have been fully developed, the judgment will be reversed and the cause dismissed.

SMITH, J., dissenting.

## BARNETT v. BANK OF PANGBURN.

Opinion delivered February 21, 1921.

1. BANKS AND BANKING—AUTHORITY OF PRESIDENT TO RECEIVE PAYMENT.—Where a debtor owing notes to a bank delivered to the president notes which were accepted as payment of his notes, the bank was bound by the act of its president in receiving such payment, though he converted the payment to his own use.
2. BILLS AND NOTES—BURDEN OF PROVING PAYMENT.—One asserting payment of notes has the burden of proving payment by a preponderance of the evidence.

Appeal from Cleburne Chancery Court; *L. F. Reeder*, Chancellor; reversed.

STATEMENT OF FACTS.

E. B. Crump brought this suit in equity against T. N. Barnett, Harry Churchill and the Bank of Pangburn to recover damages for a breach of warranty and for the cancellation of two notes given by him for the purchase price of the lands described in his complaint.

The Bank of Pangburn answered, claiming that it was the owner of the notes mentioned, and averred that it had a lien on the lands described in the complaint for the payment of said notes.

T. N. Barnett filed a separate answer in which he set up that the two notes referred to had been paid by him and asked that the lien of the bank be satisfied and his title to the lands be quieted against it.

The bank filed a reply, denying that the two notes in controversy had been paid, and asked judgment for the amount of same, and for a lien on the land to secure the payment thereof.

On November 27, 1917, Harry Churchill conveyed by warranty deed to T. N. Barnett 257 acres of land in Cleburne County, Arkansas, for the consideration of $5,000. The sum of $1,000 was paid in cash and the balance in notes as follows: Two notes for $1,250 each, due twelve and eighteen months after date and two notes for $750 each, due twenty-four and thirty months after date. These notes were transferred by Churchill for value received before maturity to the Pangburn State Bank. On

the 12th day of October, 1918, T. N. Barnett conveyed eighty acres of these lands to E. B. Crump for the consideration of $3,000. One thousand and eight hundred dollars were paid in cash and the balance by two notes for $600 each, due one and two years after date. T. N. Barnett was represented by W. A. Barnett, his brother, and Harry Churchill. The cash and notes paid by Crump, after deducting the commissions due Churchill and W. A. Barnett, were delivered to the Pangburn State Bank to be applied to the notes owed by T. N. Barnett. On March 1, 1920, T. N. Barnett sold forty acres of the land conveyed to him by Churchill to A. F. Williams for the consideration of $1,500. He took in payment three land notes executed by Y. D. Whitehurst to A. F. Williams for $187.50 and the note of A. F. Williams to himself for $937.50.

Harry Churchill was the president of the Pangburn State Bank and also the local representative of the Western Tie & Timber Company. Subsequently the Pangburn State Bank became insolvent, and its property was taken over by the Bank of Pangburn and its liabilities were assumed by that bank. The Western Tie & Timber Company is one of the principal stockholders of the Bank of Pangburn. Churchill transferred the notes given by A. F. Williams for the purchase price of the forty acres of land to the Western Tie & Timber Company, and that company now claims the notes.

The record shows that all the notes originally given to T. N. Barnett for the purchase price of the land have been paid except the two notes for $750 each, held and claimed by the Bank of Pangburn. At the time Crump purchased the eighty acres of land, the cashier of Pangburn State Bank assured him that the lien of the bank for the unpaid purchase money would be released, and Crump relied upon his statement in making the purchase. At the time these representations were made by the cashier, he had in his possession for the bank one of the $750 notes, and soon thereafter the bank became the holder of the other.

Other facts will be stated or referred to in the opinion.

The chancellor was of the opinion that the lien of the bank for the unpaid purchase money of the land should be released on account of the representations made by its cashier. He was also of the opinion that the Bank of Pangburn should recover from the plaintiff, E. B. Crump, the sum of $1,200 which was declared to be a lien upon the land purchased by him, and the chancellor further was of the opinion that the Bank of Pangburn should have judgment against T. N. Barnett for the amount due on the two notes for $750 each, and that this amount should constitute a lien upon the land of the original purchase now owned by T. N. Barnett. A decree was entered in accordance with the finding of the chancellor. Crump has satisfied the decree in so far as it affects him, and T. N. Barnett alone has appealed to this court.

The appellant, *pro se.*

1. Whether or not the Bank of Pangburn holds the two notes as owner or liquidating agent, it came into possession of them at a receiver's sale, and it has no better title than the insolvent State Bank of Pangburn had at the time it closed its doors. 98 Ark. 200; 97 *Id.* 534; 98 *Id.* 370; 115 *Id.* 235; 128 *Id.* 449; 131 *Id.* 140. The bank was not an innocent purchaser, but took subject to all the equities between the original parties. 99 Ark. 458; 115 *Id.* 44.

2. The two notes were paid by appellant, as the evidence shows. The burden is upon the holder of an altered negotiable note to show that the alteration was made with the maker's consent. 27 Ark. 108. The presumption is that the alteration was made by the one having the custody. 5 Ark. 347; 50 *Id.* 358. The testimony showed that appellant instructed Churchill to make the sale to Williams in order to pay the $750 notes, and that the cashier of the Pangburn State Bank told that the notes had been paid. The testimony is conclusive, and

the findings of the court should not be based upon inference or conjecture. 116 Ark. 82; 114 *Id.* 112; 117 *Id.* 638; 113 *Id.* 353. The record shows conclusively that appellant paid the two notes, and the chancellor was in error in finding against appellant.

*Hammock & Bittle,* for appellee.

The only question is whether or not the two $750 lien notes, executed by appellant to Harry Churchill, have been paid. The chancellor found they had been paid, and his finding is not against the preponderance of the testimony.

HART, J. (after stating the facts). The issue raised by the appeal has been narrowed down to the question of whether or not the two notes for $750 each have been paid. Barnett assumes the affirmative of this issue and the Bank of Pangburn the negative. One of the $750 notes was delivered to the Pangburn State Bank, and the other $750 note was transferred to it by Churchill, the president of the bank, as collateral security. Both notes were held by the Pangburn State Bank and were turned over to the Bank of Pangburn when it was organized and had taken over the assets and assumed the liabilities of the Pangburn State Bank.

It is the contention of T. N. Barnett that these two notes were paid when he sold forty acres of the land originally purchased to A. F. Williams and took three land notes given to Williams for $187.50 each and the individual note of Williams for $937.50. On the other hand, it is contended by counsel for the bank that Churchill took these notes and endorsed them to the Western Tie & Timber Company on his own account and that the two $750 notes are due and unpaid.

It will be remembered that Churchill was the president of the Pangburn State Bank and was also the local representative of the Western Tie & Timber Company, and that his office was in the bank building. It is true that he acted as the agent for T. N. Barnett in making the sale of the forty acres of land to A. F. Williams; but

he also acted for the bank in accepting the notes given for the purchase price of the land by Williams if in fact he did accept them in payment of the two $750 notes. As president of the bank, it was his duty to collect the debt which T. N. Barnett owed it; and if the notes were turned over to him by T. N. Barnett in payment of the two $750 notes, the bank was bound by his action in receiving the notes in payment of the notes of Barnett held by it, although Churchill may have afterward converted the notes received in payment to his own use. *Binghampton Trust Co.* v. *Auten,* 68 Ark. 299.

On this point Barnett testified that Churchill agreed with him to apply the notes given by Williams in payment of the two $750 notes held by the bank and which were a lien on the land originally purchased by Barnett, and which are still owned by him. Indeed, Barnett said that he sold the forty acres of land to Williams for the very purpose of settling with the bank for these two $750 notes. He said that Churchill told him that the bank had the notes and would deliver them to him in a few days; but that the notes were never in fact delivered to him by the bank. Barnett is corroborated by the testimony of his brother who negotiated the sale for him.

Again, A. F. Williams who purchased the forty acres of land testified that at the time he purchased the land the cashier of the bank told him that the title was good and that there was nothing against it. Williams did not know at the time that the bank held the two $750 notes.

This testimony, if true, shows that the bank agreed to accept the notes given by Williams for the purchase price of the lands in payment of the two $750 notes. The testimony tending to contradict this is that the two $750 notes were not surrendered at the time the transaction was had. Barnett said, however, that the president and cashier told him that the bank had the notes and would surrender them at a more convenient time in the near future. His testimony in this respect is not disputed.

The cashier of the Bank of Pangburn does testify that T. N. Barnett promised to pay the two $750 notes after that bank took over the assets of the defunct Pang-

burn State Bank. His testimony, however, is not sufficient to overcome the affirmative testimony to the effect that such payment was agreed upon between the parties at the time Barnett sold the lands to Williams. Barnett states positively that he sold the lands to Williams for the purpose of paying these two notes. There is certainly nothing in the record tending to show that he delivered the notes given to him by Williams to Churchill for the purpose of accommodating the latter and allowing him to transfer them to the Western Tie & Timber Company for his own debt. Barnett did not owe that company anything, but did owe the Pangburn State Bank the two $750 notes. As above stated, the president of that bank had the authority, and it was his duty, to collect from Barnett the debt owed by him to the bank.

The testimony shows that the notes for the purchase price of the forty acres of land given by Williams to Barnett were turned over by Barnett to Churchill for the payment of the two $750 notes. The burden was on Barnett to establish payment by a preponderance of the evidence, and we think he has done so. The chancellor erred in holding to the contrary.

It follows that the decree must be reversed, and the cause will be remanded for further proceedings in accordance with this opinion.

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## SUTER v. MASON.

Opinion delivered February 21, 1921.

1. DAMAGES—WHEN LIQUIDATED.—In a contract for the sale of 720 acres of land for $54,000, the greater part of which was on deferred pyments extending over a period of eleven years, an agreement that the initial payment of $3,000 should be liquidated damages in case the buyer failed to perform was not unreasonable nor void as a penalty, in view of the magnitude of the transaction and the risk of monetary depression.
2. VENDOR AND PURCHASER — FREEDOM FROM INCUMBRANCES.—An agreement to convey land clear of incumbrances does not refer to permanent easements across the land visible to the purchaser, such as a public road or the right-of-way of an electric light company.

3. VENDOR AND PURCHASER — FRAUDULENT REPRESENTATION.—In a sale of a 720-acre tract of land, of which only 280 acres were cleared, the purchaser had a right to rely on the vendor's representation that 360 acres were cleared, as such representation could not be considered a matter of opinion only.

4. VENDOR AND PURCHASER—FRAUDULENT REPRESENTATION.—Where a vendor represented the number of acres of cleared land to be 360 when only 280 were cleared, the purchaser was entitled to rescind, though the vendor offered to clear up the deficiency of 80 acres.

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

STATEMENT OF FACTS.

On the 9th day of January, 1920, R. H. Suter brought this suit in equity against the Bank of Stuttgart and James S. Mason to recover the sum of $3,000 damages for the failure of the defendant, Mason, to carry out a contract made by him with the plaintiff for the sale of 720 acres of land in Arkansas County, Arkansas.

Mason filed an answer, in which he claimed that he was entitled to rescind the contract because the title tendered was insufficient and because the contract had been procured by the fraudulent representations of the plaintiff.

In October, 1919, Dr. James S. Mason, a resident of the State of Illinois, came to Arkansas County, Arkansas, for the purpose of examining a tract of land belonging to R. H. Suter with the view of purchasing it. Suter, with his agent, went with Doctor Mason to the land for the purpose of examining it. According to the testimony of Doctor Mason, they drove over a part of the land, and he was induced to make the contract on account of certain representations made by Suter. Suter represented to Doctor Mason that the tract comprised 720 acres and that 400 acres were in cultivation. Suter also represented that the land was free from overflow and that there were no incumbrances on the title. On the 27th day of October, 1919, the parties entered into a written contract whereby Mason agreed to purchase the 720 acres of land for the sum of $54,000. Of this amount $3,000 were de-

posited in the Bank of Stuttgart with a copy of the contract.

The contract provided that within twenty days thereafter Suter was to furnish a good abstract of title showing the land to be free from incumbrances, except two mortgages, which were described. A further payment of $5,000 was to be made on January 1, 1920. The balance of the purchase money was in deferred payments extending over a period of years from the date of the contract to January, 1931.

It was also provided that the initial payment of $3,000 should be liquidated damages in case Mason failed to carry out the contract on his part.

According to the testimony of Mason he had the cleared land surveyed soon after he signed the contract of purchase and found that there were only 280 acres of cleared land. He also ascertained that a material part of the land was subject to annual overflow to such an extent that it was not susceptible to cultivation. There was a public road running across the land, and an electric power company had a right-of-way across the land over which it had erected its poles. Mason also ascertained that the land was in a road improvement district, and that road improvement taxes would be levied on it for a period of more than twenty years. The testimony of Mason was corroborated by that of other witnesses.

According to the testimony of the plaintiff, Suter, he carried Mason over about three-fourths of the land, and Mason expressed himself as satisfied with what he had seen. Suter suggested to him that he had better examine the place more closely before he completed the contract of purchase. Mason replied that he had seen enough to satisfy him about the quality and condition of the land. Suter denied that he had made any false representations to Mason about the overflow of the land and testified that but a very small quantity of the land was subject to overflow. His testimony in this respect was corroborated by other witnesses. He said that Mason observed that the light poles were on the land, and that the light company had a right-of-way over the land at

the time they viewed it. Suter denied that he had represented to Mason that 400 acres of the land were in cultivation. He said that he told Mason that he had never surveyed the cleared land separate from the balance, but that he thought that about one-half of the land was cleared, and that he based this opinion upon the fact that he had stepped off the cleared land and estimated it to be that much. His testimony was corroborated by that of other witnesses.

Other facts will be stated or referred to in the opinion.

The chancellor made separate findings in favor of the defendant on all the issues raised by the pleadings. The chancellor found that the $3,000 sued for was a penalty and not liquidated damages. He found that the plaintiff did not furnish an abstract of title showing a good and sufficient title in fee to the land in the plaintiff. He also found that Mason was induced by the fraudulent representations of the plaintiff, Suter, to enter into the contract for the purchase of the land.

A decree was entered in accordance with the findings of the chancellor, and the plaintiff, Suter, has duly prosecuted an appeal to this court.

*George C. Lewis,* for appellant.

1. The chancellor erred in finding that the contract was induced by fraud and misrepresentation, and that appellant had failed to show a good and sufficient title. The evidence fails to show any misrepresentations or fraud by appellant, but, admitting for argument that the representations were made and were untrue, the appellee is not in an attitude to complain. 71 Ark. 97; 87 *Id.* 567. A vendee of land seeking cancellation of the sale for false representations of the vendor must show that the representations induced him to purchase and that he relied upon them and had a right to so rely upon them in the belief of their truth. 11 Ark. 58; 47 *Id.* 148; 71 *Id.* 91. Taking the view of the testimony most favorable to defendant, the testimony fails to bring this case within

the rule. 19 Ark. 522; 192 U. S. 232; 24 Sup. Ct. Rep. 259; 48 S. W. 729; 28 Fed. 708-12.

2. The chancellor erred in holding that, if the second payment should not be made and the notes and mortgage executed, the first payment should become the property of appellant *as liquidated damages* and all rights of both parties cease and determine and that it was in the nature of a penalty and not enforceable. 93 Ark. 371; 122 *Id.* 167.

3. The chancellor erred in his finding as to the sufficiency of the title. Appellee knew of the existence of the transmission line, the road and the road assessments before he signed the contract. The abstract of title disclosed all these assessments, and no objection was made, and this was a waiver. Maupin on Marketable Title to Real Estate (2 ed.), pp. 197-9; 146 Pac. 975; 168 *Id.* 633; 64 Misc. (N. Y.) 422; 124 N. Y. Supp. 370; 116 N. Y. 501; 22 N. E. Rep. 1087; 10 Am. St. Rep. 836. The fact that part of land conveyed with covenant of warranty was at time of conveyance a highway and used as such is not a breach of covenant. The decree should be reversed and judgment entered for appellant Bank of Stuttgart for $3,000 and interest.

*John L. Ingram,* for appellees.

1. The lands described were misrepresented in two respects, that they were free from overflow and that there were 400 acres cleared or open lands, when there were only 280¼ acres. These representations were false and material, and appellee had a right to and did rely on them. The evidence fully supports the decree. 71 Ark. 71; 99 *Id.* 438. See, also, 101 Ark. 95; 100 *Id.* 28.

2. Appellant failed to comply with his contract.

3. The sum sued for is a penalty, and not enforcible in equity. Fetter on Equity, pp. 96-107; 8 Am. Dec. 598; Eaton on Equity, pp. 99, 102; 1 Sutherland on Damages (3 ed.), pp. 733, 753; 1 Pomeroy, Eq. Jur. (2 ed.). The cases cited by appellant are not in point.

HART, J. (after stating the facts). We are of the opinion that the chancellor erred in holding the $3,000 to be a penalty and not liquidated damages. The contract provided for the sale of 720 acres of land for $54,000, the greater part of which was on deferred payments extending over a period of eleven years. The contract contemplated that only the $3,000 and an additional $5,000 should be paid within a short time after the contract was completed. In view of the magnitude of the transaction and the consequent risk of a monetary depression, it was not unreasonable that the parties should agree that the $3,000 should be liquidated damages in case the purchaser failed to carry out the agreement on his part.

We also think that the chancellor erred in holding that the plaintiff did not have a good and sufficient title because there was a public road running through the land and because the electric light company had a right-of-way over the land for the erection of its poles. An agreement to convey land clear of all incumbrances does not refer to permanent easements across the land visible to the purchaser. Mason knew that the public road ran across the land when he purchased it. He also knew that the poles of the electric light company were across the land. He purchased the property in contemplation of its physical condition and with reference thereto. Therefore, the defendant can not rely upon the existence of the road and right-of-way across the land as matters calling for a rescission of the contract. *Skinner* v. *Stone,* 144 Ark. 353; *Geren* v. *Caldarera,* 99 Ark. 260, and *McCarthy* v. *Wilson* (Cal.), 193 Pac. 578.

In *Sandum* v. *Johnson,* Ann. Cas. 1914 D, p. 1007, the Supreme Court of the State of Minnesota held that the existence of an easement for a rural public highway across the land conveyed by a deed containing a covenant against incumbrances is not a breach of the covenant. The case note cites many decisions sustaining the holding that the existence of a known easement for a public highway does not constitute a breach of a covenant against the incumbrances.

Upon the question of fraudulent representations, we will first take up the question as to the deficiency in the acreage of the cleared land. According to the testimony of Mason, Suter represented that there were 720 acres of land in the tract and that there were 400 acres in cultivation. Mason believed this representation to be true, and the amount of the cleared land was a material inducement to him to make the purchase. After he had entered into the contract of purchase, he had the cleared land surveyed and ascertained that only 280 acres of the entire tract were cleared. Suter, himself, admitted that he told him that he thought that 360 acres of the land were cleared. Then, according to his own statement, there was a deficiency in the cleared land of eighty acres. The land was purchased for a farm, and the amount of cleared land on the tract was necessarily a factor in inducing the purchase. It is true that in transactions of this kind men are expected to exercise reasonable prudence and not to rely upon persons with whom they are dealing to protect their interests; but this requirement should not be regarded so that the law will ignore positive fraud. If the tract of land had been a small one and the parties had examined it, it might be said that, owing to the small area, the purchaser could not be deceived about the quantity of cleared land and could not rely upon the representations of his vendor about a matter which was patent to an ordinary observer and about which he could scarcely make a mistake if he relied upon his own judgment. This is not the case, however, in the sale of a large tract of land where the deficiency in the amount of cleared land is great in proportion to the whole number of acres conveyed. In such cases, the vendor can not say that the vendee ought not to have trusted him, and that his statement with regard to the number of acres of cleared land was only a matter of opinion which could not be considered as evidence of fraud.

In the present case Suter had had the land cultivated and had collected rent therefrom. The number of acres cleared and in cultivation was a matter peculiarly within

his own knowledge, and it can not be said that Mason was negligent in relying upon his representations in this respect. On account of the size of the tract, it can not be said that Mason could judge of the area of cleared land by the eye. Suter represented that one-half of the land was in cultivation. His representations in this respect were material, and under the circumstances were equivalent to an assurance of an approximately accurate measurement. Mason relied upon his assertions and representations in making the purchase. His representations could not be considered as a matter of opinion merely. Neither can it be said that Mason was negligent in relying upon them, and should have had the cleared land surveyed if he was not satisfied with his own measurement by viewing the land. When the size of the tract and situation of the cleared land is considered, Mason had a right to presume that Suter knew the amount of cleared land in the tract and was justified in relying on Suter's statement based on a better knowledge of the area of the cleared land than he could obtain by simply walking over it on one occasion. *Neely* v. *Rembert,* 71 Ark. 91; *Kincaid* v. *Price,* 82 Ark. 20; *Cooper* v. *Merritt,* 30 Ark. 686, and 39 C. J. 1270, and cases cited.

We think the court erred in finding that a material part of the land was subject to overflow. The testimony is in direct and irreconcilable conflict on this point; but we are of the opinion that a preponderance of the evidence shows that only a very small quantity of the land was subject to overflow, and that no rescission of the contract should be had on this ground. However, chancery cases are tried *de novo* upon appeal, and, inasmuch as the chancellor found that the defendant, Mason, was entitled to a rescission of the contract because there was a material deficiency in the amount of cleared land, it can not be said that the decree should be reversed.

It is claimed by counsel for the plaintiff that the decree should be reversed because Suter offered to make good the deficiency in the amount of cleared land and to clear up an additional quantity of land so that one-half

of the land in the tract would be cleared as he had represented it to be to Mason. This was not a matter, however, upon which Suter had the right to make an election. The election was for the purchaser. He might have accepted the contract and sued his vendor for an abatement of the purchase price on account of the damages suffered by him by reason of the deficiency in the amount of cleared land. On the other hand, he had the right to rescind the contract on account of the misrepresentations of his vendor as to the quantity of cleared land in the tract. As above stated, the deficiency was eighty acres, and under the circumstances the deficiency was great in proportion to the whole amount of cleared land in the tract. It follows that Mason had a right to rescind the contract, and the decree of the chancellor must be affirmed.

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## HOLLAND v. ALEXANDER.

Opinion delivered February 21, 1921.

1. DEEDS—DELIVERY.—Where a grantor executes a deed in the absence of the grantee, and has it recorded, this amounts to a delivery where the record shows that the acceptance of the deed would be of advantage to the grantee.
2. DEEDS—EVIDENCE OF MISTAKE.—In a suit by an illegitimate son to restrain a sale of land under his father's mortgage which his father had bought and paid for and taken title to plaintiff, evidence *held* to justify the chancellor's finding that the father bought the land for himself, and that the deed was by mistake made to plaintiff.

Appeal from Mississippi Chancery Court, Chickasawba District; *C. D. Frierson,* Chancellor; affirmed.

STATEMENT OF FACTS.

J. B. Holland, a minor, by his next friend, J. T. Wood, brought this suit in equity against the New England Securities Company and A. G. Little to restrain them from selling, under a mortgage, a tract of land described in the complaint.

The New England Securities Company filed an answer, denying the allegations of the complaint, and also a cross-complaint, in which it asked that Hettie Wood and the administrator of the estate of J. W. Holland, deceased, be made parties. In the cross-complaint it set up the fact that the land had been sold under the power of sale contained in the mortgage and that T. C. Alexander had become the purchaser at the sale.

The prayer of the cross-complaint was that T. C. Alexander's title be quieted as against J. B. Holland, Hettie Wood and the administrator of the estate of J. W. Holland, deceased. The facts set up in the cross-complaint were established by the proof.

