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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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T. D. CRAWFORD
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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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JESSE C. HART,	Chief Justice†
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*Resigned February 12, 1927.
†Appointed February 12, 1927.
‡Elected October 5, 1926.
#Appointed January 1, 1927.
‡Appointed February 12, 1927.

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

MILLER *v.* GORDON.

Opinion delivered July 5, 1926.

1. REPLEVIN—FORM OF JUDGMENT.—The proper practice in actions of replevin is to render judgment for money, or, in the alternative, for the return of the property, unless it appears that the property cannot be returned.
2. APPEAL AND ERROR—PRESUMPTION IN FAVOR OF JUDGMENT.—Where an unconditional money judgment in a replevin suit was rendered, it will be presumed on appeal that the property could not be returned.

Appeal from Ouachita Circuit Court; *L. S. Britt,* Judge; affirmed.

G. W. Matthews, for appellant.

W. K. Oldham, Jr., for appellee.

HUMPHREYS, J. One opinion will suffice in the two cases, as the same question is involved in both. They are replevin suits, No. 9247 being to recover a Wilbourne wagon 2 3-4, of the value of $115, which appellee sold to Alex Miller and Rice Miller and retained title therein until the purchase money was paid; and No. 9248 being to recover a bay horse mule, a bay mare mule and two cows and calves of the value of $193, which were embraced in a chattel mortgage executed by Francis Miller to appellee. When the writs of replevin were served, each appellant, in order to retain the property, gave a bond signed by each with the other appellants as sureties, which bonds are as follows:

"We undertake and are bound to the plaintiff, George R. Gordon, in the sum of two hundred thirty

($230) dollars, that the defendants, Alex Miller and Rice Miller, shall perform the judgment of the court in the above entitled case.

"Dated this 27th day of May, 1924."

"We undertake and are bound to the plaintiff, George R. Gordon, in the sum of four hundred dollars ($400), that the defendant, Francis Miller, shall perform the judgment of the court in the above entitled cause.

"Dated this the 27th day of May, 1924."

Default judgments were rendered against the appellants and their bondsmen in the cases in the court of the justice of the peace where the suits were brought, from which appeals were prosecuted to the circuit court. When the cases were called for trial in the circuit court, appellants failed to appear, whereupon default judgments were again rendered against appellants and their bondsmen for the value of the property involved in each suit, from which appeals have been duly prosecuted to this court.

The respective appellants contend for a reversal of the judgments against them upon the alleged ground that the trial court erred in rendering unconditional money judgments against them, whereas he should have rendered judgments in the alternative for the return of the property or its value. It is usual and proper in replevin suits to render judgments in the alternative for the return of the property unless it appears, for some reason, that the property cannot be returned. In that case it is proper to render an absolute money judgment for the value of the property. *Cathey* v. *Brown,* 70 Ark. 348, 68 S. W. 31. We must presume that the testimony in these cases disclosed some good reason why the property could not be returned, and that the absolute money judgments were rendered against the appellants on that account. This presumption will be indulged where default judgments were rendered and where the contrary is not made to appear, for every presumption must be indulged in favor of the validity of the judgments.

No error appearing, the judgments are affirmed.

ARKANSAS RAILROAD COMMISSION *v.* INDEPENDENT BUS LINE (No. 9800)

LOONEY *v.* CADDO TRANSFER & WAREHOUSE COMPANY (No. 9816).

Opinion delivered July 12, 1926.

AUTOMOBILES—REGULATION OF MOTOR BUSSES.—Under Acts 1921, p. 183, § 5, conferring upon the Railroad Commission jurisdiction of all matters pertaining to the regulation and operation of common carriers, the Railroad Commission has no jurisdiction to require a certificate of public convenience and necessity to be secured to operate motor busses over State highways, in view of the repeal of similar authority given to the Corporation Commission under Acts 1919, p. 423, § 13.

Appeals from Pulaski Circuit Court, Second Division; *Richard M. Mann*, Judge; affirmed.

H. W. Applegate, Attorney General, *Brooks Hays*, Assistant, and *Davis & Costen*, for appellant.

R. M. Hutchins, Coulter & Coulter, Kirby & Hays, Oren Parmeter, W. G. Dinning, Peter A. Deisch, George A. McConnell and *Downie & Schoggen*, for appellee.

HUMPHREYS, J. Cases Nos. 9800 and 9816 have been consolidated, since the legal question involved in each is identical.

Case No. 9800 arose out of an application on March 26, 1926, by the Independent Bus Lines, Incorporated, to the Arkansas Railroad Commission for a permit to operate a motor bus line on certain roads leading out of Helena, over which the Messino Bus Company was operating a motor bus line under a certificate of public convenience and necessity issued to it by the Railroad Commission. The Messino Bus Company intervened and contested the right of the applicant to a permit on the ground that additional bus service was not necessary on said highways. The petition was heard and denied, from which order of denial an appeal was prosecuted to the circuit court of Pulaski County. On May 15, 1926, the appeal was heard in the circuit court, and a judgment was rendered setting aside the order of the Railroad

Commission, from which an appeal has been duly prosecuted to this court.

Case No. 9816 arose out of an application on March 13, 1926, by the Caddo Transfer & Warehouse Company to the Arkansas Railroad Commission for a permit to operate a motor bus line over certain public highways in Union and Ouachita counties, Arkansas, over which J. P. Looney was operating a motor bus line under a certificate of public convenience and necessity issued to him by the Railroad Commission. Notice of the application was given to J. P. Looney, who appeared and contested the applicant's right to a permit on the ground that additional motor bus service was not necessary on said highways. Upon a hearing of the cause the Commission entered an order denying the application, from which an appeal was taken to the Pulaski Circuit Court, Second Division. On May 31, 1926, the appeal was heard and a judgment was rendered setting aside the order of the Commission, from which an appeal has been duly prosecuted to this court.

The record reflects that the Independent Bus Line, the Messino Bus Company, the Caddo Transfer & Warehouse Company and J. P. Looney had complied with the rules and regulations of the Arkansas Railroad Commission, and that it refused permits to the Independent Bus Line and the Caddo Transfer & Warehouse Company to operate motor bus lines upon the highways designated in the respective petitions because it had theretofore granted permits to the Messino Bus Company and J. P. Looney to operate motor bus lines over practically the same route and under the same schedules, and that the public convenience and necessity did not require the service of additional companies.

In refusing the permits, the Arkansas Railroad Commission was guided by the following rule it had theretofore promulgated:

"No person or motor transportation company shall begin to operate any motor-propelled vehicle for the transportation of persons or property, or both, for com-

pensation between fixed termini or over a regular or irregular route in this State, without first obtaining from the Railroad Commission a certificate declaring that a public convenience and necessity require such operation."

The applicants challenged the authority of the Railroad Commission to promulgate such a rule or to deny them the privilege of operating motor bus lines over the highways in question. The circuit court sustained the contention of the applicants. The sole question therefore presented by this appeal is whether the Legislature ever granted authority to the Arkansas Railroad Commission to issue permits or certificates of public convenience and necessity to individuals, partnerships or corporations to operate motor-propelled vehicles to transfer persons or property for compensation over the highways of the State. This is the very question which this court reserved for future decision in the case of *Kinder* v. *Looney,* 171 Ark. 16, 283 S. W. 9. If the Arkansas Railroad Commission has such authority, it was conferred by § 5, act 124, Acts of 1921, which is as follows:

"The jurisdiction of the commission shall extend to and include all matters pertaining to the regulation and operation of all common carriers."

It was said in *Kinder* v. *Looney, supra,* that "the statute under consideration in this case does not confer express authority upon the Arkansas Railroad Commission to establish a rule that no automobile transportation company shall operate for the transportation of persons for hire over a regular route in this State without first having obtained from the Commission a certificate declaring the public convenience and necessity require such operation." It follows then, that, if such authority exists in the Railroad Commission, it is by necessary implication from language used in the statute. The language is not broad enough to justify the implication. "Regulation and operation" does not import the right of denial or the right to grant an exclusive franchise or permit which, in effect, involves a denial to some. "Regulation" is not synonymous with "prohibition,"

and a delegation of the authority by the Legislature to regulate does not imply authority to prohibit. *Tuck* v. *Waldron,* 31 Ark. 462; *Swaim* v. *Morris,* 93 Ark. 363, 125 S. W. 432; *Little Rock* v. *Reinman,* 107 Ark. 174, 155 S. W. 105; *Bryan* v. *Malvern,* 122 Ark. 379, 183 S. W. 957; *Incorporated Town of Paris* v. *Hall,* 131 Ark. 134, 198 S. W. 705; *North Little Rock* v. *Rose,* 136 Ark. 298, 206 S. W. 449. We think the Legislature never intended for such an implication to be drawn from the language used in the statute, for the reason that the act in which the section appears specifically repealed § 13 of act 571 of the Acts of 1919, which conferred authority on the Arkansas Corporation Commission (now abolished) to grant certificates of convenience and necessity to public service corporations. The specific repeal of such power indicates very clearly that the Legislature had no intention of again conferring the power upon the new body through inference or implication.

No error appearing, the judgments are affirmed.

McCULLOCH, C. J., (dissenting). It is well understood that an administrative body such as the Arkansas Railroad Commission can exercise only such power as is delegated to it by the lawmakers, either in express terms or by necessary implication. The statute creating the Railroad Commission does not, in express words, confer authority to place a limit on the number of utilities to operate along a given route or in any given territory, and the question presented in this case is whether or not such authority is necessarily implied from the general powers expressly conferred. My conclusion is that the statute is so broad and comprehensive in its language in conferring upon the commission authority to control all public utilities that the power to place a limit on the number of utilities is necessarily implied. In testing the effect of the statute, consideration should be given to the matters sought to be controlled and the purpose of the lawmakers in placing those matters under statutory control.