The record also shows that J. B. Holland was born on August 15, 1899. The land in controversy comprises forty acres, and on the 16th day of October, 1899, H. P. Davis and wife executed a deed to it to J. B. Holland for the consideration of $1,000. The deed recites a consideration of $1,000 as follows: $160 in hand, paid by J. B. Holland, one note for $340, due and payable on the 15th day of November, 1900, and one note for $100 due and payable on the 15th day of November, 1901, and one note due and payable on the 15th day of November, 1902, for $100, and one note for $100 due and payable on the 15th day of November, 1903, and one note for $100 due and payable on the 15th day of November, 1904, and one and the last note for $100 payable on the 15th day of November, 1905.

J. B. Holland was the illegitimate son of J. W. Holland. During December, 1906, or January, 1907, J. W. Holland applied to the New England Securities Company for a loan of $600 and offered the land in controversy as security for the loan. The agent of the securities company called attention to the fact that the deed was made from H. P. Davis and wife to J. B. Holland. J. W. Holland told the agent that his initials were originally J. W. B. Holland; that in preparing the deed from Davis to himself the draftsman left out the "W" and made the deed to J. B. Holland, and that subsequently

he had dropped the "B" entirely from his name, and made affidavit to that effect.

J. W. Holland married the mother of J. B. Holland, and she joined with him as his wife in the execution of the mortgage in January, 1907. Subsequently J. W. Holland died, and his widow paid the interest on the loan one year after his death. The notary public taking the acknowledgment to the mortgage testified that Mrs. Holland stated that at the time she understood the meaning of the instrument and acknowledged it of her own free will and accord. J. W. Holland lived on the land from the time he purchased it until his death.

The mother of J. B. Holland testified that she had heard J. W. Holland say that the lands belonged to his son, J. B., and that her husband had paid the taxes in the name of J. B. Holland.

The chancellor found the issue in favor of the defendants, and the complaint of the plaintiff was dismissed for want of equity; and on the cross-complaint it was decreed that the title be quieted and confirmed in the purchaser at the mortgage foreclosure sale against the claims of J. B. Holland, his mother, Hettie Wood, and Rex Baker, the administrator of the estate of J. W. Holland, deceased.

The case is here on appeal.

*J. T. Coston,* for appellant.

1. The court erred in reforming the deed, as there is no evidence whatever to justify the court in so doing. The evidence of W. F. Rhea was incompetent, and the declarations of J. W. Holland were *ex parte* and self-serving, not part of the *res gestae* and incompetent; and if competent they were wholly insufficient to offset the positive testimony of Hettie Wood and overturn the deed itself. 2 Wigmore on Ev., § 1481.

2. The declarations of J. W. Holland were also *incompetent,* as they were made while a controversy and litigation was pending and self-serving. 2 Wigmore on Ev., §§ 1482-3.

3. The evidence of the boy's mother, Mrs. Wood, was competent, because such acts, statements and declarations were *against* the interest of J. W. Holland. 131 S. W. 671; 146 *Id.* 502. A mere affidavit is inadmissible. 2 Wigmore on Ev., § 1384; 42 Ark. 357; 9 Ore. 315. See, also, 17 Conn. 400; 90 Mass. 100; 6 Mich. 14. It was hearsay and not part of the *res gestae.* 7 So. Rep. 747.

4. It was error to admit Robert A. Campbell's testimony. It was self-serving and incompetent. See 58 S. W. 8. To the same effect are 87 Mo. App. 219; 2 So. Rep. 30; 51 Mass. 53; 39 S. W. 187; 85 *Id.* 215; 42 S. E. 887; 31 *Id.* 734; 37 So. Rep. 405; 54 S. W. 609; 67 *Id.* 735; 77 *Id.* 135; 72 N. W. 423.

5. The evidence is insufficient, even if competent. The evidence of mistake must be clear, unequivocal and decisive. 77 S. W. 53; 101 *Id.* 724; 131 *Id.* 452; 219 *Id.* 328.

*Buck & Lasley,* for appellees.

The only witness for appellant was the mother, Hettie Wood, and she was an interested witness, living on the land and anxious to defeat the N. E. Security Company's deed. The burden was on appellant, and he has failed. 20 Cyc. 1219, 1195; 66 Ark. 299. The testimony of Rhea as to the declarations of J. W. Holland were clearly competent and sustain the decree.

HART, J. (after stating the facts). The decree of the chancellor was correct. It is true, as contended by counsel for appellant, that where a grantor executes a deed in the absence of the grantee and has it recorded, this amounts to a delivery where the record shows that the acceptance of the deed would be to the advantage of the donee. *Graham* v. *Suddeth,* 97 Ark. 283.

There is nothing in the present record, however, that tends to show that the deed was to the advantage of the minor, even if it could be said that the record shows that it was intended to be made to the minor.

The deed was made in October, 1899, when the infant was only a few weeks old. The deed was for forty acres of land and recited a consideration of $1,000. One hundred and sixty dollars of it were paid in cash, and the balance was payable in yearly installments for each succeeding year until the 15th day of November, 1905.

There is nothing in the record to show whether it would be for the benefit of the minor or not to have had the land conveyed to him. Moreover, it appears from the recitals of the deed that the cash payment was made by the grantee and that the deferred payments were evidenced by promissory notes to be signed by the grantee. J. B. Holland was an infant at that time, and, of course, could not have made the cash payment and could not have signed the notes for the deferred payments.

It is fairly inferable from what happened at the time, that J. W. Holland purchased the land for himself, and by mistake the deed was made to J. B. Holland. It was shown that the full initials of J. W. Holland were J. W. B. Holland. J. W. Holland went into possession of the land himself and lived there until he died. In the latter part of 1906 or the first part of 1907 he mortgaged the land to secure a loan of $600 made to him by the New England Securities Company. His wife joined him in the execution of this deed. All these facts and circumstances tend to show that J. W. Holland bought the land for himself, and that by mistake the deed was made in the name of J. B. Holland, instead of J. W. Holland. The whole substance of the transaction and the conduct of J. W. Holland and his wife until he died show that he purchased the land for himself. The only contradiction of it is the testimony of his widow to the effect that her husband always spoke of the land as belonging to his infant son, J. B. Holland. Her testimony, in this respect, is contradicted by her own action in the premises. When her husband desired to mortgage the land to secure a loan, she readily signed the deed as his wife and relinquished her dower in the premises. This act indicated that she regarded the land as belonging to her husband at that time. She knew that her husband paid

the interest on the loan, and she paid the interest thereon for the first year after his death. Her conduct then tends to show that she regarded the land as belonging to her husband and is entitled to more weight than her bald testimony to the contrary after her husband's death.

It follows that the decree will be affirmed.

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JEFFERSON v. CONWAY COUNTY BRIDGE DISTRICT.

Opinion delivered February 21, 1921.

BRIDGES—LIST OF LANDS SUBJECT TO TAXATION.—Failure of the secretary of the board of commissioners of a bridge district to file with the county clerk a list of lands subject to taxation in the year 1919, as required by Acts 1917, p. 314, did not defeat the right of the district to sue to enforce the collection of the assessments for that year, where a correct list had been furnished to the clerk by the secretary for the year 1917; no change having been made in the assessments since 1917.

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

*J. Allen Eads,* for appellant.

Under the rule of construction universally followed by this court the chancery court should have denied the complaint of appellee and rendered a decree for appellant and dismissed the complaint. The secretary of the board did not certify to the clerk of the county court the taxes to be collected for the year 1919. The appellants were not entitled to the relief prayed for under the proof. Act No. 71, Acts 1917, § 12. The statute must be strictly construed and strictly complied with.

*Edward Gordon, Sellers & Sellers* and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

It was not necessary for the secretary of the district to annually file with the clerk of the county a list of the lands subject to taxation with the amount of taxes assessed against each tract. See act 71, Acts 1917, §§ 9, 12, etc. The correct amount of taxes was shown by the tax books. The provisions of section 12 are directory

merely. It was unnecessary for the secretary to strictly pursue a mere form of procedure that was unnecessary in this case and a waste of effort. Other sections of the act provide for the assessment of benefits and the levy of the annual installments of taxes to be paid in each year. See 40 Ark. 34; *Ib.* 491; 64 *Id.* 395; 98 *Id.* 505. It is not necessary to follow the literal language of the provisions of section 12 in regard to the annual list to be furnished the county clerk. 116 Ark. 538; 133 *Id.* 491.

SMITH, J. Appellant owns real estate in the Conway County Bridge District, and seeks by this suit to enjoin the collector of taxes and the commissioners and officers of the district from returning his land as delinquent for the taxes for the year 1919. The basis of the suit is that the secretary of the district did not certify to the clerk of the county court the taxes to be collected for the year 1919.

The secretary of the board made a certificate which the parties agreed should be treated as an agreed statement of facts. It there appears that in the year 1917 the secretary of the board, under the directions of the board, filed with the clerk of the county court, a list of all the property subject to taxation within the district, with a tax of five per cent. extended thereon against the amount of benefits assessed against each particular piece of property. That by proper resolution the same rate had been fixed for the years 1918 and 1919, for and in each of which years the secretary had personally directed the clerk of the county court to continue to use the list which he had originally filed for the year 1917. In other words, the assessments for the years 1917, 1918 and 1919, and subsequent years, were made by the same resolution, and for each of those years the resolution directed a collection of five per cent. of the assessed betterments, and the resolution further directed the annual collection of these installments, a copy of all of which was filed in 1917 with the list of the lands.

Section 12 of the act under which the district was organized (Act 71, Acts 1917, vol. 1, page 314) provides

that "the secretary of the board shall annually deliver to the county clerk, before he has made up the tax books, a list of all the property subject to taxation thereunder within the district, with the amounts assessed against each tract to be paid at the next collection of taxes." Appellant's insistence is that the failure of the secretary to file a list of lands subject to taxation in the year 1919 defeats the right of the district to sue to enforce the collection of the assessments for that year.

We do not concur in this view. Other sections of the special act provide for the assessment of the benefits and for the levy of the annual installments thereof to be paid in each year, and make the same a lien upon the property in the district, which continues until the assessments are paid. The board, by proper resolution, had discharged its duty under the statute, and the secretary had furnished the county clerk a certificate showing the lands taxed.

It was, of course, essential that a list of the lands be furnished the clerk showing the lands taxed and the amount of the assessments against the respective tracts, and additional lists would necessarily be required to cover any changes made either in the lands or in the amount of assessments. The statute does not require an annual certificate from the secretary of the board to confer authority to collect the taxes. It does require an annual list, but we perceive no reason why a correct list once furnished should not be used until some change in the assessment made a new or revised list necessary. The purpose of the statute quoted was evidently to convey information to the clerk, and not to confer authority. The collection was not made by the clerk. This information was obtainable from the secretary of the board. It was the duty of that officer to furnish it, and it is agreed that "the said clerk has since the filing of said list used said list in extending the taxes each year after being verbally directed to do so each year by the secretary of the board of commissioners."

We think there was a substantial compliance with the requirements of the statute, and the decree of the court denying appellant the relief prayed is affirmed.

# KELL v. BUTLER.

Opinion delivered February 21, 1921.

EASEMENTS — PRESCRIPTION — PERMISSIVE USE.—Continuance for the statutory period of the use of a ditch permissive in its inception will not ripen into a hostile right.

Appeal from Carroll Chancery Court, Eastern District; *B. F. McMahan,* Chancellor; reversed.

*Johnson & Simpson,* for appellant.

The court erred in holding that appellee acquired an easement by adverse possession for drainage purposes over his land. Appellee had no easement over the land by grant or reservation or by adverse possession. 14 Cyc. 1144; 19 Ark. 23. A mere permissive use of the land of another for any length of time confers no right of continued enjoyment. 14 Cyc. 1201; 19 Ark. 23. Appellee had no easement, and the chancellor erred in so holding.

*Roy Thompson* and *Andrew J. Russell,* for appellee.

1. The findings of the chancellor as to facts are clearly sustained by the clear preponderance of the evidence.

2. The doctrine of easements by prescription rule this case. Butler's possession was not only open and notorious but hostile and adverse. 79 Ark. 5.

3. Kill is estopped; the purchase of the right to remove the dirt from either side of the ditch forms the basis for invoking the principle of law enunciated in 221 S. W. 454, citing many cases. 19 Ark. 23; 49 *Id.* 503; 93 *Id.* 608; 54 *Id.* 519.

4. The question of *license* is involved—in view of the evidence—and this is equivalent to an easement. 25 Cyc. 646. If a license merely, it can not be revoked under the law and the proof here. 47 Ark. 66; 19 *Id.* 23; 88 Cal. 217; 22 Am. St. Rep. 298; 120 Ga. 760; 48 S. E. 332; 33 Pa. St. 169.

5. There were *mutual benefits,* as the evidence proves, and appellee has established an easement by prescription, and appellant is bound by equitable estoppel.

HUMPHREYS, J. Appellee instituted suit against appellant in the Eastern District of the Carroll Chancery Court to enjoin him from obstructing a ditch on his land, which served to carry water from appellee's adjoining land to the main ditch, which served as the drainage for that particular section, alleging as a ground for the injunction that appellee had acquired an easement to the ditch.

Appellant filed answer, denying all the material allegations in the bill. The cause was submitted to the court upon the pleadings and the evidence, which resulted in a decree enjoining appellant from obstructing the ditch. From that decree, an appeal has been duly prosecuted to this court, and the cause is here for trial *de novo.*

Appellee is the owner of ten acres in the northeast corner of the southwest quarter of the northwest quarter, section 36, township 20 north, range 25 west, in said county. Appellant is the owner of the balance of the 40. Appellee purchased the 10-acre tract from Jim Fanning, who at the time owned the entire 40, in the year 1909. A portion of the tract was low and wet at the time he purchased it. A branch ran through the 30-acre tract, which carried the drainage water from that particular section. In the year 1910, appellee cut a ditch on his 10-acre tract, and, for the purpose of reaching the main ditch by a shorter route, continued the ditch across the 30-acre tract for about twenty-nine feet until it intersected said branch. The ditch dug by him on the 30-acre tract was very narrow and about two feet deep. At this time there was no division fence between the 10 and 30-acre tracts —that portion of the thirty acres, upon which the ditch was dug, being in the woods. Afterward, Jim Fanning sold the 30-acre tract to Mr. Grove, who sold it to Carl Freeman. On November 7, 1913, appellant purchased the 30-acre tract from Carl Freeman. Appellee and his son, Fred Butler, testified that, at the time they

dug the ditch on the 30-acre tract, Jim Fanning, the then owner of said tract, gave appellee oral permission to dig the ditch. Jim Fanning testified that they dug the ditch without any permission from him. In the year 1915, appellee bought some dirt on each side of the ditch for the purpose of filling his land and widening the ditch. The banks were beveled so that stock might pass from one side to the other. Appellee paid appellant $1 and a part of a straw stack for the dirt. It was possible for appellee to drain his tract of land through a ditch entirely upon his own land, by an expenditure of about $100. After the division fence was built on the line between the 10 and 30-acre tracts, appellant and his grantors were in actual possession of the land on which the ditch was dug and paid the taxes thereon. A controversy arose between appellant and appellee as to appellee's right to use the ditch, whereupon appellant placed obstructions therein and this suit was instituted.

Appellant insists that the court erred in holding that appellee had acquired an easement by adverse possession for drainage purposes over his land. We think appellant correct in this contention, as the evidence shows only a permissive use of the land for an indefinite period of time. The right to dig and use the ditch for drainage purposes was entirely permissive. No consideration was paid for the right, and no valuable improvements were made on account of it. The ditch itself was only twenty-nine feet long and two feet deep and very narrow. "A user to ripen into a prescriptive right must be adverse, not by license or favor, but under a claim or assertion of right hostile to the rights of the owner, so as to expose the claimant to an action of trespass if his claim is not well founded." 14 Cyc. 1150. It is true that appellee used the ditch for drainage purposes for more than seven years, but a "continuance for the statutory period of a use permissive in its inception will not ripen into a hostile right." 14 Cyc. 1150. "A mere permissive use of lands of another for any length of time confers no rights of continued enjoyment. The owner may prohibit

the use or discontinue it altogether at his pleasure as long as it is merely permissive.'' 14 Cyc. 1150. The evidence fails to show that appellee renounced the permissive use of the ditch for drainage purposes and thereafter claimed adversely for the period of seven years. The holding during the entire period was under the original permission to dig and use the ditch.

For the error indicated, the decree is reversed and the cause remanded with directions to dismiss appellee's bill for the want of equity.

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## CARR v. STATE.

Opinion delivered February 21, 1921.

1. HOMICIDE—GENERAL REPUTATION OF DECEASED.—Where a plea of self-defense was interposed in a murder case, and it became a material issue whether defendant or deceased was the aggressor, the general reputation of each for peace and quiet was admissible as tending to show which was the probable aggressor.
2. WITNESSES—CROSS-EXAMINATION OF CHARACTER WITNESS.—A character witness who testified to deceased's good reputation could, on cross-examination, be interrogated concerning specific acts of violence on the part of the deceased within the personal knowledge of the witness, to test the soundness of the statement of the witness tending to establish the deceased's good character, where such acts of violence were of such a notorious and public nature within themselves as would tend to establish general reputation.

Appeal from Mississippi Circuit Court, Osceola District; *R. E. L. Johnson,* Judge; reversed.

*George L. Teat* and *J. T. Coston,* for appellant.

1. The court erred in holding that defendant had no right to ask the character witnesses for the State on cross-examination as to specific acts of violence on the part of deceased.

2. The argument of Hon. H. H. Rogers, counsel for the State, was prejudicial and improper.

3. The trial judge in overruling objections to leading questions intimated to the jury his opinion that de-

fendant should be convicted. 140 S. W. 282; 44 Ark. 120; 144 S. W. 196; 159 *Id.* 195-6; 67 *Id.* 756-7; 85 *Id.* 237; 11 Tex. App. 378. See, also, 134 S. W. 927; 152 *Id.* 992; 67 Ark. 117-18. It was error to deny the right to cross-examine the witnesses. 67 Ark. 117; 19 So. Rep. 139; 7 *Id.* 193; 45 Pac. 862; 32 N. E. Rep. 306; 35 So. Rep. 667.

The remarks of the court were improper and prejudicial, and only a reversal will cure the error. 58 Ark. 368; 207 S. W. 435-6.

*J. S. Utley,* Attorney General, and *Elbert Godwin,* Assistant, for appellee.

1. The remarks of H. H. Rogers for the State were not improper nor prejudicial, and on objection the jury were properly told to disregard them, which cured any seeming error.

The testimony set out in the affidavit can not be considered, because not set out in the bill of exceptions. 2 R. C. L. 143. The fact that the court sustained the objections to any improper remarks of counsel and instructed the jury to disregard them cured any error. 74 Ark. 256; 100 *Id.* 437; 86 *Id.* 600. See, also, 74 Ark. 256.

2. There was no error in the ruling of the court as to the admission of evidence as to character, etc. 29 Ark. 131; 3 Cyc. of Ev. 49; 10 R. C. L. 953; 3 Enc. of Ev. 49-50.

Exceptions to testimony or the ruling of the court should be *specific,* not general. General objections will not be sustained on appeal. 2 R. C. L. 94-5.

3. The remarks of the court in overruling the objections to testimony were not improper nor prejudicial. 58 Ark. 368 and 207 S. W. 436, are not in point.

4. The proof here shows murder in the first degree and hence the jury must have given defendant the benefit of every doubt, and there is no error in the court's rulings.

HUMPHREYS, J. Appellant was indicted in the Osceola District of the Mississippi Circuit Court for murder in the first degree, for killing George McCulloch, on the 13th day of August, 1920, with a club, to which he interposed the plea of self-defense. Upon the trial, he was convicted of murder in the second degree and sentenced to imprisonment for twenty-one years. From the judgment of conviction, an appeal has been duly prosecuted to this court.

At the time of the tragedy, appellant and the deceased resided at Pride's Spur upon the same farm. They had moved from Mississippi to that place in December, 1919. They had a quarrel the day before the killing.

The evidence adduced by the State was, in substance, to the effect that appellant claimed deceased had called him a vile name, for which he intended to kill him, explaining that he intended to walk up behind him, knock him down, take his gun away from him and kill him; that, on the following day, when the freight train came in, one hundred pounds of ice was put off the ice car for the deceased, and three hundred pounds for appellant; that appellant appeared on the scene first, and, while talking to the boy in charge of the ice car, the deceased appeared, whereupon appellant went away; that he soon returned, and, while the deceased was stooping over for his ice, appellant struck him on the back of the head with a pick handle, and, as the deceased started to fall, he pushed him over on the ground; that, while the deceased was attempting to get up, appellant struck him on the forehead and again knocked him down and struck him a third lick after he fell; that he then got on him, searched his pockets but found nothing; that a third party was prevented from interfering by appellant's son, who drew a pistol upon him; that, about this time, the wife of the deceased, who witnessed the tragedy, ran up and caught the club, and, when her husband got up, assisted him to their home where he became unconscious and died between three and four o'clock the next morning from the effect of the blow inflicted upon him by appellant.

The evidence adduced by appellant was, in substance, to the effect that, the day before the fatal encounter, a dispute, initiated by deceased, resulted in an attempt by the deceased to attack appellant with an ax, which attack was prevented by J. M. Black and the wife of deceased, whereupon the deceased went into his house threatening appellant as he went, and, against the entreaties of his wife, returned in a moment and, from the porch, pointed his finger toward appellant and said: "I will get you yet;" that, on the next day, while appellant was standing near the train, the deceased came up, ran his hand in his pocket and remarked that he had told appellant he was going to kill him; that appellant grabbed a pick handle, struck deceased twice in the forehead, and, when he fell, appellant, after laying the stick down, got on the deceased, searched his pockets and found a pair of steel knucks, which he gave to a by-stander, and then voluntarily retired from the conflict; that deceased arose and walked home, a distance of one hundred yards, with his wife; that he died fourteen hours thereafter from a fracture of the skull in the rear, caused by a blow on the forehead.

In the course of trial, exceptions were saved by appellant to certain arguments made by Honorable H. H. Rogers, who was assisting in the prosecution of the case, and to a statement of the court in overruling an objection interposed by appellant's counsel to a question of the prosecuting attorney, also to the ruling of the court to the effect that appellant had no right to ask the character witness for the State, on cross-examination, as to specific acts of violence on the part of the deceased. Appellant attacked the reputation of the deceased for peace and quietude. The State then introduced a witness to show that the reputation of the deceased was good. Appellant attempted, on cross-examination of the witness, to elicit his knowledge of acts of violence on the part of the deceased indicating otherwise. The court denied appellant this right. In order to make up the record upon this point, the jury was instructed to retire, and appellant offered to ask and prove by the witness:

"1. That George McCulloch, in the last three years that he lived in Mississippi, had at least twelve fights, and paid a fine for each one of them.

"2. That he had many quarrels and was boisterous toward certain people and overbearing in his manner toward them.

"3. That he had many other difficulties.

"4. That he had a fight with Rose Gladen, Henry Gladen, who was constable of the district in Choctaw County, Mississippi, and that Gladen went there to collect taxes from a negro on his place, and that he resented it and beat him up, and they were separated by the mayor of the town and he paid a fine for it.

"5. That he had a personal difficulty with George Edermon, who was in the timber business, about a settlement in regard to some crossties.

"6. That he had a quarrel with Smiley Smith, and ran him off the premises.

"7. That he had a fight with Charlie Thompson and beat him up and paid a fine for that.

"8. That he had a difficulty with the town marshal, who attempted to arrest him, and it arose over a fight with another man; Early Hunt was the marshal.

"9. Also to show that he killed a negro and put the negro in the stable where the mule was, and circulated the report that the negro had been kicked to death by the mule."

The plea of self-defense was interposed, so the question as to whether the appellant or deceased was the aggressor became a material issue. The general reputation of each for peace and quiet, therefore, was admissible as tending to show which was the probable aggressor. The question presented by this record is whether a character witness, who testified to the good reputation of the deceased, could, on cross-examination, be interrogated concerning specific acts of violence on the part of the deceased within the personal knowledge of the witness, to test the soundness of the statement of the witness tending to establish the good character of the deceased. This court announced the doctrine, in the case of *St. L., I. M. & S. Ry.*

*Co.* v. *Stroud,* 67 Ark. 112, that "there could be no doubt that when a witness is put on the stand to attack or defend character, he can only be asked, on the examination in chief, as to the general character of the person whose character is in question, and he will not be permitted to testify to particular facts, either favorable or unfavorable to such a person; but when the witness is subject to cross-examination, he may then be asked, with a view to test the value of his testimony, as to particular facts." The learned Attorney General contends that this doctrine has relation only to the report of specific acts of violence on the part of the one whose character is in question, inconsistent with the statements of a character witness, and has no relation to particular acts of violence within the personal knowledge of the witness, and that, because the proof offered reached to the personal knowledge of the witness only, the offered evidence was properly excluded. We think the form of the question immaterial in the instant case, because the very nature of the specific acts of violence offered to be established by the witness were of such a notorious and public nature within themselves as would tend to establish general reputation. Especially is that true in view of the great number of violent acts offered to be proved, covering so short a period of time. We think the court committed prejudicial error in excluding the evidence offered on the cross-examination of the character witness.

It is unnecessary to discuss the other assignments of error, as they will not likely recur on a new trial of the cause.

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

## ROSE v. MILLION.

Opinion delivered February 28, 1921.

1. MORTGAGES—EFFECT OF FAILURE TO RECORD.—Although the holder of a first chattel mortgage failed to record it properly, and the second mortgage was properly recorded, the lien of the first mortgage is superior to that of the second where the latter contained a recital that it was subject to the former.
2. NOVATION—TRANSACTION HELD NOT TO BE.—Where sureties on a note of the original purchaser of mules took a mortgage on the mules from such purchaser, and on his default on the note sold the mules to a second purchaser, who gave a note therefor to the original vendor with the same sureties, who took a mortgage from the second purchaser, the substance of the transactions was not a novation, but a surrender of the mortgaged property by the original purchaser and a resale to the second purchaser.
3. MORTGAGE—DISCHARGE OF LIEN.—Where a mortgagee of chattels entered no satisfaction of record and did not surrender the mortgage, but took the property with the mortgagor's consent in lieu of a formal foreclosure, and sold it to another, *held* that there was no discharge of the mortgage lien, so as to let in a subordinate mortgage lien; the junior mortgagee having a right to redeem.
4. PRINCIPAL AND SURETY—MORTGAGE TO ONE SURETY INURING TO ALL.—The obligation of sureties on a note being joint as well as several, a mortgage of chattels executed to one of them inured to the benefit of all, so that it is unnecessary to reform such mortgage to include the other sureties.
5. EQUITY—LOOKS TO SUBSTANCE.—Equity looks to substance, rather than the form, of a transaction in order to determine the rights of the parties.

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

*W. L. Pope,* for appellant.

1. There are two reasons why the decree should be reversed. (1) There was a complete satisfaction and discharge of the debt for which the mortgage sought to be foreclosed was given. (2) No such loss or damage is shown as would entitle plaintiff to a foreclosure.

There was a complete novation which discharged the Weeks debt. A release or satisfaction prior in time in-

ures to the benefit of the junior incumbrancer. 2 Cyc. 1222-4. Where a prior mortgagee discharges his mortgage debt and takes a new one for the same debt, he loses his priority, and the new mortgage is postponed to the intervening old liens. 55 Vt. 329.

There was a complete novation and an extinguishment of the old debt. 39 Cyc. 1130; 3 Ark. 216; 4 *Id.* 506; 14 *Id.* 267; 24 *Id.* 356.

A debt may be paid or extinguished by a third person becoming responsible to the creditor with the concurrence of the debtor. 29 Cyc. 1136. The novation extinguishes the original debt with all rights and liens. 29 Cyc. 1137.

2. Weeks' mortgage to Million was never enforceable, as no breach was shown of its conditions entitling Million, Cooper and Bates to foreclose. It is shown that the alleged mortgagees have ever suffered any loss entitling them to foreclosure. The testimony shows that the sureties never paid one penny by reason of their suretyship, and appellees had no cause of action against appellant.

*E. G. Schoonover,* for appellees; *Jerry Mulloy,* of counsel.

There was no novation of the debt. The later note by Collier and others was merely a renewal of the former note of Weeks. Weeks had surrendered his right to the property to his mortgagees; they were in possession and the owner subject to appellant's right to redeem; the purchase price was unpaid, and they merely made new papers for the same debt. Collier obtained nothing by his purchase of the rights that appellees had, and conveyed nothing by his mortgage unless appellees had title and he acquired title from them. Appellant had no rights except the rights of a junior mortgagee, only the right to redeem from the prior mortgage to Million and Bates, to which the one he took was by its express terms subject. The theory of the chancellor was correct, and there is no error.

McCULLOCH, C. J. In February, 1918, G. U. Weeks purchased a pair of mules from Cooper Bros. for the sum of $225 and executed his note to them for said sum with appellees Million, Bates and Ed Cooper as sureties. At the time of the execution of said note Weeks executed and delivered to Million a mortgage on said team of mules, containing the following recital:

"Whereas, the said party of the first part (the mortgagor) is indebted to the party of the second part (the mortgagee) in the sum of $225 in the following way: The said party of the second part has this day signed a note for the above-named sum, due November 15 next, and drawing 10 per cent interest per annum from date until paid, as surety to (for) the said party of the first part. This is to secure the said party of the second part against any loss whatsoever by reason of having signed the same." The mortgage provided that upon default in the payment of the indebtedness therein described the mortgagee could sell the mortgaged property at public sale, etc.

Weeks was a tenant on the farm of appellant, W. W. Rose, and he executed a mortgage to Rose to secure an indebtedness for future advances, and the mortgage contained the following recital, after the description of the mortgaged property: "George Million and D. Bates hold a first mortgage on mules." Million filed his mortgage with the recorder of the county, but failed to make the proper indorsement showing that it was "to be filed but not recorded," and later appellant Rose also filed his mortgage for record.

Weeks failed to pay the note to Cooper Bros., and in November, 1918, proposed to Million and the other sureties on his note to turn over the mules and for them to make such disposition with them as they pleased. The said sureties sold the mules to one Collier, who executed a new note to Cooper Bros., with Million, Bates, Ed Cooper and Ben Brown as sureties. The mules were then turned over to Collier who executed a new mort-

gage to Million and the other sureties on his note to secure them against loss. Subsequently Rose took possession of the mules for the purpose of foreclosing his mortgage, and appellees Million, Ed Cooper, and Bates instituted this action in the chancery court against Weeks and Rose to foreclose the mortgage on the mules executed by Weeks.

It is alleged in the complaint that it was intended by the parties, in executing the mortgage, to incorporate the names of all the sureties so as to protect them from loss, and the court was asked to reform the mortgage so as to carry out the intention of the parties. The case was heard by the chancellor on documentary evidence and oral testimony, and the court rendered a decree in favor of appellees in accordance with the prayer of the complaint.

Million failed to properly record his mortgage, but the lien of that mortgage is superior to the subsequent mortgage executed by Weeks to appellant Rose, for the latter mortgage contained a recital which in effect made it subject to the former mortgage. *Clapp* v. *Halliday Bros.*, 48 Ark. 258.

The contention of counsel for appellant is that there was a complete novation of the debt—the substitution of one debtor (Collier) for Weeks, the original debtor. We do not think that the facts bring the case within that doctrine, for there was no agreement between the parties that there should be a substitution of debtors. The substance of the transaction was a surrender of the mortgaged property by Weeks in lieu of a foreclosure to Million and a resale of the property by Million to Collier. Million and his cosureties satisfied the original debt to Cooper Bros., by the execution of a new note, and Collier executed his note and mortgage to Million and the other sureties to protect them. Weeks did not make manual delivery of the mules directly to Million and the other sureties, but he delivered the mules to Collier at their direction. In order to constitute a novation, there must

have been an agreement between the parties for the assumption by Collier of the debt of Weeks to Million, and there was no evidence that this was done. *Brewer* v. *Winston,* 46 Ark. 163; *Elkins* v. *Henry Vogt Machine Co.,* 125 Ark. 6. On the contrary, Weeks was entirely ignored in the disposition of the property by Million and his cosureties to Collier, who did not assume the debt of Weeks, but entered into an original obligation for his own purchase of the property from Million.

Counsel is also mistaken in the contention that there was a discharge of the mortgage obligation of Weeks to Million and a satisfaction of the lien. The proof shows that there was no satisfaction entered of record and no surrender of the mortgage. Neither is there any evidence of an intention on the part of Million to discharge the mortgage lien which he held. On the contrary, the intention was to take the property with the consent of Weeks, the mortgagor, in lieu of a formal foreclosure, according to the terms of the instrument. There could be no cancellation of the lien under the circumstances where the actual intention was, as manifested by their conduct, to enforce the lien rather than to cancel it. The effect of the transaction was to foreclose the lien, and it was effectual for that purpose except as against appellant's right to redeem as a junior lienor.

Lastly, it is contended that the mortgage of Weeks was only to Million to secure him against any loss, and that the proof does not show that he sustained any loss or damage in the transaction as surety for Weeks. The court reformed the mortgage, and we think the evidence was sufficient to justify it, for it is undisputed that it was the intention of the parties to indemnify all the sureties. But a reformation of the mortgage was unnecessary in order to give protection to all the parties. The obligation of the sureties was joint as well as several, and the security taken by one of the sureties inured to the benefit of all of them. The sureties paid the note, as before stated, by executing a new note to Cooper Bros., with an

additional surety. This was a payment of the debt as between Million and the mortgagor, and it is the right of the former to foreclose the mortgage for the benefit of himself and his cosureties who joined in the payment. Equity looks to the substance rather than to the form of a transaction in order to determine the rights of the parties, and we are of the opinion that the chancery court reached the correct conclusion.

The decree is therefore affirmed.

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## PROTHO v. WILLIAMS.

Opinion delivered February 28, 1921.

1. EMINENT DOMAIN—REMEDY OF LANDOWNER—EVIDENCE.—In an action for damages to land by the routing of a ditch by a landowner, the preponderance of the evidence *held* to establish that the commissioners of the district misled plaintiff into failing to make timely objection to the orders establishing the route of the district and confirming the assessment of benefits by promising her either to change the route of the ditch or to give her notice that the route would not be changed.
2. EMINENT DOMAIN—FAILURE TO MAKE TIMELY OBJECTION—ESTOPPEL.—Where the commissioners of a drainage district misled a landowner into believing that they would either change the route of a proposed ditch or would notify her that they would not do so, and she in good faith failed to present her complaint to the county court against the assessment of benefits, and the commissioners failed to assess damages in her favor, she is entitled to damages against the district, and will not be barred by her failure to present her complaint to the county court within time.
3. EMINENT DOMAIN—ASSESSMENT OF BENEFITS OR DAMAGES—LIMITATION TO COMPLAINTS.—Provisions in Crawford & Moses' Digest, §§ 3615, 3617, as to the time in which a landowner may make complaint of assessment of benefits or damages in a drainage district, were not intended to deprive a property owner of the right to complain of such assessments where she was led into not making such complaint by the conduct of the commissioners of the district causing her to believe that the route of the ditch would be changed.
4. DRAINS—POWER OF COMMISSIONERS TO ALTER LOCATION.—Under Acts 1913, No. 177, § 2, commissioners of a drainage district

have power to alter the location of a ditch at any time before constructing the work, even after a judgment of the county court is rendered confirming assessment of benefits.

5. DRAINS—ILLEGAL ASSESSMENTS—EQUITABLE REMEDY.—Equity had jurisdiction to set aside and cancel an illegal assessment of benefits and damages resulting from construction of a drainage ditch, and, at a landowner's instance, to restrain the collection of those assessments, and, having jurisdiction for that purpose, it also had jurisdiction to award the landowner damages.

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

*Chas. Jacobson,* for appellant.

Appellants by their conduct did not lead appellee to believe that they were going to change the route of the ditch. There is no proof of misrepresentation or deception. Appellee had an opportunity for her day in court, which she chose to ignore, and the court erred in sustaining the demurrer and granting the injunction. 224 S. W. 334. The county court had power to change the location of the ditch and the route. 91 Ark. 79; 120 S. W. 402; Drainage act of 1909, § 8. The demurrer should have been sustained, as the chancery court had no jurisdiction. All those matters are for the county court. Appellee should have protested, as she and her counsel had ample notice and had full knowledge of all the facts and records.

*Chas. T. Coleman, W. H. Pemberton* and *W. G. Riddick,* for appellee.

1. Appellee is not estopped by the statute bar of thirty days in which she should have made protest against the assessment of benefits. The doctrine of estoppel is as old as the law itself, and has often been applied. 36 Ark. 96; 99 *Id.* 260; 91 *Id.* 141. The doctrine has often been applied to prevent the bar of the statute of limitation. 60 Ark. 491; 80 Ky. 309; 33 Miss. 173; 56 N. H. 143; 65 Mo. App. 55; 71 *Id.* 299; 7 N. H. 494; 91 N. C. 398. This doctrine may be invoked by waiver. Wood on Limitations, § 49; 61 S. W. 386; 54

*Id.* 689. The case in 74 N. E. Rep. 123, is a very similar case to this and supports our contention.

2. The cases cited for appellant do not sustain his contention. 91 Ark. 31; *Ib.* 79.

3. Mrs. Williams was misled by the acts and word of the commissioners and properly acted upon them.

4. She was misled by what the commissioners said and what they did. Under the law the Legislature may levy benefit assessments directly or through a board of commissioners until the indebtedness of the district is paid. 139 Ark. 4; Sand. & H. Digest, § 5855.

5. The commissioners promised to notify Mrs. Williams if a change was not made and they failed.

6. The findings of the circuit court on questions of fact are conclusive as the verdict of a jury. 35 Ark. 445. Where the evidence is conflicting, the finding is conclusive. 84 Ark. 406; 90 *Id.* 100; 122 *Id.* 43. The chancellor's finding will not be disturbed on appeal unless against the clear preponderance of the evidence. 129 Ark. 583; 181 S. W. 913; 121 *Id.* 295. See, also, 91 Ill. 273.

WOOD, J. This action was brought by the appellee against the appellants as commissioners of the Faulkner Lake Drainage District. She alleged in substance among other things that the district was created September 18, 1916; that she owned certain lands in the district (described in her complaint); that the benefits assessed against her property were $5,004.50; that the assessed valuation of her property was $8,600; that before and after the expiration of the thirty day period within which she had the right to make protests in the county court against the action of the commissioners in the assessment of benefits or damages, or to acquiesce therein, she took up with the commissioners the change of the route of the ditch in an endeavor to have them locate the same between her place and the Kline place instead of the place where it is now located; that she represented and showed to the commissioners that the route they had selected would do her property great

damage and pointed out to them a more suitable location; that the commissioners represented to her that they would take up the matter of changing the route of the ditch according to her suggestion and expressly stated to her that they would not locate the ditch where it is now located; but, if they did not change the location, they would so inform her; that she relied wholly upon these assurances of the commissioners that they would notify her if they allowed the ditch to remain where they had located it, and she continued to so rely until the time expired for her to protest. She alleged at length and in detail the various conversations that she had with the commissioners and the attorney for the district, and, among other things, stated that as late as March or April 1917, the commissioners through their attorney, told the attorney of the plaintiff to tell the plaintiff that she need not worry any more about the location of the ditch; that the commissioners had agreed to locate it in accordance with her suggestion; that her attorney so notified her, and neither he nor she gave the matter any further thought until some months afterward, to-wit, on the 24th day of August, 1917, at which time she learned that machinery was being placed on the ground at the point where the ditch is now located and on the route where the commissioners assured her the ditch would not run; that at that time her regular attorney was absent, and she employed another attorney, and at her request a meeting of the board of commissioners was called within a few days thereafter, and at that meeting the commissioners again assured the plaintiff that they had not decided where the ditch would be located, and that they would notify her when they did so. There is also an allegation in the complaint to the effect that the commissioners had the right to change the route of the ditch at any time and to revise the assessments in accordance therewith, and that it was provided in the contract for the construction of the ditch that the location, distances, and number of lateral ditches may be

altered by the commissioners prior to or after the work had commenced, showing that the commissioners reserved the right to change the location of the ditch at any time as they had agreed to do with the plaintiff. She also alleged that the commissioners utterly failed and refused to keep their word to her; that, through the representations and assurances of the commissioners and their attorney, she was misled, deceived and lulled to rest; that the commissioners, notwithstanding these assurances and promises, proceeded to have the ditch constructed over the route where they had first located the same; that the commissioners thereby perpetrated a fraud upon her by which her property was taken and damaged. She set forth specifically the items of her damage, which amounted in the aggregate to the sum of $30,000, for which she prayed judgment. The commissioners answered, setting up the legality of the district, alleging that they had proceeded in all things as the law required in such cases, and specifically denied that they had by any word or act of theirs in any manner misled or deceived the plaintiff as to the route of the ditch. They denied that they had ever agreed to change the same as requested by her, or that they had ever led her to believe that the change would be made, and specifically denied the allegations of fraud. They alleged that plaintiff and her attorney had full knowledge of the route of the ditch where it was finally located in ample time to make their protests to the county court, and that plaintiff had ignored her remedy in that court until long after the time for making such protests had expired. They specifically denied the allegations of damage and prayed that the complaint be dismissed for want of equity.

The testimony on the issues raised was heard *ore tenus* by the trial court, which rendered a decree in favor of the appellee against the appellants in the sum of $11,040, with interest, and restraining them from the further collection of assessments, from which decree is this appeal.

The first questions presented by this appeal are whether or not the appellants as commissioners by their conduct led the appellee to believe that they were going to change the route of the ditch so as to locate it between her place and the Kline place, instead of between her place and the Spence place where it was finally located, and whether or not they told her that if they did not make such change she would be notified. These are purely questions of fact, and it could serve no useful purpose to set out in detail the testimony concerning them. The testimony shows that the district was established September 16, 1916. The assessment of benefits was filed with the county court October 9, 1916. Notice was duly given of the filing of such assessment, as the statute requires, and November 14, 1916, was set for the hearing on the assessments.

The uncontradicted testimony shows that, prior to the order of confirmation, the appellee had protested against the route of the ditch as laid out by the commissioners and finally adopted by them. The undisputed testimony also shows that she continued to protest against the location after November 14, 1916, up until the work on the ditch was begun, but there is a sharp conflict in the testimony as to whether or not the commissioners gave the appellee to understand that the route as originally fixed would be changed, and if not changed that she would be notified. The appellee testified positively that she had various conversations with the commissioners and their attorney, and that they told her when she first went to them (which was long before November 14, 1916,) that they would take it up with the engineer and place the ditch somewhere else, if it possibly could be done. They had already determined on the advisability of putting it where it now exists, and after witness pointed out the way it would affect her homestead they said "if they found out there was no other way to go and they had to go that way, the way it now is, they would advise me." This they said

at the first meeting, which was at Mr. Jacobson's office (May 10, 1916). Her testimony further shows that they had cleared a right-of-way between the Kline place and witness' place on the route that witness desired to have the ditch run, and witness was led to believe from this that they intended finally to adopt that route, and witness didn't know that the commissioners had finally located the route where it now is until they unloaded the machinery on the ground. In response to witness' first objection to the location, they had cut the right of way between Mrs. Kline's place and witness' place. In August, 1917, when they began to unload the machinery, witness discovered that appellants had not changed the location. Witness was not sure until then that they intended to finally locate the ditch where it is now located. After the district was organized, witness employed Colonel House to represent her and later, in the summer of 1917, she employed Mr. Pemberton.

The testimony of the commissioners was to the effect that, while they had frequent conversations with the appellee, who was protesting as to the location of the ditch, they never intended by any word or act of theirs to give her the impressoin that any change would be made. They never told her, and no one was authorized by them to tell her, that they would make a change, and that if they did not make such change they would notify her. The commissioners were anxious to accommodate her, if possible, provided it was consistent with the best interest of the district, but the route had been fixed by the engineer after a thorough investigation and the ditch finally constructed as originally located. There was a meeting at the home of Mr. Galloway, one of the commissioners, on February 26, 1917, at which the entire matter was discussed, and it was again agreed that no change would be made, and on that day the attorney for the district was instructed by the commissioners to write the attorney of the appellee to that effect, which was done. Such was the purport of the testimony by the

commissioners and the attorney of the district. The engineer of the district also testified that he never made any statement that would lead the appellee to believe that any change would be made in the route of the ditch other than the report he sent back to the board—if they could agree on the damages between the two places. No one else in his presence made any such statement to her or that would lead her to believe that, at least they did not intend to. It was their intention to deal as fairly with her as they could.

On the other hand, Col. House, one of the attorneys for the appellee, testified that in February or March, 1917, the commissioners represented to appellee that if they concluded to locate the ditch where it is at present they would notify her; that the attorney for the district told witness to tell the appellee that she needn't worry any longer; that the commissioners had agreed to build the ditch where she wanted it.

Another one of her attorneys, Mr. Pemberton, testified that at a meeting at Mr. Jacobson's office when all the commissioners were present, and the witness, representing the appellee, was protesting against the location of the ditch where it is at present located, the commissioners said if they could make a change without serious detriment, that is, locate the ditch between the Kline place and appellee's place, they would be very glad to do so, and that, if it was put anywhere else than between those places, they would notify the appellee. After that witness paid no attention to the matter until he was advised by appellee that they had actually begun the construction of the ditch. The reason that the appellee did not take any further action was because of what the commissioners had told witness and their promise to notify appellee if the ditch was to be put where it now is. Witness relied upon that promise absolutely; that was his purpose in going to the meeting—the only thing that he had in view. This was more than a year after November 14, 1916. Within thirty days after the machinery

was put on the ground and they began to dig the ditch, witness brought this suit.

It occurs to us that, although the plat had been filed on September 16, 1916, showing the route that was then contemplated by the commissioners, and, although the judgment of the county court was entered on that day establishing the district, and although the judgment of the county court was thereafter entered on November 14, 1916, confirming the assessment of benefits and showing that no protest was made by the appellee, nevertheless a clear preponderance of the evidence does show that the commissioners had not at either of those dates definitely decided that they would not change the location of the ditch from that shown by the plat then on file. For, if they had at that time definitely fixed the location why would they afterward have taken the matter up with the appellee and her counsel with a view of changing the location and placing the ditch, if possible, where the appellee desired that it should go? That they did do this, there can be no sort of doubt, as shown by the testimony of Col. House, Mr. Pemberton, and the appellee. That they had not finally decided the matter until as late as February 26, 1917, is also proved by the testimony of the commissioners themselves and their attorney to the effect that on the 26th day of February, 1917, they met at Mr. Galloway's, one of the commissioners, and there decided that they would not change the route as shown by the plat and as originally contemplated, and instructed their attorney, Mr. Jacobson, to write to Col. House, the attorney for the appellee, that they had concluded that it was impracticable to locate the ditch as desired by the appellee, and that it would be best to locate it as originally planned. This letter itself shows that the commissioners had not reached a final decision because it states that "the commissioners said they would be glad at any time to again visit the place with you and Mrs. Williams and discuss it, because they felt that it would be to her interest to locate it there."

The testimony of the appellee and of Mr. Pemberton and of Col. House was to the effect that they did afterward discuss it and led appellee to believe that, if they did not change it as she desired, they would notify her. We conclude, therefore, without further discussion of the facts, that the preponderance of the evidence shows that the commissioners by their conduct led the appellee to believe that the route of the ditch was not definitely fixed at the time the judgment of the court was rendered establishing the district, nor at the time when the judgment was rendered confirming the assessment of benefits; but, on the contrary, that the location might be changed to conform to appellee's wishes, and that if such change were not made she would be notified.

The next question is: Are the commissioners estopped from claiming that the appellee is barred from maintaining this action because she did not present her complaint to the county court complaining of the assessment of benefits, and did not within twenty days appeal from the judgment of that court confirming the assessment of benefits? To hold otherwise would be to enable the commissioners to take advantage of their own wrong and the district, which can only act through its commissioners, to profit by such wrong. If the commissioners by their acts or words led the appellee to believe that they would change the location of the ditch in controversy and that, if they did not make such change, they would notify her, and if their conduct was such to justify her in acting upon such assurances and she in good faith did so act and thereby failed to present her complaint to the county court against the assessment of benefits and the failure of the commissioners to assess damages in her favor, then unless she has a remedy in equity to restrain the further levy of assessment against her property and compensation for the property already taken and for damages to that not taken, she is deprived of her rights under the Constitution. "Private property shall not be taken, appropriated or damaged for public use without

just compensation therefor." Art. 2, sec. 22, the Constitution.

The declaration of the above provision of our Constitution that "the right of property is before and higher than any constitutional sanction, that same shall not be taken or damaged without just compensation, is but the recognition of the fundamental principles of natural right and justice lying at the basis of all wise and just governments independent of all written constitutions or positive law." *Cairo & Fulton Rd. Co.* v. *Turner,* 31 Ark. 494, 500. The conduct of the commissioners, although not intended to deceive or to mislead the appellee, nevertheless had that effect, and to enable them or the district through them by virtue of this conduct to deprive her of her property would be perpetrating a fraud upon her through the forms of law.

This drainage district was created under act 279 of the Acts of 1909, and act 221, Acts of 1911, as amended by act 177 of the Acts of 1913. (Crawford & Moses' Digest, §§ 3607-3655). The time given under the first section of the latter act to the property owner for making complaint against the assessment of benefits and damages and for taking an appeal from the judgment of the county court on such assessment is exceedingly short, even when there are no mistakes or irregularities on the part of the commissioners, either in the manner of formulating the plans of the district or the assessment of benefits and damages. Where there are such mistakes or irregularities, it could never have been contemplated by the framers of our drainage statutes that the property owners should be bound thereby. These provisions of course contemplate that the commissioners should proceed in the regular manner prescribed by the statute and without any conduct on their part, intentional or unintentional, which is calculated to deceive or mislead property owners to their detriment and cause them to fail to avail themselves of the provisions of the statute made for their benefit. As is said in *Matter of Application of*

*Mayor,* N. Y., 4 Sicvkels 150-154: "The statute plainly never intended to give a vested interest in a mistake, an irregularity or a fraud, whereby important rights of property were acquired or lost."

Section 17 of act 177 of the Acts of 1913, under which the drainage district under review was created, provides: "Commissioners may at any time alter the plans of the ditches and drainage, but, before constructing the work according to the changed plans, the changed plans, with accompanying specifications, showing the dimensions of the work as changed, shall be filed with the county clerk, etc." Crawford & Moses' Digest, § 3625. Doubtless both the appellants and the appellee were proceeding upon the theory that the commissioners would have the right under the above statute to change the route of the ditch at any time before the actual work of constructing the ditch began. This was the correct theory, for, under section 4, act 279 of the Acts of 1909 as amended by section 4 of act 221 of the Acts of 1911, which section was in no manner altered by act 177 of the Acts of 1913, it is expressly provided: "Such plans and specifications shall show not merely the location, width and depth of the ditches, but the work to be done in removing obstructions, etc." Therefore, the commissioners have the power under section 17 of act 177 of the Acts of 1913, *supra,* to alter the location of the ditches and drainage at any time before constructing the work by complying with the terms of that section.

Counsel for the appellants relies upon the cases of *Chapman & Dewey Land Co.* v. *Wilson,* 91 Ark. 30, and *Williams* v. *Rutherford,* 91 Ark. 79, as authority for his contention that the commissioners had no power to change the location of the ditch after the judgment of the county court was rendered confirming the assessment of benefits and damages on November 14, 1916. In the first of the above cases the drainage district was established under the act of April 23, 1891, sections 1203-1232, Sandels & Hill's Digest, the latter section of which pro-

vides among other things that such order or judgment of the county court establishing the district shall be conclusive that all prior proceedings were regular and according to law. The district in the last case was established under the act of April 23, 1903, sections 3569-3606, inclusive, of Crawford & Moses' Digest. In *Williams* v. *Rutherford, supra,* we construed the provisions of this act to mean that the county court had power to change the location of the ditch at any time before it finally approved the assessment of damages and benefits. But in neither of the above cases was there a provision in the statute under which the districts were established similar to section 17 of act 177 of the Acts of 1913 (Crawford & Moses' Digest, § 3625), here under review, which we have seen gives the commissioners the power at any time to alter the plans before constructing the work.

We conclude, therefore, that the commissioners are estopped from asserting that the appellee is barred by the limitations contained in the act, and the decree of the chancery court so holding was correct. *Kreiling* v. *Northrup,* 215 Ill. 195, 74 N. E. 123. See, also, *Newton* v. *Carson,* 80 Ky. 309; *Davis* v. *Hoopes,* 33 Miss. 173; *Swafford Bros.* v. *Curtis Goss,* 65 Mo. App. 55; *Mo. Pac. Ry.* v. *B. F. Combs & Bro.,* 71 Mo. App. 299; *Purkins* v. *Coleman,* 5 Miss. 298; *Barcroft* v. *Roberts,* 91 N. C. 363; *Daniels* v. *Board of Commissioners,* 74 N. C. 494.

The last question is as to the amount of damages. The court had jurisdiction to set aside and cancel the assessment of benefits and damages and to restrain at the instance of the appellee the collection of these assessments, and, having taken jurisdiction for this purpose, it also had jurisdiction to award her damages. *Horstman* v. *Lafargue,* 140 Ark. 558, and other cases there cited. As to the amount of damages, it is also purely a question of fact, upon which there was some conflict in the testimony; but after a careful review of all the evidence, we are convinced that a preponderance of the testimony shows that the appellee was entitled to

the amount she recovered. The decree is therefore in all things correct, and it is affirmed.

McCULLOCH, C. J. and SMITH, J., dissenting.

McCULLOCH, C. J. (dissenting). The statute under which the drainage district was organized and carried on its operations in this instance (Crawford & Moses' Digest, § 3607 *et seq.*) provides that the commissioners shall form plans and file the same with the county clerk accompanied by "a map showing the location of all main and lateral ditches" and by "specifications fully describing the character of the improvements to be made, the width and depth of the ditches, the probable quantity of earth to be removed and all other work to be done;" that the commissioners shall then proceed to assess benefits to the lands in the district and the damages thereto, if any, and shall file with the county clerk a list or report of such assessment, and that upon the filing of such assessments "the county clerk shall give notice of the fact by publication two weeks in some weekly newspaper. * * *" The statute further provides that any owner of property in the district who is aggrieved by the assessment of benefits or damages may present his complaint to the county court and may, within twenty days, take an appeal to the circuit court from an adverse judgment of the county court. It also provides that if an owner of property does not accept the assessment of damages made by the commissioners, he may, within thirty days after the filing of the assessment give notice in writing that he demands an assessment of damages by a jury.

The assessments of benefits and damages are necessarily made with reference to the plans and specifications on file with the county clerk and all property owners in the district must take notice of those plans, which include the route of the ditch.

There is a provision in the statute authorizing the commissioners to alter the plans, but that, if by reason of

such change the original assessments are found to be inequitable, there shall be a reassessment at the instance of either the commissioners or any property owner. Crawford & Moses' Digest, § 3625. The commissioners of such district have only such powers as the statute confers in express terms or by necessary implication. They do not deal with the owners of the property in the district in any private capacity, and all who deal with them must take notice of their powers. All the property owners in the district must take notice of the proceedings and are interested in any changes to be made. Publicity of these proceedings is required, and places are indicated where property owners may obtain information. Interested parties have no right to rely on promises made to them privately as to what the future proceedings will be. Appellee knew that the route had been selected, and she also knew what the powers of the commissioners were under the law with reference to making changes. She had no right to rely upon alleged promises that a change would be made or that she would be notified if a change should not be made. Hardships may result in rare cases on account of misunderstandings with or broken promises of the commissioners, but this results from the failure of the property owners to resort to the protection afforded by law, and it is a dangerous thing to go beyond the limits of the law to afford protection.

I am unable to discover any principle under which appellee can be given relief against the district from the result of the alleged broken promise of the commissioners to change the route. If there is any remedy at all, it is against the commissioners personally and not against the district.

## JOHNSON v. STATE.

Opinion delivered February 28, 1921.

CRIMINAL LAW—FORMER CONVICTION.—In a prosecution for the unlawful sale of liquor, a plea of former conviction was sustained by proof that at a former trial for the same offense a number of witnesses testified to different purchases of liquor from defendant, that no specific date was mentioned, but that there was a general inquiry covering all sales within the statute of limitations, that the court instructed the jury to convict if they found him guilty of selling liquor within the statute of limitations; the former conviction in such case operating as a bar to any further prosecution for selling liquor illegally within three years of the date of the former indictment.

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

*E. A. Williams* and *R. W. Holland,* for appellant.

1. The court erred in overruling the plea in bar of former jeopardy. Appellant had once been in jeopardy for the same offense. 1 Bishop, Cr. Law (7 ed.), pp. 1052-4; 101 Ark. 159; 43 *Id.* 68-70; 65 *Id.* 38; 222 S. W. 1066.

2. The court erred in its instructions.

3. The court erred in overruling objections to the questions and answers of Mrs. McAfee.

*J. S. Utley,* Attorney General, and *Elbert Godwin,* Assistant, for appellee.

1. There was no error in overruling the plea of former jeopardy. It was not verified. 32 Ark. 722; 45 *Id.* 97; 54 *Id.* 227. It was not alleged that the former conviction was for the same offense. 48 Ark. 34; 130 *Id.* 48.

2. The motion for continuance was properly denied; it is not made a part of the bill of exceptions. 36 Ark. 305. Nor does it appear in the motion for new trial.

3. No objections were made or exceptions saved to the alleged incompetent testimony. 78 Ark. 40.

4. No exceptions were properly saved to the instructions. 2 R. C. L. 96; 2 Cyc. 738-9; 1 Ark. 349; 26 Ark. 526; 90 Ark. 482.

5. The evidence fully sustains the conviction.

WOOD, J. Appellant was convicted of the crime of selling liquor under an indictment which alleged a sale in Pope County on May 1, 1919. At his trial he interposed a plea of former conviction. In support of that plea he offered the indictment under which the former conviction was had. That indictment alleged a sale on May 15, 1919.

Appellant offered to introduce testimony to the effect that at the former trial a number of witnesses testified to different purchases of liquor they had made from him, that no specific date was mentioned by the witnesses, but there was a general inquiry covering all sales within the statute of limitation. That the court instructed the jury that "if they found the defendant guilty under the testimony of selling whiskey any time within three years from the returning of said indictment, they should find him guilty," and that neither the testimony nor the instructions were confined to any specific sale or date, but covered the whole cycle of time within the statute of limitation.

The court asked counsel if the sales testified about by the witnesses at the former trial were not entirely different transactions from those about which the witnesses testified in the instant case; and counsel for appellant admitted that they were entirely different. Thereupon the court overruled the plea of former conviction, and refused to submit it to the jury.

A majority of the court are of the opinion that the court below erred in its ruling. The offered testimony would have shown that, to secure a single conviction, the State put in issue and proved disconnected sales made at different times to different persons, and that there was no election to rely for a conviction upon any particular sale.

Under the law each sale constitutes a separate offense, and there may be as many convictions as there are separate sales. But, if the State elects to ask a separate conviction for each separate sale, the question of guilt upon each charge must be separately and severally submitted. In other words, the jury must be told that a conviction can be had only upon a finding of guilt of making the particular sale upon which the prosecution has elected to stand.

This was done in the case of *Turner* v. *State,* 130 Ark. 48. At the trial in that case the witnesses detailed a number of sales, but the case was submitted on the issue of guilt of making a sale to one Marshall on which the prosecution elected to rely. Testimony concerning the other sales had been offered solely for the purpose of showing that the cider sold to the witnesses was the same kind of cider which had been sold to Marshall. It was a disputed question of fact as to whether the cider sold to Marshall was intoxicating, and the testimony concerning the other sales had been admitted as tending to show that the cider was intoxicating and that other cider bought at the same place produced intoxication upon those who drank it. It was there held that the prosecution of the other sales was not barred. But this was true only because the State had elected to rely on a specific sale. Had no such election been made, our holding would have been otherwise.

The rule in such circumstances is stated by Judge COCKRILL in the case of *State* v. *Blahut,* 48 Ark. 34, as follows: "It is true the State may preclude the possibility of more than one conviction, even where there have been many sales, by taking a wide range in the proof, putting all the guilty sales in evidence, and relying upon the whole proof for a single conviction. In that case the defendant can be convicted upon the proof of any one of the sales made within a year of the finding of the indictment, and it is the established rule that the former conviction is a bar to a subsequent indictment for any of-

fense of which the defendant might have been convicted upon the testimony under the indictment in the first case."

The language here quoted has been many times approved by this court. Since the rendition of that opinion, the grade of the offense has been raised from a misdemeanor to a felony and the period of limitation has, of course, been enlarged from one year to three. Section 2886, Crawford & Moses' Digest.

It follows, therefore, that if, to secure a single conviction, the State makes no election to rely upon a particular or specific sale, but offers testimony concerning more than one sale, and allows the jury to decide the question of guilt or innocence upon a finding that any sale had been made about which any witness had been allowed to testify, the State will be held to have merged into a single charge all sales made within three years before the finding of the indictment, and a conviction, or an acquittal, operates as a bar to any further prosecution for selling liquor illegally within three years of the date of the indictment upon which the former trial was had.

Such is the doctrine of the case of *State* v. *Lismore,* 94 Ark. 211. The prosecution in that case was for keeping a bawdy house, and it was there said the State could have shown that the offense was committed within twelve months before the date of the filing of the information in the justice court where the prosecution was begun, and for that purpose could have adduced all the evidence of the commission of such offenses within that time and relied upon the whole proof for a single conviction. And, as was there said by Judge BATTLE: "in that case the appellant could have been convicted of any one of the offenses proved, if any; and such conviction would be a bar to a subsequent indictment for any offense of which the defendant might have been convicted upon the testimony under the information in the first case. *State* v. *Blahut,* 48 Ark. 34; *Bryant* v. *State,* 72 Ark. 419." And,

further, that "if such evidence proved that more than one of such offenses were committed in the twelve months, and the defendant was convicted of any one of them, then such conviction is a bar to an indictment for any of them." See, also, *Johnson* v. *State,* 101 Ark. 159; *State* v. *Nunnelly,* 43 Ark. 68; *DeShazo* v. *State,* 65 Ark. 38; *Hettle* v. *State,* 144 Ark. 564.

Judgment reversed and cause remanded.

HUMPHREYS, J. (dissenting). In my opinion, the plea of former conviction was properly overruled by the trial court. The instant case related to a different transaction or sale than any transaction or sale covered by the evidence at the former trial. Under the statutes of this State each sale of liquor is a separate offense. The test as to whether jeopardy attached by reason of the first conviction does not depend solely upon whether the State made an election but as well upon whether the sale or transaction complained of in the instant case constituted a part of the proof on the former trial. In my humble judgment, the language of the cases cited by the majority is against the conclusion reached by them, and strongly supports the view expressed in this dissent. For example, it was said in *State* v. *Nunnelly,* 43 Ark. 68, that "the established rule is that the former conviction is a bar to a subsequent indictment for any offense of which the defendant might have been convicted under the indictment and *testimony* in the first case." And in the case of *State* v. *Lismore,* 94 Ark. 211, 213, it was said: "In that case the appellant could have been convicted of any one of the offenses proved, if any; and such a conviction would be a bar to a subsequent indictment for any offense of which the defendant might have been convicted upon the *testimony* under the information in the first case."

It strikes my mind as illogical to say that the independent sale or transaction constituting a separate offense can be barred by a former conviction of which proof was not made on the former trial, for aught that

appears, may not have been known to the officers of the law at the time of the former trial.

For the reasons suggested, I am impelled to register my dissent from the majority opinion.

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## BROWNFIELD v. BOOKOUT.

Opinion delivered February 28, 1921.

1. LIMITATION OF ACTIONS—HOMESTEAD OF INFANTS.—Where land belonging to a father was his homestead at his death, the statute will not run against his adult children until termination of the homestead right of the youngest child.
2. HOMSTEAD—ABANDONMENT BY WIDOW.—On the abandonment of the homestead by a widow, the entire homestead right vests in deceased's minor child or children.
3. TRUSTS—RESULTING TRUST.—Where a father and sons purchased land in the father's name under an agreement that the sons who furnished the greater part of the consideration should have a proportionate part of the land, a resulting trust in favor of the sons was created.
4. ESTOPPEL—ACQUIESCENCE.—Where a person, with actual or constructive knowledge of the facts, by his words or conduct induces another to believe that he acquiesces in a transaction, or that he will offer no opposition thereto, and the other, in reliance on such belief, alters his position, the former is estopped from repudiating the transaction, to the other's prejudice, regardless of the intent of the former.
5. ESTOPPEL—SILENCE.—If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when he ought to remain silent.
6. ESTOPPEL—ACQUIESCENCE.—Where a father and his sons purchased 160 acres of land under an agreement that the sons who furnished the greater part of the consideration should each have 40 acres of the land, and where the father died before paying the balance of the purchase money, an adult daughter, who, on her father's death, declined to pay any part of the balance, and permitted the sons to pay the balance of the purchase money under agreement with their mother that they were to have the land, and to go into possession and make valuable improvements thereon, is estopped to assert any rights in the land.
7. ESTOPPEL—PRIVIES.—Where a daughter by her acts estopped herself from claiming an interest in her father's land, such estoppel is binding on her children.

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

STATEMENT OF FACTS.

On the 28th day of September, 1918, Alma Brownfield *et al.,* brought this suit in equity against W. H. Bookout *et al.,* to have the defendants declared trustees, for themselves and the plaintiffs to 160 acres of land described in the complaint.

The complaint alleges that plaintiffs and defendants are the children and heirs at law of Jake Bookout, deceased, and that the land described in the complaint belongs to his estate. The legal title is in the defendants.

The defendants denied that the plaintiffs had an equitable estate in the land and averred that if the plaintiffs had an equitable interest in it, they are estopped by their conduct from claiming such interest.

The facts are as follows: In 1905, Alfred Lowrance and Jake Bookout, together with his sons, W. H. Bookout, A. R. Bookout and J. W. Bookout, entered into a contract for the sale by Lowrance to the Bookouts, of a tract of land in Izard County, Arkansas, comprising 160 acres for the sum of $425. The contract was in writing and was made between Alfred Lowrance and Jake Bookout. The Bookouts gave Lowrance, at the time, a wagon and harness and a team of mules, which were valued by the parties at the sum of $250. J. R. Bookout was the owner of one mule, and A. R. Bookout was the owner of the other. Each mule was valued at $100. W. H. Bookout and his father, Jake Bookout, jointly owned the wagon and the harness which was valued at $50. Jake Bookout delivered to Lowrance two promissory notes for the balance of the purchase price of $175. One note was for $85 and the other was for $90. Jake Bookout moved upon the land, and the same constituted his homestead until his death, which occurred on the 16th day of February, 1907. He left surviving him a widow, Mary Bookout, and his sons above named, together with his daughters, Alma Bookout and Eliza Goodson, and his minor

son, Owen Bookout. After his death, his widow being unable to pay the balance due on the purchase price of said land, it was agreed between her and his sons, W. H. Bookout, A. R. Bookout and J. W. Bookout, that said sons should pay the balance of the purchase money, and that a deed to the land should be executed to them. W. H. Bookout paid the $85 note and the three brothers paid the $90 note. At the time the original contract was made, Jake Bookout agreed with his sons that, if they would help him pay the purchase price, as above stated, he would give each of them 40 acres of the land.

Alma Brownfield and Eliza Goodson knew that their brothers made the initial payment on the land, as above stated, and that they were going to finish paying out the land and have the title taken in themselves. Eliza Goodson joined herself as a party plaintiff to the suit, but subsequently filed a disclaimer in which she stated that she would never have claimed any part of the land, but that her husband had made her do so. She testified that she did not claim any interest in the place and did not deserve any interest in it; that her brothers had paid for the place, and that she had executed a quitclaim deed to them and never claimed any interest in the land.

Alfred Lowrance corroborated the testimony of the defendants in regard to the original contract and the payment of the land by the defendants.

According to the testimony of W. H. Bookout and J. W. Bookout, their sister, Alma, declared that she would not help pay out the land, and knew that they intended paying it out and taking the title to themselves. Jake Bookout died on the 16th day of February, 1907, and Alfred Lowrance executed a deed to the land to the defendants on the 16th day of November, 1909, after they had finished paying the purchase price. Alma married E. D. Brownfield on the 29th day of September, 1909. She died during the pendency of this suit, and the suit was revived in the name of her minor children. Alma Brownfield lived near the land in controversy from the

date of her father's death until she instituted the present action.

The defendants took possession of the land and made valuable improvements on it after their father's death. In August, 1918, they sold the land to Dave Boles, one of the defendants to this action. Dave Boles made improvements on the place which it is agreed enhanced the value of the land in the sum of $150. The land, at the time the suit was pending in the chancery court, was variously estimated at from $1,000 to $1,500.

The chancellor found the issues in favor of the defendants, and the complaint was dismissed for want of equity. The plaintiffs have appealed.

*Elbert Godwin,* for appellants.

The issues for this court to determine on the pleadings and testimony are, Have appellees asserted their rights within the time allowed by law? Were the lands the homestead of Jake Bookout, deceased? Did the defendants or Jake Bookout make the first payment on the place in the sum of $250? Were the appellees barred by laches? Did the appellees, in good faith, believing themselves to be the true owners thereof, and under color of title make improvements on said lands? Was the finding of facts as announced by the court sustained by a preponderance of the testimony? And was the decree sustained by the testimony?

According to the undisputed testimony, Mrs. Mary Bookout, the widow of Jake Bookout, deceased, lived on the lands with one of the three boys who were occupying and cultivating said lands from the date of the death of her husband until the lands were sold to defendant Dave Boles. Jake Bookout bought the lands in the year 1905 and died in February, 1907. He collected the rents and profits from the lands, and the boys were not known in the deal until after his death. Although the widow may have abandoned her right to the homestead in favor of the boys to whom the deed was made immediately after

the death of her husband, nevertheless she could not abandon the homestead to the prejudice of the minors.

The homestead estate is created equally for the benefit of the wife and children, and none of them can do an act that will impair or prejudice the right of the others. 29 Ark. 280; 21 Ill. 178. We admit that Jake Bookout did not have the legal title in himself. He had only the equity of redemption in said lands. There had been paid on the lands the sum of $250, leaving a balance of $175 still due and payable. It does not make any difference who paid the $250, the title bond was made, executed and delivered to him; and if he had paid the balance before he died, the deed would have been made to him and not to the three boys. A man can have a homestead interest in an equitable estate the same as in an estate in fee simple. 40 Ark. 69; 21 Cyc. 508; 101 Ark. 296.

Jake Bookout occupied the lands as a homestead, the title bond was to him and his heirs, and the taxes were paid in his name, and he collected the rents and profits. No one was known in the deal except Jake Bookout, and he occupied them as a homestead, and he certainly had an interest that his widow or heirs could sustain against all claimants. 53 Ark. 400.

Abandonment of a homestead by the wife and mother does not affect the homestead right of the minor children. 115 Ark. 359; 29 *Id.* 635.

Jake Bookout's minor children had two separate estates in the lands existing at the same time and incapable of merger, one of homestead and one of inheritance. 47 Ark. 504; 53 *Id.* 400. Though the rights to rents and profits belonging to the heirs of Jake Bookout ceased on their becoming of age, their interest in the lands does not cease until Owen Bookout, the youngest child, became of age, if he had lived. 47 Ark. 504. Alma Brownfield was not barred by laches. 55 Ark. 85; 56 *Id.* 485; 155 Fed. 809-10; 85 *Id.* 55; 101 *Id.* 322;-30; 145 U. S. (Law. Ed.), 738.

Appellees are not prejudiced by any delay of appellants in bringing their suit.

The very question involved here was decided in 70 Ark. 371. See, also, 49 Ark. 242.

The adult heirs who paid some on the purchase price of the lands stand in exactly the attitude of any other creditor of their father's estate.

The law forbids a trustee or one standing in a fiduciary capacity from taking personal advantage touching the subject as to which the fiduciary relation exists. The rule applies to tenants in common. 20 Ark. 402; 5 Johnson, Chy. 407; 6 Dana 321; 3 *Id.* 321; 2 Black. 618; 39 Cal. 125; Freeman on Cotenancy & Part. (2 ed.), §§ 151-163. Beaphams, Eq. (3 ed.), §§ 92-3.

The law as announced, 49 Ark. 242, is approved in 68 Ark. 534. As this case must be tried here *de novo* on appeal (93 Ark. 394), judgment should be entered here for appellants as prayed in their complaint.

*John C. Ashley,* for appellees.

The appellants are barred by laches and did not assert their rights in time. 55 Ark. 85; 56 *Id.* 485; 101 *Id.* 235. Alma Brownfield waited too long after she had notice. 65 Ark. 535. She was guilty of laches also. 58 Ark. 84; 55 *Id.* 85; 60 *Id.* 50; 87 *Id.* 233; 75; *Id.* 52; 97 *Id.* 537, 596.

HART, J. (after stating the facts). Counsel for the defendants first seek to uphold the decree on the ground that the plaintiffs are barred of relief under the seven-year statute of limitations. We can not agree with counsel in this contention. The land was the homestead of Jake Bookout when he died. His youngest son, Owen Bookout, died in March, 1920, at the age of 15 years. If the land belonged to Jake Bookout and was his homestead at the time of his death, the statute of limitations would not begin to run against the adult children until the termination of the homestead of the youngest child. *Smith* v. *Scott,* 92 Ark. 143, and *Burel* v. *Baker,* 89 Ark. 168.

The widow abandoned the homestead after her husband's death and agreed that the title should be placed in the defendants, her adult sons, when they should pay the balance of the purchase money. This did not affect the rights of the plaintiffs, however. Where the widow abandons the homestead, the right to the entire homestead thereupon vests in the minor child or children. *Stubbs* v. *Pitts,* 84 Ark. 160; *Gatlin* v. *Lafon,* 95 Ark. 256, and *Martin* v. *Conner,* 115 Ark. 359.

W. H. Bookout, A. R. Bookout and J. W. Bookout furnished the greater part of the consideration at the time the contract for the purchase of the land was entered into with Lowrance, and it was agreed that they should have a proportionate part of the land for their interest. This is clearly established by the testimony. Although the contract was made in the name of Jake Bookout, the father, a resulting trust was created in favor of the sons, W. H. Bookout, A. R. Bookout, and J. B. Bookout in the land. *Davis* v. *Dickerson,* 137 Ark. 14; *Lasker-Morris Bank & Trust Co.* v. *Gans,* 132 Ark. 402.

It follows from this that Alma Brownfield would be entitled to claim as one of the heirs of Jake Bookout, deceased, her interest in that part of the land which was the homestead of her deceased father, unless she is estopped by her conduct from claiming her interest in the same. Where a person, with actual or constructive knowledge of the facts, induces, by his words or conduct, another to believe that he acquiesces in a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice. And this is so regardless of the particular intent of the party whose acquiescence induces action. 21 C. J., p. 1216, section 221; 2 Pomeroy's Equity Jur. (2 ed.), section 818. See, also, *Thompson* v. *Wilhite,* 131 Ark. 77; *Davis* v. *Shelby,* 136 Ark. 405; *Fagan*

v. *Stuttgart Normal Institute,* 91 Ark. 141, and *Rogers* v. *Galloway Female College,* 64 Ark. 627.

This doctrine rests upon the principle that, if one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. This principle of natural justice decides against the plaintiffs in this case. Alma Brownfield knew the circumstances under which the original contract was made, and that a balance of the purchase price remained due and unpaid at the time of her father's death. She declined to take any part in paying out the land and knew that it was agreed between her mother and her three adult brothers that they should finish paying out the land and take the title in themselves. They had already made the greater part of the initial payment in their father's lifetime with the understanding that they should receive a proportionate part of the land. Alma Brownfield allowed them to remain in possession of the land after they had paid it out and to make valuable improvements thereon. In 1918 before this suit was instituted, they sold the land to Dave Boles for a valuable consideration, and he made improvements thereon which enhanced the value of the land in the sum of $150. These facts and circumstances make a case of equitable estoppel against Alma Brownfield, and she cannot be permitted in a court of equity to assert her legal rights against the defendants in whose favor the estoppel is invoked.

The estoppel against Alma Brownfield is equally efficacious in its operation upon all who claim under her. Therefore, her children are estopped to maintain this action.

As shown in our statement of facts, Eliza Goodson, the sister of Alma Brownfield, executed a quitclaim deed to the land to the defendants and disclaims any interest in the present suit.

It follows that the decree must be affirmed.

KANSAS CITY LIFE INSURANCE COMPANY v. RIDOUT.

Opinion delivered February 28, 1921.

1. INSURANCE—DELIVERY OF POLICY WITH KNOWLEDGE OF INSURED'S SICKNESS.—Though a life insurance policy provided that it should not take effect unless the applicant was in good health at the time of its delivery, the insurance company was bound by a policy delivered by an authorized agent when the agent had knowledge that the insured was then sick.
2. INSURANCE—AUTHORITY TO DELIVER POLICY.—An agent to whom a life policy was sent with instructions to deliver it to insured has the authority to bind the company by making such delivery, although he knew that insured was sick at the time of delivery.
3. INSURANCE—WAIVER OF RQUIREMENT OF GOOD HEALTH.—The provision of a life insurance company that it shall take effect only if delivered while the applicant is in good health is one which can be waived by the company.

Appeal from Prairie Circuit Court, Northern District; *Geo. W. Clark,* Judge; affirmed.

*Carmichael & Brooks,* for appellant.

1. The evidence shows that at the time of the receipt and acceptance of the application of Homer W. Ridout at the home office, at the time it was approved by the medical director, and at the time it was delivered, he was not in good health. The applicant was dangerously ill from a disease from which he never recovered, and the policy was null and void because not approved by the medical director during the good health of the applicant. It was not accepted by the company during the good health of applicant, nor was it delivered to applicant nor his beneficiary while applicant was in good health. Under the terms of the policy itself it was void. The note for the premium was not paid at the time of trial and was never paid.

2. The approval of the application and delivery of the policy while the applicant was in good health was a condition precedent to the making of the contract under the terms of the policy. 218 Fed. 597; 1 Joyce on Ins. (2 ed). § 97 (a); 111 Ark. 173; 36 S. E. Rep. 637; 96 N. C.

158; 1 S. E. 796; 33 *Id.* 536; 165 Pac. 997; 154 *Id.* 44. See, also, 35 O. C. C. 131; 106 Atl. Rep. 163; 211 S. W. 114; 181 Pac. 906; 203 S. W. 698; 134 Ark. 250.

The policy must be delivered while the applicant is in good health. 11 Ark. 173; 97 *Id.* 229; 129 *Id.* 137; 218 Fed. 599.

3. There was no waiver of the conditions, and the court erred in refusing instruction No. 2 asked by defendant.

4. The banker was not such a representative of the company that he was empowered to waive such conditions precedent. 154 Pac. 44; 85 Ark. 345. We have not overlooked the case in 129 Ark. 142, nor 111 *Id.* 435. See, also, 65 Mich. 527; 8 Am. St. 908; 45 So. Rep. 208-10. Under the evidence the banker had no authority to waive conditions in a policy.

5. There is no evidence to support the verdict.

*Brundidge & Neelly* and *Emmet Vaughan,* for appellee.

1. There is but one disputed question of fact, whether Hudson, the local agent, knew of the illness of insured when the policy was delivered. The testimony is conflicitng, and the verdict of the jury settles the matter.

2. The evidence shows a waiver and estoppel. The agent had authority to waive the condition and the company is estopped. 81 Ark. 205-7; 97 *Id.* 229; 111 *Id.* 236; 92 *Id.* 378; 97 *Id.* 564; 110 Tenn. 720; 27 Am. Rep. 761; 95 Tenn. 38; 93 U. S. 24.

The acceptance of the premiums with full knowledge of the condition of assured was a waiver. 127 Tenn. 521. Conditions precedent may be waived. See 111 Ark. 435; 164 S. W. 296; 136 Ga. 181; 138 *Id.* 778; 76 N. E. 91; 29 L. R. A. (N. S.) 433; 138 Am. St. 180; 108 Pac. 1048; 160 Iowa 184; 134 S. W. 892; 144 N. W. 843; 124 *Id.* 434; 144 *Id.* 843; 140 Am. St. 793; 124 N. W. 434; 64 S. W. 36; 55 *Id.* 364; 90 *Id.* 921; 48 *Id.* 219, and many others.

The case was submitted upon proper instructions, and the evidence fully sustains the verdict.

SMITH, J. This is a suit to collect an insurance policy issued by the appellant company on the life of Homer W. Ridout, and this appeal is from a verdict and judgment in favor of the beneficiaries named in the policy.

The applicant was examined and the medical report made out by the company's examiner on August 2, 1919. The application was received on August 6, 1919, at the home office of the company in Kansas City, Missouri, but the application was held for certain reports and was not approved by the medical director until August 18, 1919, on which date the policy issued.

Upon issuing the policy the company sent it to its general agency in Oklahoma City, Oklahoma, which was its "exclusive representative in the Southern States." This agency transmitted the policy to J. F. Hudson, the company's local agent at Des Arc, the postoffice address of the insured.

The letter transmitting the policy contained the following directions concerning it: "In order to advise policy holder at the earliest possible moment of the issuance of his policy, we suggest that you immediately send him a postcard notice reading as follows: 'At your earliest convenience please call at the bank.'

"When he calls, point out that the policy as issued is in every respect what he applied for. Then ask him to sign the receipt—Form C103—attached to policy. As this receipt is necessary for completion of our records, please return same to this office at your earliest convenience. Your co-operation in promptly returning signed policy receipt will be greatly appreciated."

The policy arrived in Des Arc on August 27, and on August 28 a brother of the insured called at Hudson's office in the bank of which he was cashier for the policy, and asked to be permitted to sign his brother's name to the receipt therefor, stating to Hudson at the time that his brother, the insured, was at home sick and could not

call for the policy. Hudson first agreed to this, but upon reconsideration decided it would be better to have the receipt signed by the insured himself. This the insured did on the 28th, when the policy was delivered to him. The insured died August 30th.

Proof of death was duly made, but payment of the policy was refused because of a provision on the back thereof reading as follows:

"Section 1. This policy shall not take effect unless the first premium herein has been paid and this policy delivered to the applicant within thirty days from the date hereof, or unless the applicant is in good health at the time of its delivery."

The insured paid the first premium by executing his note on the date of the application. Hudson accepted this note as payment, and remitted to the company its part of the premium. After the death of the insured the company offered to return this premium, but the tender thereof was refused.

It stands undisputed that the policy was issued, and was delivered, and the premium was paid; but Hudson testified that he was unaware of the insured's illness, and that he would not have delivered the policy had he been apprised of that fact. This question of the agent's knowledge of the insured's illness presents the only question of fact in the case. No contention is made that any false answers were found in the application for the insurance. The jury was told there could be no recovery if Hudson was not advised of the insured's illness; so that the jury's verdict eliminates that question of fact. There is no allegation or proof of collusion between the agent of the company and the insured.

The decision of the case turns upon the effect to be given the act of the agent in delivering the policy after being advised of the insured's illness—in view of the provision of the policy quoted above.

Respective counsel have collected many cases dealing with the question stated; but we find it unnecessary to

review these authorities, as we have announced the principles which control here.

The policy sued on in the case of *Peebles* v. *Columbian Woodmen,* 111 Ark. 435, contained a provision substantially identical with the one set out above in regard to the health of the applicant at the time of the delivery of the policy. The policy there sued on contained provisions for disability benefits, and Peebles became disabled. It was insisted, on the motion for rehearing, as is indicated in the opinion on rehearing, that the agent who delivered the policy did not know the insured was seriously hurt. But we said the jury would have been justified in believing that, under the circumstances attending the delivery of the policy, the agent did know the insured was severely or seriously injured at the time of the delivery, although the agent testified that it was not thought that the insured was seriously hurt. We held that the company was bound by the act of its agent in delivering the policy. The doctrine of that case has since been reaffirmed in *Maloney* v. *Maryland Casualty Co.,* 113 Ark. 174; *Clinton* v. *Modern Woodmen,* 125 Ark. 115; *Grand Lodge A. O. U. W.* v. *Davidson,* 127 Ark. 133; *Missouri State Life Ins. Co.* v. *Burton,* 129 Ark. 137; *American Life & Accident Assn.* v. *Walton,* 133 Ark. 348; *Sovereign Camp W. O. W.* v. *Anderson,* 133 Ark. 411; *Hutchins* v. *Globe Life Ins. Co.,* 126 Ark. 360; *Sovereign Camp W. O. W.* v. *Newsom,* 142 Ark. 132.

It is finally insisted that Hudson was not such an agent as could bind the company by a delivery of the policy. But we do not agree with learned counsel in this contention. The delivery of the policy was the final act to the consummation of the contract. That duty was expressly committed to Hudson. He was admonished to discharge that duty expeditiously, and he was directed to secure and return signed policy receipt.

Hudson had acted for the company in taking the application, and in remitting the premium, and he was necessarily acting as the company's agent when he delivered

the policy. The provision quoted above was for the company's benefit, yet, notwithstanding that provision, he did the final and essential thing to consummate the contract of insurance, towit: he delivered the policy.

The case of *Independent Order of Forresters* v. *Cunningham*, 127 Tenn. 521, 156 S. W. 192, is found annotated in 5 A. L. R. 1569. The annotator's case-note reads as follows: "It has been generally held that provisions in an insurance contract of a mutual benefit association stipulating that liability for benefits on the part of the insurer shall not attach unless the certificate or policy is delivered to the applicant while in good health, or unless he is in good health at the date of the policy or date of issuance, or unless he is in good health at the time of payment of the first premium, are conditions precedent which may be waived by the insurer."

The rule stated is, of course, applicable to other insurance companies as well as to mutual benefit associations.

In support of the note quoted the author cites a large number of cases in addition to our own case of *Peebles* v. *Columbian Woodmen,* 111 Ark. 435.

Judgment affirmed.

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## DeLoney v. Froug.

Opinion delivered February 28, 1921.

1. Wills—devise to one and heirs of her body.—Under a will of land to A and the heirs of her body, A took a life estate with remainder in fee to her bodily heirs.
2. Wills—mode of division.—Where a testator devised a portion of her property to her husband and the residue to her sister for life with remainder in fee to her sister's bodily heirs, a subsequent paragraph providing for a mode of division of the property between the husband and sister did not affect the previous gift of the property so as to give the sister a fee-simple estate.

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

*Woodson Moseley,* for appellants.

Lucy B. DeLoney at the time of her conveyance to J. H. Breathwaite had only a life estate under the will with a remainder over to Lucy B. DeLoney's children. Kirby's Digest, § 735; 95 Ark. 18; 140 *Id.* 109. Appellants are the owner of the estate in remainder subject to the life estate of Lucy B. DeLoney, and the chancellor erred in his construction of the will.

*A. R. Cooper,* for appellees.

1. The manifest intention of the testatrix was to devise to her husband a legacy of $1,000 and the remainder of her estate to her sister, Lucy B. DeLoney, in fee simple. Wills are literally construed so as to carry out the intention of the testator. 31 Ark. 588; 218 S. W. 194; 213 *Id.* 372. The intention must be gathered from the entire will and all parts thereof, and such construction given it as will give force and meaning to every clause of the will. 98 Ark. 553; 136 S. W. 981; 167 *Id.* 99; 189 *Id.* 668; 40 Cyc. 1413. Where there is an irreconcilable conflict in two clauses of a will, the latter clause will prevail. 40 Cyc. 1413-17; 28 Ark. 102; 113 *Id.* 500; 115 *Id.* 405.

The language of paragraph 6 of the will is clearly sufficient to indicate the intention of the intestate between her husband and her sister, and in giving her sister a fee simple estate.

2. The language of the will, "to her heirs of her body born and unborn," means nothing more than her children, when read in connection with the limitations contained in the concluding part of the same paragraph and the concluding paragraph. The words "heirs of her body" were not used in their technical signification for the purpose of creating a mere life estate. 23 Ark. 378; 75 *Id.* 19; 86 S. W. 830. Where the intention is apparent to devise a fee simple estate, it will not be presumed that the testator intended to use these words in their technical sense for the purpose of creating a mere life estate. The words "heirs of the body" ordinarily mean such of the issue or offspring as may inherit, and where such is the

testator's manifest intention may be construed to mean children. 40 Cyc. 1466; 23 Ark. 378; 75 *Id.* 19; 86 S. W. 830.

When the intention of the testator is apparent to devise a fee simple estate, but is obscured or endangered by inapt words, the language will be subordinated to the intention and intention carried out. 40 Cyc. 1400-1606-7. The law favors the vesting of estates, and, in the absence of a contrary intention of the testator, the estate will vest at the time of the death of the testator. 104 Ark. 448; 189 S. W. 667; 213 *Id.* 372; 218 *Id.* 194. The lower court held that the words in their ordinary sense vested the fee simple estate in the sister, and the finding is correct.

Humphreys, J. This appeal is to challenge the construction placed upon the will of Rosa Breathwaite, deceased, by the chancery court of Cleveland County. The court's construction of the will was that it devised the tract of land involved in the suit, consisting of 260 acres, to Lucy B. DeLoney, the sister of the testatrix, in fee simple. Appellee purchased the land from John H. Breathwaite, who obtained it, by warranty deed, from Lucy B. DeLoney. They then brought suit to quiet the title to said real estate against appellants, children of Lucy B. DeLoney.

Appellants interposed the defense that the will created a life estate in said real estate in their mother, Lucy B. DeLoney, with the remainder over to them in fee simple. The testatrix, after providing for the payment of her burial expenses, debts and a $5 legacy to a half-sister, bequeathed $1,000 to her husband, John H. Breathwaite, if her estate exceeded $3,000 in value, or one-third of the estate to him, if its value did not exceed $3,000. Following these provisions are the fifth and a part of the sixth paragraphs of the will, relating to the lands in question. The fifth paragraph is as follows:

"5th. I give and bequeath to my beloved sister, Lucy (Brewer) DeLoney, and to her heirs of her body,

born and unborn, all the residue of whatever estate I may die seized and possessed of every description and kind, the same to be used for their common benefit and happiness and to be controlled absolutely by my said sister and for the use of which she shall not be held to account to any one."

That part of the sixth paragraph, relating to said land, is as follows:

"At the time of the execution of this my last will and testament I own some land near my old home place, and in the event that my estate is at my demise worth only three thousand dollars or less than that amount, and it should be necessary for my husband and sister, Lucy (Brewer) DeLoney, to make a division of the land in order that my bequests herein be carried out, then I desire them to divide it to suit themselves; and if they fail to agree, then it is my will that the matter of division be submitted to three good and lawful men for arbitration, and I further will that, if any disagreement be had, that it be settled in this manner rather than by recourse to the civil courts. I would prefer that my sister, Lucy DeLoney, keep the land and my husband, John H. Breathwaite, receive his legacy, whether it be one-third interest or one thousand dollars in cash or personal property."

The language of the fifth paragraph of the will is clear and unambiguous. The limitation in said paragraph is to the heirs of the body, born and unborn, of the devisee, Lucy B. DeLoney, and, at the death of the testatrix, vested in Lucy B. DeLoney a life estate with the remainder in fee simple to appellants, who are her bodily heirs. The language used in said paragraph is not susceptible of any other construction, under the rule announced in the cases of *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18, and *Gray* v. *McGuire,* 140 Ark. 109. Appellees contend, however, that, if the provisions of paragraph 5 provided for a life estate only to Lucy B. DeLoney, then there is an irreconcilable conflict between the paragraph and paragraph 6, quoted above, for

the suggested reason that paragraph 6 evinces an intention on the part of the testatrix to divide her lands in fee simple between her husband, John H. Breathwaite, and her sister, Lucy B. DeLoney; and that, on account of the conflict, the intention of the testatrix in paragraph 6 should prevail, as being the latest expression of the testatrix. We do not concur with learned counsel for appellees in his construction of paragraph 6 of said will. Paragraph 6 does not attempt to devise or bequeath the testatrix's estate. It relates entirely to the method by which certain real estate may be divided in order that her bequests may be carried out. The method provided was by agreement, if possible; if not, by arbitration, rather than by recourse to the civil courts. Since paragraphs 4 and 5 related to the character and nature of the bequests and paragraph 6 to the manner of division in the execution of the bequests, there could be no conflict between the first two and the last paragraphs. They relate to different matters.

On account of the error indicated, the decree is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

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SPARKS v. HOLLOWAY.

Opinion delivered February 28, 1921.

1. HIGHWAYS — DETERMINATION OF OWNERSHIP. — In determining whether or not a majority in acreage of lands within a proposed road improvement district was represented by the signers to a petition, under Acts 1915, No. 338, the assessment of lands for general taxation is conclusive evidence of ownership of lands within the district.
2. HIGHWAYS—LEGISLATURE MAY ORGANIZE ROAD DISTRICT WITHOUT CONSENT OF MAJORITY.—The Legislature may organize a road improvement district without the consent of a majority in land value, acreage or number of landowners and may provide for the organization of such a district on any basis it might choose.

Appeal from Prairie Circuit Court, Northern District; *George W. Clark,* Judge; affirmed.

*Emmet Vaughan,* for appellants.

The court erred in refusing to declare as requested by appellants. There is a conflict between sections 1 and 2 of act 338, Acts 1915, which can be reconciled only upon the theory that the assessment in force at the time is *prima facie* evidence of ownership. The court's interpretation of the act is error. The Legislature did not intend more than to make the assessment book in force at the time a *prima facie* showing of ownership. The court's ruling is manifestly unjust to the actual landowners, and the judgment should be reversed.

*F. E. Brown* and *Carmichael & Brooks,* for appellees.

1. The circuit court is a court of general jurisdiction, and all presumptions are in favor of its judgments. 137 Ark. 462. There is no proof that the petitions contained a majority in land value or in number of landowners. One is entitled to a judgment upon a *prima facie* showing on evidence. If even *prima facie evidence,* it was sufficient, as appellants offered *no proof* to the contrary; they did not even introduce the assessment book. See 140 Ark. 10.

2. There was no motion for a new trial.

3. Appellants show no injury by the court's refusal to declare that the assessment books were only a *prima facie* showing. If any error was committed it was invited error. The remonstrants set forth that no plans or sketch were filed with the county clerk before the circulation of the petition, and no plans or specifications made by the State Highway Commission were filed with the county clerk before the circulation of the petition, and there was no proof to overcome the allegation. The judgment is correct.

HUMPHREYS, J. This is an appeal from a judgment rendered in the Northern District of the Prairie Circuit Court, affirming the judgment of the county court of said county in dismissing the petition of appellants for the organization of Des Arc-Steinville Road Improvement

District, under act 338, Acts 1915, commonly known as the Alexander Road Law. It was admitted by the petitioners that a majority in acreage within the proposed district had not been signed for by parties in whose names the same had been assessed at the time, for the purpose of general taxation, and no contention is made that the petition contained a majority of the landowners or a majority in land value within the district, according to the last assessment for the purpose of general taxation in said county. Based upon the admission, appellants requested the court to declare that the assessment book for general taxation, in force at the time the petition was filed, presented only a *prima facie* showing of ownership, which might be rebutted by evidence of ownership in the petitioners signing the petition. The court refused to so declare, but, on the contrary, ruled that, in determining whether or not a majority in acreage of lands within the proposed district was represented by the signers of the petition, the assessment of lands within the district in force at the time for general taxation governed. This appeal is for the purpose of testing the correctness of that ruling.

It is insisted by appellants that there is a conflict between sections 1 and 2 of said act, which can be reconciled upon the theory only that the assessment in force at the time is *prima facie* evidence of ownership, subject to be rebutted by evidence of actual ownership at the time of the filing of the petition. It is true that section 1 of said act provides that a majority in acreage within a certain district may petition for the organization of a road improvement district therein, but we see no conflict between that provision and the provision in section 2 providing that the majority in acreage within the district shall be determined by the assessment for the purpose of general taxation in force in the county at the time the petition is filed. The second section simply provides the method by which a majority of the acreage, referred to in said section 1, shall be ascertained or determined. The

Legislature had a right to organize the district without the consent of a majority in land value, acreage or number of landowners, and could therefore provide for the organization of such a district upon any basis it might choose. Section 2 of the act, by clear and unambiguous language, made the assessment record, at the time the petition was filed, conclusive, and not *prima facie,* evidence of the ownership of the land. The language is that a majority in acreage shall "be determined by the assessment for the purpose of general taxation in force in said county at the time."

The court's interpretation of the act was correct, and the judgment is therefore affirmed.

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ROBERTS v. PRATT.

Opinion delivered March 7, 1921.

1. TRUSTS—PAROL AGREEMENT—STATUTE OF FRAUDS.—A parol agreement that another shall be interested in the purchase of lands, or a parol declaration by a purchaser that he buys for another, without an advance of money by that other, falls within the statute of frauds, and can not give birth to a resulting trust.
2. TRUSTS—TRUST EX MALEFICIO.—An heir purchasing from his deceased father's estate *held* not a trustee *ex maleficio,* though he orally agreed to hold as trustee for the widow and the other heirs, in the absence of any contention of fraud or sale for inadequate price or that the parties were induced to refrain from attending the sale or from adopting other means for protecting themselves from an improvident sale, and where there was no showing of wrong, and the other heirs did not furnish any of the purchase money.

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

*Will G. Akers,* for appellants.

The only issues are, (1) Can a parol express trust be engrafted upon the absolute administratrix's deed? (b) Are the appellees estopped by the fact that they agreed to or permitted the conveyance of the lots to Gabe Pratt, Jr., by a deed absolute on its face?

1. A parol trust can not be engrafted upon the absolute administratrix's deed. Kirby's Digest, §§ 3666-7. These sections prohibit the creation of express trusts by parol, but do not prohibit the creation of implied trusts by parol. 73 Ark. 310, 312-13. There was no trust which arose or resulted by implication, and the court erred in declaring a trust. 103 Ark. 145-9; 3 Pomeroy on Equity, pp. 1981-2, § 1030; 73 Ark. 310-13; 84 *Id.* 189-192. This was not an implied trust nor a constructive trust. 3 Pom. on Eq., p. 2007, § 1044; *Ib.*, p. 1983, § 1031; *Ib.* There was no gift, and the instrument does not state a consideration, the consideration being $1,000. See, also, 3 Pom. on Eq., pp. 1991-2, § 1037. An advancement of money by the person claiming to be the beneficiary of a resulting trust is necessary to the creation of a resulting trust. 50 Ark. 71, 76-7. There was no fraud and no trust.

2. Appellees are estopped from asserting as against appellants the existence of a trust relation. They have received adequate compensation for the lots, and no injustice can be done by holding that they are not entitled to take the surplus in the commissioner's hands after the foreclosure sale, but injustice has been done Roberts unless it is held that that surplus, or at least enough thereof to repay the moneys he has expended on Gabe Pratt, Jr.'s, account, is appellant's property and should be delivered to heirs. 84 Ark. 227; 86 *Id.* 486; 92 *Id.* 315-20; 126 *Id.* 595. Roberts is clearly entitled to all the surplus, and the decree should be reversed.

*T. E. Helm,* for appellees.

1. The holding was not an express trust in the sense claimed by appellants.

1. The purchase of the lots by Gabe Pratt, Jr., at the sale, under the agreement and the conveyance to him by the administratrix, constituted and was an implied, resulting or constructive trust. The argument of appellants that it was a parol express trust in the sense

contended for is misapplied, and counsel has wholly misconstrued and misapplied the law applying in this case. C. & M. Digest, § 4868; 70 Ark. 145; 59 Miss. 148; 41 Conn. 278; 25 Ia. 43; 40 Ark. 62, 68. See, also, 132 Ark. 408-9. The statute of frauds does not apply. 70 Ark. 145; *Id.* 146; 105 *Id.* 323. Under the facts of this case, the findings are correct. Gabe Pratt, Jr., was heir to one-sixth interest in the property, and in addition he had the deed from Mary E. Pratt, his mother, to all her dower interest in the property. The decree is in all things correct.

McCULLOCH, C. J. Gabe Pratt was the owner of two lots in the city of North Little Rock and died intestate, survived by his widow and children, who are appellees in this case. The widow of Gabe Pratt administered on the estate under the orders of the probate court of Pulaski County, and for the purpose of raising funds to pay debts of the estate she sold said lots pursuant to the orders of said probate court; all the proceedings being regular and in accordance with the statute governing such sales. The lots were duly appraised at the sum of $1,300, and at the sale Gabe Pratt, Jr., one of the children and heirs at law of said decedent, became the purchaser for the sum of $1,000. The sale was duly confirmed by the probate court, and a deed was executed to said purchaser by the administratrix.

Gabe Pratt, Jr., the purchaser of said lots, borrowed the sum of $1,000 from the People's Savings Bank of Little Rock and mortgaged the lots to secure the debt. The sum borrowed was used in payment of the purchase price to the administratrix of the Pratt estate. The widow had previously advanced the money to pay off the debts of the estate, and this sum went to her, and she conveyed her dower interest in the lots to Gabe Pratt, Jr.

Appellant, C. G. Roberts, obtained judgment against Gabe Pratt, Jr., in the circuit court of Pulaski County for the recovery of a sum of money paid by said appellant as surety for Gabe Pratt, Jr., on a note executed to

another person for borrowed money. Execution was issued on said judgment and levied on said lots, and appellant became the purchaser at the sale.

The present action was instituted in the chancery court of Pulaski County by the People's Savings Bank and W. E. Lenon, as trustee, to foreclose said mortgage. The suit was against Gabe Pratt, Jr., and appellant Roberts was joined as a defendant as a subsequent purchaser of the mortgaged property. Appellees, who are the heirs at law of Gabe Pratt, deceased, intervened in the action and filed a plea in the nature of a cross-complaint against appellant Roberts and also against Gabe Pratt, Jr., alleging, in substance, that Gabe Pratt, Jr., was not the owner in fee simple of said lots, but that he had purchased the same at the sale by the administratrix under the express agreement that he would hold the title to said lots as trustee for the other heirs, and that he now holds said title in such capacity as trustee. The prayer of the cross-complaint was that the deed to appellant under the execution sale be canceled, except as to the one-sixth interest of Gabe Pratt, Jr., in the land, as one of the heirs at law, and that said interveners be decreed their proportionate part of all the funds raised from the foreclosure sale in excess of the amount necessary to satisfy the mortgage to the plaintiff People's Savings Bank. Appellants answered the cross-complaint and denied that Gabe Pratt, Jr., held the lots as trustee for appellees as alleged, but that on the contrary, the said Gabe Pratt, Jr., became the owner in fee simple as purchaser at the sale by the administratrix, and also that at the time of the execution sale at which appellant became the purchaser he held title to the said property in fee simple subject to the mortgage to the plaintiff People's Savings Bank.

At the trial of the cause there was oral testimony introduced establishing the fact that Gabe Pratt, Jr., purchased said property at the sale by the administratrix at the request of the widow and heirs and upon an express

oral agreement that he would hold the title to said land as trustee for the other heirs. There was no writing between the parties in evidence of the alleged agreement. On the trial of the cause the court decreed a foreclosure of the mortgage to the People's Savings Bank and ordered a distribution of any surplus funds remaining in the hands of the commissioner after the satisfaction of said mortgage, awarding to appellant the share of Gabe Pratt, Jr., as one of the heirs at law of Gabe Pratt, deceased, and the dower interest of the widow which had been conveyed to Gabe Pratt, Jr., and the remainder was apportioned to the appellees as the other heirs of Gabe Pratt. The court held that there was a valid and enforcible trust estate in the land in favor of appellees.

The testimony clearly shows an attempt to establish an express trust by oral agreement, but this is forbidden by the statute of frauds. In the case of *W. B. Worthen Co.* v. *Vogler,* 145 Ark. 161, we said:

"It is too well established for controversy that a parol agreement that another should be interested in the purchase of lands without the advance of money by the other person, and there being no other element in the case than that of a broken promise to reconvey, is within the statute of frauds, and can not be made the basis of a trust, either express or implied."

In that case we also quoted the following from *Bland* v. *Talley,* 50 Ark. 71: "Now, a parol agreement that another shall be interested in the purchase of lands, or a parol declaration by a purchaser that he buys for another, without an advance of money by that other, falls within the statute of frauds, and can not give birth to a resulting trust."

Nor does the transaction contain any of the elements of a trust *ex maleficio.* There is no contention that there was any fraud committed—not even a broken promise to reconvey the property. There is no contention that the property was sold for an inadequate price, or that the parties were induced to refrain from attending the sale

or from adopting other means for protecting themselves from the consequences of an improvident sale. There is, in fact, nothing in this case to establish a trust except the express agreement of the parties. Therefore, it can not be said that there was any wrong, either actual or constructive, committed by the trustee sufficient to justify a court of equity in declaring the existence of a trust *ex maleficio*. *Ammonette* v. *Black,* 73 Ark. 310; *W. B. Worthen Co.* v. *Vogler, supra.* It is clear that no trust resulted, for appellees did not furnish any of the funds used in purchasing the property. They did not furnish the property itself nor an interest therein because it was sold under an interest (that of the creditors of the estate) which was superior to that of the heirs. It is therefore unnecessary to cite any authority to show that there was no resulting trust.

It is not contended that the conveyance constituted an equitable mortgage. There is no testimony tending to show that there was an agreement on the part of Gabe Pratt, Jr., to hold the property as security for debts or for funds advanced to pay off the debts of the estate. There was no intention to create a mortgage and no basis in the facts of the case for the court to declare an equitable mortgage. In other words, we find that, according to the undisputed testimony, there is nothing in the way of an attempt to create a trust except an express agreement on the part of Pratt, Jr., that he would hold the land and title for himself and as trustee for the other heirs. This agreement, as before stated, is within the statute of frauds and is unenforceable.

The chancery court was, therefore, in error in declaring a trust, and the decree is reversed and the cause remanded with directions to dismiss the cross-complaint of appellees for want of equity, and to render decree in favor of appellant C. G. Roberts for the surplus funds in excess of the amount necessary to pay off the debt due the plaintiff, People's Savings Bank.

BERTIG BROTHERS v. INDEPENDENT GIN COMPANY.

Opinion delivered March 7, 1921.

1. APPEAL AND ERROR—WAIVER OF FILING OF MANDATE.—On the reversal of a case on appeal, the parties may waive the filing of the mandate; such waiver not being a case of attempt to confer jurisdiction on the lower court by consent, but merely of the formal evidence of the jurisdictional fact.
2. CERTIORARI—AFFIRMANCE ON QUASHING WRIT.—Where the record of the trial court is brought up on certiorari, which questions only the jurisdiction of the trial court, the practice is either to quash the judgment if the trial court had no jurisdiction, or to affirm the judgment if the court had jurisdiction, and thereby to cut off the right of appeal.
3. ELECTION OF REMEDIES—EFFECT.—Where a party has two remedies, one limited, the other general in scope, he should, in the first instance, adopt that remedy which will give him complete relief; otherwise he is bound by his election to pursue the limited remedy.

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

*Huddleston, Fuhr & Futrell,* for petitioner.

The judgment is void, as the circuit court, notwithstanding the waiver of the filing of the mandate, did not acquire jurisdiction to retry the cause. Where a judgment is reversed, the circuit court proceeds to try the case again until the mandate is filed. 10 Ark. 454. Consent can not confer jurisdiction. The certiorari should be quashed. The rule in 10 Ark. 454 has been often followed. 79 Ark. 185; 93 *Id.* 168; 38 S. E. 575.

*Block & Kirsch,* for respondents.

No question as to the mandate being filed was raised. The case was reversed and remanded.

The filing of the mandate was not necessary for jurisdiction, if the parties voluntarily appear at the trial. Their appearance is a waiver. 4 C. J. 1208; 1 Col. 491; 35 Conn. 97; 50 Ia. 139; 135 Pa. 176; 15 Ill. App. 520; 63 Neb. 34; 16 S. C. 621. Where both parties go to trial after remand of a cause without raising the issue of the

filing of the mandate, the trial is conclusive. The certiorari should be quashed and the judgment affirmed.

McCULLOCH, C. J. Appellants were the plaintiffs below in an action against appellees to recover damages alleged to have resulted from furnishing false samples of baled cotton. The trial of the cause resulted in a verdict and judgment against appellants who prosecuted an appeal to this court. This court reversed the judgment of the circuit court and remanded the cause for a new trial. The judgment of reversal was rendered on April 12, 1920, and on October 11, 1920, the parties waived the issuance and filing of the mandate of this court and proceeded to a retrial of the cause in the circuit court. The second trial resulted in a judgment against appellants and they now attempt to bring the record of the last proceedings before us by certiorari to quash the judgment.

The contention is that the judgment is void for the reason that the circuit court, notwithstanding the waiver of the filing of the mandate, could not and did not acquire jurisdiction to retry the cause. They rely in this contention on decisions of this court holding that on the reversal of a judgment the lower court acquires jurisdiction by the filing of the mandate in that court. *Lafferty* v. *Rutherford,* 10 Ark. 454; *Hollingsworth* v. *McAndrews,* 79 Ark. 185; *Bowman* v. *State,* 93 Ark. 168. In neither of those cases did the question arise as to the effect of an express waiver of the filing of the mandate. It is undoubtedly true that a trial court loses jurisdiction when an appeal is taken from its judgment, and it reacquires jurisdiction only on the reversal of the judgment by the appellate court and the filing of a mandate of reversal; but the written mandate is merely the evidence of the action of the appellate court, and this may be waived by the parties themselves. This is not a case of an attempt to confer jurisdiction by consent, but is merely a waiver of the formal evidence of the jurisdictional fact. The waiver itself presupposes that the Supreme Court had

entered the judgment of reversal and ordered a remand of the cause for further proceedings. Therefore, the parties had the power to waive the written evidence of those proceedings.

The writ of certiorari is therefore quashed and the judgment of the circuit court affirmed.

OPINION ON MOTION TO MODIFY.

McCULLOCH, C. J. We are asked to modify the judgment of this court by eliminating the affirmance of the judgment of the circuit court, leaving in force only that part of our judgment which quashes the writ of certiorari, so that appellants will be left free to prosecute an appeal from the judgment of the circuit court. They say that there are errors in the record of the trial below which will be brought before us for review in a bill of exceptions if they are allowed to prosecute an appeal.

It has always been the practice in this court where the record of the trial court is brought before us on *certiorari* which questions only the jurisdiction of that court, either to quash the judgment if it appears that the court had no jurisdiction, or to affirm it if the court had jurisdiction. *Auditor* v. *Davies,* 2 Ark. 494; *Pulaski County* v. *Irvin,* 4 Ark. 473; *Jefferson County* v. *Hudson,* 22 Ark. 595; *Baxter* v. *Brooks,* 29 Ark. 173; *St. L., I. M. & S. Ry. Co.* v. *Barnes,* 35 Ark. 95. Such is the universal practice in other courts of the country, and it is approved by the text-writers on the subject. Harris on Certiorari, § 38; 11 C. J. 209.

The rule stated in the encyclopedia above cited, with numerous authorities to support it, is as follows: "Unless otherwise provided, the judgment should be that the proceedings below be quashed, or that they be affirmed." We do not find in any of the authorities, either among the adjudged cases or the text-writers, where the reasons are stated for the adoption of this practice of affirming a judgment brought up on certiorari, where it is found that it was rendered within the jurisdectional powers of the court. But there can be but one reason, and it is

this: Certiorari can not ordinarily be used as a substitute for appeal, but the aggrieved party has the election to test the validity of the judgment on its face, either by appeal or by certiorari; and if he adopts the latter remedy, he can not afterward resort to the former, for it is the duty of an appellate court, if it is found that a judgment is not void, to affirm it, which cuts off any further review by appeal. Remedy by certiorari is not one which may be had as of right, but it is only at the discretion of the court, and it would be the duty of the court to refuse that remedy if the aggrieved party could afterward prosecute an appeal and had that remedy in contemplation.

The question falls within the general doctrine of election of remedies, and it is the duty of the party, where he has two remedies, one of which is limited in its scope and the other is general in its scope, to adopt, in the first instance, the remedy which will give complete relief; otherwise he is bound by his election to pursue the limited remedy.

The motion to modify is therefore denied.

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## BROWN v. WATERWORKS IMPROVEMENT DISTRICT NO. 1, OF FORT SMITH.

Opinion delivered March 7, 1921.

WATERS AND WATERCOURSES—AUTHORITY OF WATERWORKS DISTRICT TO MORTGAGE PLANT.—Under Special and Private Acts 1911, No. 158, providing, in § 1, that the Waterworks Improvement District No. 1 of Fort Smith is authorized to take title to the entire waterworks plant of the Municipal Waterworks Company, and to mortgage the same, and in § 2, that the city of Fort Smith was authorized to use the income for the purpose of paying principal and interest on purchase-money bonds, the plant, though mortgaged for the purchase price, may also be mortgaged to raise funds for its maintenance.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; affirmed.

*Daniel Hon*, for appellants.

There is no law or statute in this State that authorizes Waterworks Improvement District No. 1 to place any incumbrance on the waterworks plant without legislative authority, and the mortgage was in violation of article 19, § 27, Constitution, and void, and the maintenance and upkeep of the plant must be performed by the city of Fort Smith, which is operating the plant, under Kirby's Digest, § 5675; Act 158, Acts 1911. The statutes only provide for one assessment, except that § 5716, Kirby's Digest, provides that, if the first assessment is insufficient to complete the improvement, the board shall report the deficiency to the city council and it shall enter an assessment for the sum sufficient to complete the improvement. See, also, Kirby's Digest, §§ 5720-1, 5664. See 109 Ark. 99; 50 *Id.* 116; 112 *Id.* 259. Defendants were without power to execute the mortgage, and the court erred in refusing the relief prayed by plaintiffs.

The district was without authority to make the repairs or borrow the money.

*Dailey & Woods*, of counsel for appellants.

*A. A. McDonald* and *J. B. McDonough*, for appellees.

1. The Waterworks District of Fort Smith, under the facts, stands in a class of its own. It has power to maintain the works and the power to mortgage. The money to make repairs and replacements was used to pay bonds and interest, and, under the act, one exercise of the power to borrow money did not exhaust the power. 44 Fed. 224; 86 Iowa 1. Act 158 gives the power to borrow money, and it did not restrict the district to a single mortgage. This case falls within the rule. 217 S. W. 795.

2. Even if the district is without power to "maintain" the system of waterworks, nevertheless, under the law and the facts, it has the power to mortgage the plant as security to repay the money, thus enabling the city to maintain the system. Kirby's Digest, § 5675;

act 158, Acts 1911; 117 Ark. 93. See, also, 70 N. J. L. 98; 170 Ind. 113; 89 N. J. L. 418.

3. The borrowing of $200,000 by the Waterworks Improvement District No. 1 did not call for or require any additional assessment against the property in the district.

4. The improvement district has ample power under the law to borrow the money and secure its repayment by the execution of the mortgage. From the undisputed facts and what has been stated before, it is clear there is no violation of article 19, § 27, of the Constitution, and the board has power to execute a second mortgage. 109 Ark. 90; 50 *Id.* 116; Acts 1911, p. 415; 160 Cal. 30; 161 Pac. 722; 71 S. E. 654; 88 Ia. 154. Under act 158, Acts 1911, and also prior acts, the district had power to mortgage the water system to secure money to build and maintain the system.

5. The power of Waterworks Improvement District No. 1 to mortgage the water system is not taken away, under the facts of this case, by Kirby's Digest, § 5675.

6. There is no showing in the record that the improvements contemplated are anything other than a part of the original plans. 218 S. W. 381, did not decide the questions raised here.

7. The district was organized to acquire and maintain. 118 Ill. 446; 151 Ill. 634; 140 Mass. 329; 16 Okla. 436; 101 S. W. 414; 133 S. W. 953; 170 U. S. 744.

8. We also rely on the doctrine of estoppel. 117 Ark. 93; 131 *Id.* 77; 150 *Id.* 116.

9. The city is not borrowing money, and is not issuing interest-bearing evidences of indebtedness.

WOOD, J. The appellant instituted this action against the Waterworks Improvement District No. 1 of the city of Fort Smith, Arkansas (hereafter called district) and the commissioners of the city of Fort Smith, who were also ex-officio commissioners of the district. He alleged that the district was duly established

by ordinance of the city council of the city of Fort Smith, February 4, 1907; that a board of improvement and a board of assessors for the district were duly elected; that on January 6, 1911, an assessment was duly made on the real estate in the district; that on April 3, 1911, an ordinance was duly passed transferring to the district an option, which was then held by the city of Fort Smith, to purchase a waterworks system of the Municipal Waterworks Company (hereafter called company), then owning and operating a waterworks plant in the city of Fort Smith; that by special act No. 158 of the General Assembly of the State, approved March 30, 1911, the district purchased and took title to the waterworks plant formerly owned by the company, and to secure money necessary to pay the company for the plant and to make further improvements contemplated, the district mortgaged the plant to the Mercantile Trust Company for $750,000, of which amount still remains unpaid the sum of $664,000; that the city, in the transfer of its option to the district, reserved the right and has the right by law, and is now operating and maintaining the waterworks system, and under act No. 158 of the Acts of 1911, was using the revenues from the waterworks to pay the debt to the Mercantile Trust Company in addition to the use authorized by section 5675 of Kirby's Digest; that the commissioners of the district, pursuant to a resolution passed by them and an ordinance of the city of Fort Smith, were about to issue bonds in the sum of $200,000 and to mortgage the waterworks plant to secure said sum in order to make certain improvements, reconstructions and enlargements; that these improvements were no part of the original plans of the district and should be made and maintained by the city alone; that assessments for these improvements were not authorized by law nor by consent of the majority of the property owners in the district and were, therefore, in violation of article 19, section 27, of the Constitution. The appellant alleged that he was a landowner and taxpayer in the district, and he

instituted the action in behalf of himself and all other interested property owners of the district, and he prayed that the appellees be enjoined from creating a debt against the district and issuing bonds and mortgaging the property of the district to secure the payment of the same, and for all proper relief. The resolution of the commissioners of the district setting forth the necessity for the improvements and the issuance of bonds, and the ordinance of the city authorizing the district to issue bonds in the sum of $200,000 to raise money for the improvements set forth in the resolution of the commissioners of the district and to mortgage the property of the district to secure the payment of the same, were made exhibits to the complaint.

The appellees, the district, and its commissioners filed separate answers in which they denied that they are intending to enlarge the waterworks plant, but allege that they intend only to maintain it up to the standard of efficiency required by the obligations of the mortgage and pledge to the Mercantile Trust Company. They deny that the improvements contemplated in the organization of the original district were all completed and allege that the improvements now contemplated are a necessary part of the original plant, although to some extent they increase the original plant. They deny that it is the duty of the city to make the improvements now contemplated. They deny that the borrowing of the money and the issuance of a mortgage and pledge to secure the payment of the same will incumber the property of the district illegally and unlawfully, and allege that the borrowing of the money will enable the district to fulfill its obligations to the first bondholders and keep the water plant in proper condition and up to the standard of efficiency required. They set up that, without objection of any property owner in the district, the revenues of the district had been used in part payment of the purchase money of the waterworks plant; that no installments of assessments had been made since installment No. 1; that

during the time that these installments were not made, the city had collected $397,000, net revenues, from the waterworks system, which, with the consent of all property owners of the district, had been used for the purpose of paying the principal and interest on the purchase money bonds. It was alleged that in the mortgage and pledge of the district to the Mercantile Trust Company for the purchase money, the district obligated itself to maintain the waterworks system in good condition. It was denied that the city, under the transfer of title of the waterworks system to the district, reserved the right to use the income and revenues of the waterworks system for the payment of the purchase money, and denied that the district or the city had any right or power to waive the collection of the assessments, and alleged that the $397,000, revenues from the waterworks system, should have been applied to the making of improvements necessary to keep the plant in good condition and repair; that, as a result of the payment of this sum on the purchase money bonds instead of necessary repairs, it was now necessary for the city to expend approximately $200,000 for that purpose; that the city had no title to the waterworks plant, and, in order to raise the money to make these necessary improvements, the district would have to mortgage its plant, as the city had no title to the property.

It is averred in the answers that under act No. 158 the district has power to borrow money to make these improvements which are indispensable to the welfare of the city. It is also alleged that the city, during the time it had operated the waterworks system, had not paid the district any sum for hydrant rentals, and that such rentals exceeded the sum of $110,000. It is also alleged that the property owners in the district were estopped by permitting the installment of assessments to go uncollected and by allowing the city to use the revenues from the waterworks plant to pay off the purchase money bonds instead of making the necessary improvements to

the waterworks system, thereby endangering the life and health of the citizens of Fort Smith as well as the property in the city.

The city filed a separate answer, and adopted as far as applicable the answer of the district, and alleged that the title to the waterworks plant was in the district; that it had power to mortgage the plant and consented that it do so in order to raise the necessary funds to make the repairs and improvements set out in the answer of the district. It also alleged that it had no funds with which to make these improvements and repairs, and that its revenues from the waterworks system had been used by the city to pay the purchase money bonds and interest. The proceedings of the city council showing the creation of the district were set forth in the answer.

The cause was heard upon the pleadings and the exhibits thereto and the documentary evidence and the agreed statement of counsel. All the proceedings of the city council creating the improvement district were in evidence, showing that it was established for the purpose of constructing or acquiring and maintaining a waterworks plant in the city of Fort Smith. It is shown that the estimated cost of the improvement was $1,200,000; that there had been an assessment of benefits of $1,255,103. It was also shown that the city transferred its option to purchase the waterworks system to the district under authority of act 158 of the Acts of 1911. It was prescribed in the ordinance making the transfer that the plant was to be operated by the city as provided by section 5675 of Kirby's Digest. Act 158 referred to was introduced in evidence. The mortgage of the waterworks plant by the district to the Mercantile Trust Company for the sum of $750,000 was also introduced in evidence. This mortgage shows a loan of $750,000 to the district and recites the issuance of 750 bonds by the district in the denomination of $1,000 each, bearing interest at the rate of 7 per cent. per annum. There is a recital in each of these bonds as follows: "This bond is issued for the

purpose of acquiring and extending a waterworks system for supplying said city and its inhabitants with water for public and private use." One of the provisions of the mortgage was that the district was required to keep insurance on the property and keep the premises in a good state of repair, and another provision pledged to the Mercantile Trust Company "all rents, issues and profits of the property acquired by or from the operation of its system of waterworks, and all uncollected assessments that had been levied or that might thereafter be levied on the real property of the district."

The resolution of the district in its preamble set out at length the history of the waterworks plant at Fort Smith and the proceedings under which and the purposes for which it was acquired by the district. It is shown that it was necessary to make extensive repairs, replacements and improvements in order to keep the waterworks system efficient; that the district and the city had determined that these improvements should be made according to the report of a consulting engineer, which states specifically and in detail the various improvements, machinery and replacements that were necessary to be made, together with an itemized statement of the cost of same. His report, among other things, states that the new water supply works were completed and placed in operation in 1913 and have been in continuous use without additions or extensions to the present time. It shows that neither the district nor the city had any funds with which to make the improvements.

The preamble to the ordinance of the city of Fort Smith, passed December 4, 1920, sets forth practically the same facts as were set forth in the preamble to the resolution of the district, and the ordinance authorized the district to issue bonds in the sum of $200,000, which bonds were to be a lien upon the entire waterworks system of the district and the income derived from the operation of the plant subject to the first mortgage of the Mercantile Trust Company for the balance due, which

was $664,000; and also authorized the district to execute a mortgage on its waterworks plant to secure the payment of the bonds. The ordinance also binds the city for the purpose of securing the loans and to make the payments in the amounts and at the dates fixed for such payments, and authorized its officers to execute all obligations that might be necessary to carry out the provisions of the ordinance. There was introduced in evidence a resolution adopted by the commissioners of the district to borrow the sum of $200,000 at such rate of interest, and upon such terms as may be provided by law, fixing the payments and authorizing the issuance of interest-bearing bonds to cover the amount of the loan, and agreeing to mortgage the waterworks plant and all uncollected assessments on the real property in the district for the payment of the same, subject to the first mortgage of the Mercantile Trust Company. There was a stipulation of counsel in evidence to the effect that there was no express consent of the property owners in the district to the noncollection of assessments, and stating that every property owner knew that the assessments were not being collected and knew that the net revenues of the waterworks plant were being applied to the payment of the first mortgage bonds and interest; that the collector of the district, during each of the years, in keeping his books wrote in the books opposite each tract or parcel of lands the words, "Paid by the city;" but the city, as a matter of fact, never paid any of the assessments, nor were they collected by the district, and the collector had no authority either from the district or the city to make the above entry on his books. The stipulation showed that two old boilers of the waterworks system were to be kept and held in reserve for use in case of an emergency which might arise at any time.

The court found the issues of fact and law in favor of the appellees and rendered a decree in their favor dismissing the complaint for want of equity and for costs, from which decree is this appeal.

As shown by the petitions of the original property owners, the district was created for the construction, acquisition, operation and maintenance of a waterworks system for the city of Fort Smith. The real purpose of the district was, not the building of a waterworks system, but to acquire from a private owner a waterworks system already constructed and to extend, operate and maintain the same for the use and benefit of the inhabitants of the city of Fort Smith.

Section 5739, Crawford & Moses' Digest, provides that, "in case of the construction of waterworks * * * by any improvement district or districts, the city or town council, after such works are constructed, shall have full power and authority to operate and maintain the same, instead of the improvement district commissioners." Act of April 12, 1893. Appellant contends that, under the above section, after the waterworks system was acquired by the district the full power to operate and maintain the same was in the city, and that the district therefore had no power to mortgage the waterworks plant to make repairs, replacements, etc., such as are contemplated by the proceedings which appellant here seeks to enjoin. Appellant urges that there is no authority in the Constitution or statutes for mortgaging the waterworks plant, and to sustain his contention he relies upon the cases of *Rector* v. *Board of Improvement,* 50 Ark. 116; *Improvement Dist. No.* 1 *of Wynne* v. *Brown,* 86 Ark. 61; *Sembler* v. *Water & Light Improvement Dist. No.* 2, 109 Ark. 90; *Augusta* v. *Smith,* 117 Ark. 93; *Road Improvement Dist.* v. *Toler,* 130 Ark. local citation, 416; *Arkansas Light & Power Co.* v. *Paragould,* 146 Ark. 1; *Easley* v. *Patterson,* 142 Ark. 52; *Commrs. of Broadway-Main Street Bridge Dist* v. *Quapaw Club,* 145 Ark. 279.

Without reviewing these cases *seriatim,* it suffices to say we do not consider any of them applicable to the facts of this record for the reason that section 5739 of the general statutes, which controls generally as to operation

and maintenance of improvement districts must be read in connection with act 158 of the Special Acts of 1911, under which this district acquired the waterworks plant from the company which the city of Fort Smith is to operate and maintain. Section 1 of that act provides that "the Waterworks Improvement District No. 1 of the city of Fort Smith, Arkansas, is authorized to take title to the entire waterworks plant of the Municipal Waterworks Company under the decree of the United States Circuit Court for the Western District of Arkansas, and to mortgage the same." Section 2 provides that the "city of Fort Smith, Arkansas, is authorized to use the income arising from said waterworks for the purpose of paying the principal and interest on the bonds issued by the Waterworks Improvement District No. 1 of said city to raise funds for the purchase of said plant in addition to the use authorized by section 5675 of Kirby's Digest."

This act must be construed in the light of the history of the creation of the district and the purpose for which it was established as shown by the pleadings, the resolutions of the district, the ordinance of the city, and the stipulation of counsel. When these are all considered, the uncontroverted facts clearly show that this district is in a class to itself, and clearly differentiate it from the districts in the cases *supra* upon which counsel for appellant relies. It will be observed that the first section of the act authorized the district to take title to the waterworks plant and *to mortgage the same.* The contention of learned counsel for appellant that the only purpose of the power to mortgage given under the act was to secure the purchase price is plausible. Undoubtedly, that was one purpose, but is it the only purpose? The act does not say so. No such restriction can be found in the language of the act. On the contrary, the power to mortgage is without any such limitation, and as to whether or not the Legislature intended to place such a limitation upon the power to mortgage must be gath-

ered from a consideration of the particular words under review, when taken in connection with the immediate context and the language of the entire act, keeping in mind the subject-matter of the legislation and the end to be accomplished thereby. See *Board of Improvement Dist. No.* 60 v. *Cotter,* 71 Ark. 556; *State* v. *Handlin,* 100 Ark. 175; *McDaniel* v. *Herrn,* 120 Ark. 288, and other cases collated in 4 Crawford's Digest, p. 4677, § 54.

Special acts are usually passed to effectuate the purpose of those who bring to the attention of the lawmakers the objects to be accomplished by the special legislation. The mortgage and bonds that were issued soon after the passage of act 158, *supra,* show by recitals contained therein that the purpose to be subserved in the passage of act 158 was not merely the purchase of the waterworks system, but for the purpose of extending same. It is so nominated in the mortgage and bond, which would reasonably include the improvements that are specified in the proceedings here sought to be enjoined.

Now, before act 158, *supra,* was passed, the Legislature must have ascertained the purpose for which the district was created as shown by the proceedings by which it was established. The Legislature, therefore, knew that the declared object of the property owners and the city authorities was to have the district created and organized for the purpose of acquiring the water system from the private company and having the same extended, operated and maintained for the benefit of the inhabitants of the city of Fort Smith. Such being the purpose of the creation of the district, it occurs to us that the Legislature intended by the broad language, "to mortgage the same," as used in the first section, to give the district the power to mortgage the waterworks plant, not only for the purpose of raising the purchase money on the same, but also to enable it to raise money to aid the city in its maintenance. Such power was certainly germane to the purpose for which the district was created, and was in no

manner in conflict with the power of operation and maintenance to be exercised by the city under section 5739 of Crawford & Moses' Digest. As we have seen, the power to mortgage was without limitation, and the exercise of that power for the purpose of securing the purchase money of the plant in the first instance did not preclude its exercise also for the purpose of aiding the city in maintaining the waterworks system according to the proper standard of efficiency. See *Ames* v. *Holderbaum,* 44 Fed. 224; *Iowa Loan & Trust Co.* v. *Holderbaum,* 86 Ia. 1.

The money to be borrowed by the $200,000 bond issue in controversy does not involve any additional assessment against the owners of real property in the district, but these bonds are to be redeemed by revenue derived from the operation of the water system. The property owners of the district, as we have seen, petitioned for, and had created, the district to acquire and maintain a waterworks system for the city of Fort Smith. Act 158, *supra,* authorized the district to mortgage, and the mortgage in controversy is to aid the city to maintain, and the bonds are to be redeemed out of the net revenue of the waterworks system. Therefore, we conclude that the proceedings of the appellees, which appellant here seeks to enjoin, were not in violation of art. 19, § 27, of the Constitution, nor any statute of the State, and are expressly authorized by act 158, *supra.* The decree of the chancery court so holding is in all things correct, and it is therefore affirmed.

MCCULLOCH, C. J., (dissenting). The point of difference of my views from the conclusion of the majority is in regard to the interpretation of act No. 158 of the General Assembly of 1911, authorizing the improvement district to purchase the waterworks plant from the Municipal Waterworks Company. The district was organized under the general statutes for the construction of local improvements and the special statute was enacted to authorize the district to purchase the plant, instead of constructing one anew. The statute also contained author-

ity to mortgage the plant, the clear implication being, I think, to mortgage for the purpose of securing the purchase price or for borrowing money to pay the purchase price. Under the provisions of the general statutes (Crawford & Moses' Digest, § 5739), the waterworks, when purchased by the district, passed to the city to operate and maintain. *Improvement Dist. No.* 1 *of Wynne* v. *Brown,* 86 Ark. 61. This was clearly the intention of the lawmakers in enacting act No. 158, for section 2 of the act expressly refers to the general statute. Having in mind that the plant would pass to the city for maintenance and operation, the lawmakers provided in section 2 of act No. 158 that the city could apply the revenues arising from the operation of the plant, not only to the payment of expenses of operation and maintenance, but also "for the purpose of paying the principal and interest on the bonds issued by the waterworks improvement district."

The general statute cited above cast upon municipalities the duty and burden of maintaining and operating water and light plants through the agency of improvement districts, and the special statute referred to (act No. 158) clearly recognized the application of that statute to the purchase of the waterworks plant in Fort Smith.

Since it is made the statutory duty of the city to maintain the waterworks and that duty is distinctly recognized in act No. 158, then it is not reasonable to assume that the Legislature meant to authorize the improvement district to mortgage the plant for maintenance purposes. Construing act No. 158 in connection with the general statute (Crawford & Moses' Digest, § 5739), I think it clearly confers authority to mortgage the plant only for the purchase price or for borrowed money to pay the purchase price, and it does not confer continuing power to mortgage for maintenance or extension of the plant. When a water or light plant is constructed and put into operation by an improvement district, control over the

plant passes to the municipality, and the only remaining function for the district to perform is to complete the payment for the improvement—to enforce assessments for that purpose and pay off the indebtedness.

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## PAYNE v. STOCKTON.

Opinion delivered March 7, 1921.

1. APPEARANCE—WHAT CONSTITUTES.—Any action on the part of a defendant, except to object to the jurisdiction, which recognizes the case as in court, constitutes a general appearance.
2. APPEARANCE—FILING MOTION TO STRIKE.—When defendants filed a motion to strike certain paragraphs from a complaint, and appeared at the hearing of such motion without objecting to the court's jurisdiction, this constituted a general appearance on their part.
3. RAILROADS—SUBSTITUTION OF FEDERAL AGENT FOR DIRECTOR GENERAL.—Where a suit was improperly brought against the Director General of Railroads, instead of against the agent of the United States, as required by the transportation act of February 28, 1920, and the attorneys representing the United States asked that the agent be substituted for the Director General, which was done, it was unnecessary that service should be had upon such agent.
4. RAILROADS—CONSTRUCTION OF FEDERAL TRANSPORTATION ACT.—The Federal transportation act of February 28, 1920, was not intended to destroy vested rights of action, but to provide for the designation of an agent by the President who might be served as agent of the United States and defend suits which had arisen out of the operation of the raliroads by the President.
5. RAILROADS — NEGLIGENCE IN MAINTAINING CROSSINGS.—Under Crawford & Moses' Digest, § 8483, requiring railroads to construct and maintain crossings at public highways, a railroad company is liable for injuries to persons or property caused by its negligence in constructing crossings or bridges where the railroad crosses a public highway in this State.
6. RAILROADS — NEGLIGENCE IN MAINTAINING BRIDGE OVER ROAD.—Where the approach to a highway bridge constructed over its track by a railroad company, under Crawford & Moses' Digest, § 8483, became out of repair, so that when the driver of a team drove near the embankment, the dirt caved away, allowing the wagon to fall into the ditch and injuring a horse, the company was negligent in maintaining the bridge.

7. RAILROADS—APPROACHES TO BRIDGE AS PART OF CROSSING.—Approaches or embankments reasonably necessary to enable crossings or bridges to be used are regarded as a part of the crossings, within Crawford & Moses' Digest, § 8483.

8. TRIAL—ABSTRACT INSTRUCTION.—It was not error to refuse an instruction not based on the evidence.

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

STATEMENT OF FACTS.

On May 7, 1920, appellee sued appellants to recover damages for injuries alleged to have been sustained by one of his horses in becoming entangled in the approach to a bridge across a railroad track operated by appellants in Miller County, Arkansas. The facts are as follows:

Appellants operated a railroad in Miller County, Arkansas, which intersected a public road running north and south known as the Lynn Ferry Road. The railroad company, under the statute, constructed across its line of road a wooden bridge seventy-two feet long, being thirty-six feet on each side from the center of the bridge. It also built a fence across the bridge, which was extended along the approaches to the bridge. The fence extended from the wooden part of the bridge ninety-three feet on the right-hand side and seventy-eight feet on the left. The approach on the south side of the bridge was in bad condition. On the right-hand side of the embankment the bulkhead, which had been constructed for the purpose of holding the dirt that made the approach to the bridge had given away and the banisters to the fence, or railing down the approach, leaned out at an angle of forty-five degrees. There was a ditch or gully on the right-hand side with a hole under the bottom rail of the fence near the lower side of the approach.

On December 3, 1919, two of the minor sons of appellee had been to town with a wagon and team of their father's. On their way home they started across the bridge, described above, with the wagon and team. They

passed another wagon on top of the bridge and then saw another one near the bottom of the incline, or approach, waiting for them to pass. The driver of the wagon was twenty years old. He pulled his team to the right to pass the waiting wagon near the bottom of the incline. The dirt was soft and gave away so that the wagon slipped down from the incline into the ditch and pulled the horses over next to the fence. The driver tried to keep the horses out of the fence, but one of the horse's front feet and two of his hind feet got entangled in the fence. The horse commenced to struggle to get out, but it took some time for him to do so. The boys unhitched the horse from the wagon to extricate him, and after they had pushed the wagon by hand down the approach to the bridge into the public road, they again hitched the horse to the wagon and drove him home, a distance of nine miles. They had a light load of brick on the wagon. When they got home that night, the boys turned the horse out without saying anything to their father about the accident. When the father learned of the accident on the next day, he commenced to hunt for his horse and found him lying dead two or three days after the accident happened. A veterinary surgeon cut open the horse and from his testimony it is inferable that the death was caused by the injuries received by him in trying to extricate himself from the fence, as stated above.

Appellee introduced other evidence besides that of his sons to prove that the railroad was negligent in keeping the bridge and the approaches thereto in repair where the horse was injured, and also proved the value of the horse at the time he was injured.

Evidence was adduced by the railroad company tending to show that it had not been negligent in constructing or maintaining the crossing. Other evidence will be stated or referred to in the opinion.

The jury returned a verdict for appellee for the value of the horse, and the case is here on appeal.

*King, Mahaffey & Wheeler,* for appellants.

1. It was error to substitute John Barton Payne, Director General, as defendant without service upon him. This suit was not pending at the time the transportation act of 1920 took effect, and no authority was given by that act, or any other, to substitute Payne for Hines as Director General without service, and the judgment was void for want of notice. Kirby & Castle's Dig., art. 5153; 49 Ark. 397; 5 S. W. 704; 65 *Id.* 108; 74 *Id.* 13; 76 *Id.* 555; 87 *Id.* 621; 69 Ark. 587; 71 *Id.* 565; 75 *Id.* 603. Payne should have been allowed full twenty days to answer. 79 Ark. 252; 96 S. W. 374; 140 *Id.* 996; 101 Ark. 22; 125 Ark. 553; 188 S. W. 1178.

2. The judgment against the receivers was without proof of their appointment. 186 S. W. 383; 104 U. S. (Law. Ed.) 126, 672.

3. The receivers were not liable. 72 Ark. 250; 79 S. W. 773; 26 L. R. A. (N. S.) 710; 5 Thompson on Corp., p. 5667, § 7185; 203 S. W. 1125; Elliott on Railroads (2 ed.), § 581; 10 S. W. 711.

4. The property was in the hands of the United States government and in the hands of the receivers. 267 Fed. 105; 267 *Id.* 171; 221 S. W. 459. The judgment against the Texas & Pacific Railway Company is in violation of § 1, art. 14, Const. U. S.

5. Instruction No. 1 for plaintiff is error. The bridge was not on the company's right-of-way, but outside the right-of-way and the duty to keep in repair was on the county authorities. 149 Ky. 459; 149 S. W. 898; 183 S. W. 915; 93 N. E. 307; 161 N. W. 506; 109 N. W. 238; 99 Minn. 280.

6. It was error to refuse instruction No. 1 for defendant, also No. 6 for defendants. 79 Ark. 484; 96 S. W. 168; 101 Ark. 90; 141 S. W. 492; 141 S. W. 440; 29 Cyc. 532. Also error to refuse No. 8 for defendant, as it was supported by the evidence.

*Arnold & Arnold* and *Miss Lois Dale,* for appellee.

1. John Barton Payne succeeded Hines as Director General and voluntarily appeared; no service was necessary.

2. Railway companies are liable, even if the United States was in charge and the railway was in the hands of receivers. 146 Ark. 170, 232.

3. Instruction No. 1 was correct. 183 S. W. 915; 33 Cyc. 273-5; C. & M. Digest, § 8483; 118 Ark. 76; 5 Cyc. 1084; 4 C. J. 1454, note 60, 7 (c) and note 8 (a); 138 Mass. 454-5.

There is no error in the instructions given or refused, and the verdict is sustained by the evidence.

HART, J. (after stating the facts). Appellee first sued Walker D. Hines, as Director General of Railroads and Special Agent Texas & Pacific Railway Company, and J. L. Lancaster, and Chas. T. Wallace, receivers of and for the Texas & Pacific Railway, defendants.

The suit was filed and summons issued on May 7, 1920. In open court on June 7, 1920, the defendants just named, through their attorneys, King & Mahaffey, filed a motion to strike out certain paragraphs of the complaint. On the 10th day of September, 1920, the record shows that this motion was sustained in part and overruled in part. The judgment recites that both parties appeared by their attorneys on the hearing of the motion to strike out certain paragraphs of the plaintiff's complaint. Subsequently the same defendants filed an answer and a demurrer to the complaint. They also allege that Congress passed what is known as the transportation act, which was approved by the President on February 28, 1920; that, under the provisions of this act, suits arising out of the management, control or operation of railroads in the United States should be prosecuted against an agent to be designated and appointed by the President; that the President had appointed John Barton Payne as such agent; that the accident which is

the basis of this lawsuit occurred about the 1st of December, 1919.

The defendant suggested that, if the plaintiff desires further to prosecute his action, he must cause John Barton Payne, Agent, as aforesaid, to be made a party defendant. The prayer is that the action be no longer maintained against Walker D. Hines, as Director General of Railroads.

Then the plaintiff asked that John Barton Payne be substituted as agent for the United States in the place of Walker D. Hines, which was accordingly done.

John Barton Payne, Agent, by his attorneys, King & Mahaffey, filed a plea to the jurisdiction of the court on the ground that he had not been served with process. His plea was overruled, and he thereupon adopted the answer of Walker D. Hines, Director General, but preserved his protest to the jurisdiction of the court.

This court has adopted the rule that any action on the part of a defendant, except to object to the jurisdiction which recognizes the case as in court, will amount to a general appearance. *Foohs* v. *Bilby,* 95 Ark. 302; *Greer* v. *Newbill,* 89 Ark. 509, and *Sager* v. *Jung & Sons Co.,* 143 Ark. 506.

Hines, as Director General, and Lancaster and Wallace as receivers of the railway company, filed a motion to strike out certain paragraphs of the complaint and appeared, by their attorneys, at the hearing thereof without making any objection to the jurisdiction of the court. Thus they took part in the proceedings in the case, and this constituted a general appearance on their part.

Subsequently their attorneys called the court's attention to the fact that the transportation act, approved February 28, 1920, provided that actions at law based on causes of action arising out of the possession, use, or operation by the President of the railroad under the provisions of the Federal control act of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal con-

trol, be brought against an agent designated by the President for such purpose, and stated that John Barton Payne had been appointed as such agent. Therefore, they ask that he be substituted in place of Walker D. Hines, Director General, as defendant. This was done without requiring new service on John Barton Payne. The same attorneys appeared for him and moved to dismiss the cause of action for want of service on him.

We do not think, however, that any new service was necessary. The object of the suit was to bring an action against the United States. The United States employed the same attorneys to act for John Barton Payne as had acted for Walker D. Hines as Director General. When these attorneys entered the appearance of Walker D. Hines, as Director General of Railroads and Special Agent, they entered the appearance of the United States to the suit, and the substitution of John Barton Payne, Agent, instead of Walker D. Hines, Director General of Railroads, was merely to correct an error in the name of the representative of the United States.

King & Mahaffey were the attorneys for the agent of the United States, and had authority to enter the appearance of the agent designated by the President. At least their authority to enter the appearance of such agent is not questioned. Therefore, we are of the opinion that, when they filed the motion to strike out certain paragraphs of the complaint and appeared at the hearing thereof, they entered the appearance of the United States agent who was authorized to defend the action, and that the substitution of Payne for Hines was merely to correct a mistake in the name of said agent.

The railroad had been turned over to the receivers at the time this action was brought. As we have already seen, they entered a general appearance to the action when they joined in the motion to strike out certain paragraphs of the complaint and appeared by their attorney at the hearing thereof. This court has held that under the Federal control act of March 21, 1918, author-

izing actions against the "carriers," an action may be properly brought against the railroad itself as well as the Director General of Railroads. *Hines* v. *Mauldin,* 146 Ark. 170, and *K. C. S. Ry. Co.* v. *Rogers,* 146 Ark. 232.

It is clear that the transportation act of February 28, 1920, was not intended to destroy vested rights of action, or to authorize the President or his agents to do so. The sole purpose of the act, as shown by its terms, was to provide for the designation of an agent by the President who might be served as an agent of the United States and defend suits which had arisen out of the operation of the railroads by the President. It did not purport to destroy any right of action which the claimants might have had before the transportation act was passed.

The principal question in the case is as to the liability of the railroad company. Section 8483 of Crawford & Moses' Digest provides for constructing and maintaining railroad crossings across public roads in this State. It makes it the duty of the railroad company to construct such crossings in such way that the approaches to the roadbed on either side shall be made and kept at no greater elevation or depression than one perpendicular foot for every five feet of horizontal distance. The section further provides that such railroad may be crossed by a good and safe bridge to be built and maintained in good repair by the railroad company.

In construing this statute in *St. Louis, I. M. & S. Ry. Co.* v. *Smith,* 118 Ark. 72, the court held that it is the duty of every railroad company to properly construct and maintain crossings over all public highways on the line of its road in such a manner that the same shall be safe and convenient to travelers, so far as it can do so without interfering with the safe operation of the road.

The court also held that it was the duty of the railroad company to use ordinary care to keep public crossings over its tracks in a reasonably safe condition for persons traveling over them. Hence it may be said that in this State a railroad company is liable for injuries to

persons or property caused by its negligence in constructing or maintaining crossings or bridges where the railroad crosses a public highway in this State.

The negligence of the railroad company in this respect was properly submitted to the jury by the instructions given by the court. At the crossing in question in this case, there was a wooden bridge seventy-two feet long over the tracks of the railroad company. A fence, or railing, was built along on top of the bridge on each side of it and extended down the approaches to the bridge. The fence on each side of the approaches had a bulkhead to keep the dirt in the embankment from giving away. The embankment had got out of repair by caving so that the fence extended out at an angle of about forty-five degrees and there were holes along the embankment where the bulkhead had caved away. As the team was turned down the embankment or approach to the bridge the driver had to turn the horses to the right to pass another wagon. This brought the wagon near the edge of the embankment and dirt caved away allowing the wagon to slide down into the ditch. The wagon was partially loaded, and this caused the horses to be dragged down into the ditch, and the feet of one of them to become entangled in the fence. This caused the injuries to the horse from which it subsequently died.

As we have already seen, it was the duty of the railroad company to construct the crossing and keep it in repair. The statute makes the duty a continuing one and thereby shows that protection to travelers and their property was the dominant idea of the Legislature in enacting the statute. Therefore, we think that the facts of the present case, as proved by the witnesses for appellee, warranted the jury in finding the railroad company guilty of negligence in maintaining the bridge and approaches thereto where the appellee's horse was injured.

It is next insisted that appellee is not entitled to recover because it is claimed that the horse was injured

outside of the right-of-way of the railroad company. The record shows that the fence from the bridge down the incline or approach to the bridge was on the right-of-way. The record shows that the wagon slipped and dragged the horses down so that one of them became entangled in the fence, and it is urged that this accident occurred beyond the southern boundary line of the right-of-way of the railroad company, and that therefore the railroad company is not liable to appellee.

The statute provides that the approaches to the bridges or crossings shall be kept at no greater elevation or depression than one perpendicular foot for every five feet of horizontal distance. Crossings are constructed for the purpose of enabling persons, horses and vehicles to cross the railway tracks, and approaches or embankments are necessary to enable the traveler to get on or off the crossings. Therefore, such approaches or embankments as are reasonably necessary to enable the crossings to be used are regarded as a part of the crossings. This view is necessary to enable the company to fulfill its obligations to the public, and is essential to the safety of persons and vehicles crossing the railroad tracks at such highway crossings. Elliott on Railroads, (2 ed.), vol. 3, sec. 1097, and 33 Cyc., pp. 273-75.

Finally, it is insisted that the judgment should be reversed because the court refused to give an instruction to the jury to the effect that the railroad company will not be liable if appellee knew that his horse had been injured and turned him out so that his death was caused by lack of due care or attention on his part. On this point, it is sufficient to say that there is no evidence upon which to predicate such an instruction.

The undisputed evidence shows that the boys turned the horse out without telling their father about his injury. The father was not told about the injury to the horse until late the next day. He at once began to hunt for the horse and found him lying dead. The evidence is undisputed on this point.

There is no prejudicial error in the record, and the judgment will be affirmed.

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BURNS v. WILLIAMS.

Opinion delivered March 7, 1921.

1. MORTGAGES—MORTGAGEE IN POSSESSION—REPAIRS.—A mortgagee in possession is entitled to reimbursement on foreclosure or redemption for repairs reasonable or necessary for the preservation and beneficial occupation of the property.
2. MORTGAGES—RIGHT OF MORTGAGEE TO REIMBURSEMENT FOR REPAIRS. —A mortgagee in possesion has no right to increase the burden of redeeming; and if he makes repairs which are not necessary to preserve the estate, he is not entitled to compensation for them, although they are of such a nature as to increase the rental value of the premises.
3. IMPROVEMENTS—COLOR OF TITLE.—A bond for title is not color of title on which to base a claim for improvements made by the occupant.
4. MORTGAGES—MORTGAGEE IN POSSESSION—RENTS.—Where a mortgagee in possession without authority made permanent improvements, for which he is denied compensation, he should be charged with such sums as are a fair rent of the premises, without such improvements.

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

*Geo. M. LeCroy,* for appellant.

The master's report is clearly against the clear preponderance of the evidence, as the deed, though absolute in form, was in fact a mortgage, as the rents did not in fact pay the mortgage debt. No part of the mortgage debt has ever been paid and there is a large balance due Burns.

*J. B. Moore,* for appellee.

1. The testimony fails to show that appellant ever made or paid for any improvements or repairs on the land. The deed was a mortgage; this is conceded.

2. The matter of balance due for supplies alleged to have been furnished for 1913 and 1914 was finally disposed of by the court in its dismissal for want of equity and is not before the court now.

The testimony discloses that John Daniels claims that he made all improvements without color and with knowledge of title that appellees executed the deed of conveyance as a mortgage to secure the repayment of $536.88 advanced as a loan, with notice that it was a mortgage. And he can not be heard to interpose any pleading against appellees for the value of improvements made by him on said lands under such evidence. Kirby's Digest, § 2754; 67 Ark. 184-8; 72 *Id.* 601; 53 *Id.* 545; 59 *Id.* 144; 97 *Id.* 397; 89 *Id.* 41; 93 *Id.* 93; 101 *Id.* 9; 128 *Id.* 15, 16.

The evidence offered was irrelevant and incompetent. The master's finding and the decree are clearly supported by the evidence.

HART, J. Nelson Williams and Hester Williams, his wife, brought this suit in equity against W. A. Burns, Jr., to have a deed, absolute in form, executed by them to Burns, declared a mortgage, and for an accounting by Burns of the rents and profits derived from the land described in the complaint.

Burns defended on the ground that the instrument sued on was an absolute conveyance, and also claimed that, if it should be found by the court to have been intended as a mortgage, he had not received sufficient rents and profits to pay off the mortgage indebtedness.

The land in controversy comprised a farm of 118 acres in Union County, Arkansas. Nelson Williams and Hester Williams, his wife, executed a mortgage on the land in controversy to one Jameson to secure an indebtedness of $536. On the 26th day of November, 1912, they arranged with W. A. Burns, Jr., for a loan to pay off the mortgage indebtedness. They executed to Burns a deed absolute in form to the land in controversy, but they intended it as a mortgage to secure the money they

borrowed from Burns, and Burns so understood the transaction. In the fall fo 1913 Williams delivered to Burns seven bales of cotton, and in 1914 delivered to him four bales of cotton. Williams had a merchandise account with Burns, and the cotton delivered to Burns was more than sufficient to pay off his merchandise account and the balance of the proceeds of the cotton was applied toward the payment of the mortgage indebtedness. In 1915 Burns took possession of the land in controversy and rented it to John Daniels, a son-in-law of Williams. In 1916 Burns executed to Daniels a bond for title, agreeing to convey to him said land upon the payment of the purchase price designated in the instrument. Daniels remained in possession of the land until the institution of this suit and is still in possession of it.

The case was heard on the 3d day of December, 1919, and the chancellor held that the instrument sued for, although absolute in form, was intended by the parties to be a mortgage. The chancellor then appointed a master to state an account between the parties. The master reported that Burns was indebted to Williams in the sum of $484.13 for rents and profits derived from the land by him as mortgagee in possession. Burns made no objection to the finding of the chancery court that the deed, although absolute in form, was intended by the parties as a mortgage. He only prosecutes an appeal to reverse that part of the decree which holds him accountable to Williams for the rents and profits of the land. Burns claims that the finding by the master, which was approved by the court, is erroneous, and that the fact is that the rents did not finish paying off the mortgage indebtedness.

According to the testimony of Williams in the fall of 1913, he delivered to Burns seven bales of cotton and three and one-half tons of cotton seed to be applied toward the payment of his supply account and the mortgage indebtedness. In November, 1914, he delivered to Burns four bales of cotton and two tons of seed to be

applied toward the payment of the supply account and the mortgage indebtedness. There is a dispute between the parties as to the amount of cotton delivered by Williams to Burns and the value thereof. We do not deem it necessary to state the testimony on this point in detail; but we are of the opinion that the finding of the master to the effect that this was more than sufficient to pay off the supply account of Williams, and that the remainder should be applied toward the payment of the mortgage indebtedness is correct.

Burns rented the place to John Daniels during the year 1915. Daniels sold some timber off the place for $230 and paid Burns $200 of it. He put the balance in improvements on the place. The master properly allowed only $200 of this amount to be charged to Burns. The mortgagee in possession is entitled to reimbursement upon foreclosure or redemption for reasonable or necessary repairs made by him while in possession. *McCarron* v. *Cassidy,* 18 Ark. 34; and *Green* v. *Maddox,* 97 Ark. 397. The repairs in question were necessary for the preservation and beneficial occupation of the property by Burns, and the $30 were properly allowed for repairs.

The testimony for Burns shows that Daniels made permanent improvement upon the property by building houses, clearing land, etc., to the value of between $500 and $1,000. Burns was not authorized by Williams to have these improvements made and is not entitled to compensation for them. The mortgagee has no right to increase the burden of redeeming; and, if he makes repairs which are not necessary to preserve the estate, he is not entitled to compensation for them, although they are of such a nature as to increase the rental value of the premises. *Robertson* v. *Read,* 52 Ark. 381, and *Green* v. *Maddox,* 97 Ark. 397.

Daniels was made a party defendant to the action and claims credit for the improvements made by him under the betterment act. He was in possession of the

land during the years 1916 and 1919, inclusive, under a bond for title from Burns and made the permanent improvements during this time. In *White* v. *Stokes,* 67 Ark. 397. The repairs in question were necessary for of title on which to base a claim for improvements made by the occupant. In *Beasley* v. *Equitable Securities Co.,* 72 Ark. 601, the court reaffirmed this doctrine and declined to overrule *White* v. *Stokes, supra.*

The principal item about which there is a dispute in the master's account is the rent for the four years from 1916 to 1919, inclusive. Williams and three of his boys testified that the rental value of the farm for these years was $200 a year. Daniels also testified that this was the rental value of the farm. Three witnesses testified for Burns that the rental value of the land for those years was only $108 per annum. Burns corroborated their testimony.

The chancellor charged Burns with rent at the rate of $200 per annum for those four years. We think the chancellor erred in so holding. If it can be said that the rental value of the farm for those years was $200 per annum, we think the increased rental value arose from the repairs and permanent improvements made on the land by Daniels. His testimony showed that he built a dwelling house, some out-houses, and cleared some land.

In *Robertson* v. *Read,* 52 Ark. 381, the court said that a mortgagee in possession of a farm is chargeable with such sums as are a fair rent of the premises; but that he should not be charged an increased rent caused by permanent improvements for which he is denied compensation. The court further said that justice is done by charging him with rent without the improvements, and that to the extent the rental value is increased by them he should not be held to account.

In the application of this rule, we think that Burns should have been only charged with the sum of $125 per annum for these four years. This was the amount that Daniels paid as rent before the permanent improvements

were made. The permanent improvements were of such a character as would necessarily add to the rental value of the land. Therefore, we think the chancellor erred in charging Burns with $800 as rent for the years 1916 to 1919, inclusive. He should have only charged him with $500, being the sum of $125 per annum. This would result in decreasing the allowance made by the master in the sum of $300.

The chancellor approved the findings of the master and made an allowance of $484.13 against Burns in the account of rents and profits. This should be reduced by $300, and the decree of the chancellor should have been for $184.13.

The decree will be modified to that extent, and as modified will be affirmed.

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## W. Y. BRANSFORD & SON v. SMITH & WHITNEY.

Opinion delivered March 7, 1921.

1. **APPEAL AND ERROR—REVIEW OF DIRECTED VERDICT.—In reviewing an order directing a verdict for plaintiff, the appellate court should accept as true defendant's evidence.**
2. **COMPROMISE AND SETTLEMENT — CONCLUSIVENESS.—Where the seller of a pump denied responsibility for its failure to answer the buyer's purpose, and refused to install new parts at the buyer's expense, and the buyer authorized the seller to purchase and install such parts, the seller is entitled to recover, regardless of the rights of the parties under the original contract, as the service sued for was rendered under a new contract and a promise to pay.**

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

*J. B. Reed* and *Carmichael & Brooks,* for appellants.

1. The court did not have jurisdiction, as there was no proper affidavit for appeal; the style of the court is not given; the venue is not shown and there is no *jurat;* nor is the title of the officer taking the oath shown. From the record it can not be known whether E. A. Henry is a

notary public, a justice of the peace or a clerk, nor in what State he is exercising authority, and the circuit court had no jurisdiction on appeal. 33 Ark. 747. The affidavit is fatally defective, and there was no jurisdiction in the circuit court. 60 Ark. 524.

2. The testimony was in conflict, and the case should have been submitted to a jury, and it was error to direct a verdict. It is too well settled to cite authorities, that where there is a conflict in the testimony it is error to direct a verdict, but the case is one for a jury.

*Rogers, Barber & Henry,* for appellees.

1. It is too late to raise the question of a defective affidavit for the first time on appeal to the Supreme Court. Failure to raise the question in the lower court is a waiver. 95 Ark. 148; 59 *Id.* 177; 225 Mo. 116; 135 Am. St. Rep. 566; 35 Ark. 212. Affidavits are amendable in the circuit court on appeal. 33 Ark. 745; 60 *Id.* 524; 67 *Id.* 524. The authorities cited by appellants are to the same effect.

2. Here there is no dispute as to the facts, and no conflict in the evidence. The court properly directed a verdict. The letters and telegrams furnish the basis for this suit, and they are not disputed, and the correctness of the charges as sworn to is not disputed. There was nothing for a jury to pass upon.

SMITH, J. Appellees sued to recover the purchase price of certain parts of a pump and for the cost of their installation. Appellants answered and denied that they were indebted in any sum, and alleged that they had bought a pump from appellees for $720, and that said pump was to be complete and was guaranteed to do certain work, and that the sum sued for was the amount which was expended in putting the pump in working condition. The court directed a verdict in favor of appellees, and this appeal is from that judgment.

The contract under which the pump was sold was in writing, but was not offered in evidence at the trial. The

bill rendered when the pump was shipped on June 13, 1918, was for "one Rees Roturbo Pump, good for 200 GPM against 120 feet direct." It is not questioned that the pump met this specification, but it is insisted by appellants that a member of appellees' firm saw the conditions under which the pump was to operate, and stated that he was an engineer, and that the pump which he proposed to furnish would answer appellants' purposes. In view of the fact that a verdict was directed against appellants, we must assume that the jury would have accepted that version of the sale, although appellees say they did not know the actual head against which the pump was to operate was 137 feet, and not 120 feet, until Mr. Connor, their erecting engineer, undertook its installation.

The pump did not do the work, and appellants reported that fact to appellees, who took the position that they were not responsible for this failure. In a letter dated September 2 appellees wrote as follows: "You understand that we are not responsible for the fact that this pump does not handle your actual conditions, but it was made for 120-foot, instead of 137-foot, head. What we want is your authority to order the parts from the factory at your expense to make the pump fit your conditions."

Again, in a letter dated September 6 appellees said: "Your letter of the 4th regarding the head which your pump will have to work against, will say that from the ground to the top of the tank is 91 feet, from the pump to the level of the ground is 18 feet, from the pump to the water is 17 feet, and the friction amounts to 8 feet total left. We can not make a pump which will fit the conditions which we figured on and the conditions which you actually have."

Under date of September 16 appellants wrote: "If you will refer to our letter of the 4th you will note that we said this pump is useless to us unless it fulfilled our requirements, and that it would be necessary to have the

additional parts you suggest. We intended this as authority to order same, and will be glad if you will have them come at once or at earliest possible moment. We have suffered considerable inconvenience already by reason of the delay. Kindly see that this impeller comes as soon as possible."

Other letters passed between the parties relating to the time of the installation of the impeller, and the correspondence and negotiations were closed by two telegrams. On January 13, appellees wired: "Shall we send our Mr. Connor to erect your pump? Wire answer." On January 14 appellants answered by wire: "Yes, send some one to complete erection of pump."

This correspondence is subject to no other interpretation than that appellees had taken the position that they had delivered the pump contracted for, and were not responsible for its failure to answer appellants' purposes, and were unwilling to furnish any new parts or to install them except at appellants' expense.

Appellees may, or may not, have been right in this position, and we must, and do, assume the jury would have found against them. But they had taken that position, and were standing on it, and with this knowledge appellants gave the order for the parts and for the work covered by the account sued on. Appellants can not escape liability by showing that appellees should have rendered this service under the original contract of sale. Appellees denied they were under this duty, and the service sued for was in fact rendered under a new contract and a promise to pay, and the liability thus assumed must be enforced.

In the article on Contracts in 6 R. C. L., page 662, it is said: "The fact that the promisor is mistaken in regard to his liability is immaterial. If there is a doubtful claim, the courts will not investigate into the relative merits or demerits of the claims of the parties. It is not a defense that the claim could not have been maintained if suit or action had been brought upon it, or that

the parties were mistaken as to the law; for, if it is, it would follow that a contract by the parties settling their own disputes would at last be made to stand or fall according to the opinion of the court as to how the law would have determined it. If the compromise of the parties is made to depend on the question whether the parties have so settled the dispute as the law would have done, then it may be truly said that a compromise is an unavailing, idle act which questions even the power of the parties to bind themselves." See, also, *Weaver* v. *Emerson-Brantingham Implement Co.*, 146 Ark. 379.

The judgment was therefore properly directed in appellees' favor, and that judgment is affirmed.

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