The highways of the State are for common use, and, if we were dealing merely with the regulation of the ordinary use of highways, the authority to regulate such use would not imply authority to exclude, but the statute deals, not with such use of the highway as is common to all, but with special use which is merely a privilege, and which can be either granted or withheld by the lawmakers at will. In other words, the use of the public highway by a carrier for profit is not such use as is the common right of all, but is a special privilege. This principle has been recognized by all authorities on the subject. In a recent work on control of public utilities, it is said:

"This private use of our streets and highways obviously differs very radically from that of converting them into places of business and using them for private gain or profit, such as operating motor vehicles thereon for the transportation of the public and its property for hire. This use is special and extraordinary, and may only be enjoyed as a privilege or licensed permission on such conditions as the State or its duly authorized agency may see fit to impose. The operation of motor vehicles for hire, being a privilege and not a right, may be granted or withheld as the State may determine, and, if granted, the State may decide to whom and under what conditions the grant shall be made. As permission to employ the highways to conduct business thereon for private gain may be entirely denied, it follows that the privilege may be extended on such conditions as the State may determine." Pond on Public Utilities, § 753.

In the exercise of authority in determining who may enjoy the privilege of using the highways as a carrier and upon what terms the privilege may be exercised, sole consideration must be given to the convenience of the public, for, the use of the highways as a common carrier being merely a privilege, it may be withheld altogether. The term "certificate of convenience and necessity," often used in statutes of this kind, refers to

the convenience and necessity of the public, and not that of the corporation to which the privilege is granted.

When the construction of the statute now before us is approached in the light of these principles, it seems clear to me that the language is broad enough to confer authority upon the Railroad Commission to determine the number of utilities which may occupy a given field or territory. The language is the same with regard to all utilities. It does not apply solely to bus lines, and, if the Commission has no authority to determine the number of bus lines which may operate along a given route, then there is no express authority in the statute to limit the number of other utilities, and all who apply for permits must be treated alike. I cannot believe that the lawmakers intended any such result.

It will be noted that the statute does not merely confer the right to regulate, but it declares that the power of the Commission shall "extend to and include all matters pertaining to the regulation and operation of all common carriers." The authority is not merely to regulate common carriers, but to control all matters pertaining to such regulation and operation. It would appear that the number of utilities to operate in a given territory or along a given route should be deemed a matter "pertaining to the regulation and operation" of common carriers, and this should apply with special force to a bus line operating along a public highway, for the safety and convenience of the public are necessarily involved in determining the number of such carriers which should operate along the same route. The principle is "as old as the hills" that, when power is conferred in express though general terms, there is a necessary implication of sufficient authority to carry those powers into execution. *McCulloch* v. *Maryland,* 4 Wheat. (U. S.) 316.

I attach no importance to the fact that the statute repealed a section of the former statute conferring power upon the Corporation Commission to issue certificates of convenience and necessity and failed to incorporate the

same in the new statute defining the powers of the Railroad Commission. This change in the language of the statute occurred in transferring authority over local utilities to municipal corporations of the State, and did not manifest an intention on the part of the lawmakers to withhold such control and authority of the Railroad Commission over utilities outside of municipalities. On the contrary, the lawmakers, in passing the new statute, used different and broader language than that used in the old statute, and made it unnecessary to confer in express terms authority to refuse permits. The language of the old statute defining the authority of the Corporation Commission was that "the jurisdiction of the Commission shall extend to and include common carriers * * ." But, as we have already seen, the language of the present statute is much broader and declares that jurisdiction shall "extend to and include all matters pertaining to the regulation and operation of common carriers." Section 1 of the act creating the Commission is not without considerable force in the solution of this question. That section reads as follows: "That the intent of this act is that the present Arkansas Corporation Commission be abolished, and that all its proper functions, not elsewhere herein delegated, be transferred to the Arkansas Railroad Commission as herein constituted." Acts 1921, p. 177. This language used by the lawmakers clearly evinces an intention to transfer all of the powers originally vested in the Corporation Commission to the Railroad Commission except those which had been otherwise delegated. Now, the language of this section may not of itself be sufficient to enlarge powers not otherwise expressly conferred, but it is certainly of much value in construing the language of that part of the statute which defines the power and authority of the new Commission. The primary object of construction of statutes is to ascertain from the language used the true intention of the lawmakers, and mere form of expression should be disregarded. *Rayder* v. *Warrick,* 133 Ark. 491, 202 S. W.

8; *Howell* v. *Lamberson,* 149 Ark. 183, 231 S. W. 872; *Standard Oil Co.* v. *Brodie,* 153 Ark. 124, 239 S. W. 753.

It seems to me therefore that the majority have taken a very narrow view of this language, and that the subject-matter calls for a liberal rather than a restricted interpretation.

Much is said in the briefs of counsel about the definition of the term "regulation." Standing by itself, the word may be construed in many ways, but, when used with reference to the granting of a mere privilege, which is not a thing of common right and may be either granted or withheld at the will of the sovereign, it is a term of sufficient breadth to warrant the interpretation contended for by counsel for the State, and, when considered with the context, it seems clear to me that the lawmakers intended to commit to the Railroad Commission authority to determine all matters relating to the regulation, control and operation of common carriers, and that this necessarily includes the power to determine when and by whom and under what circumstances the privilege should be exercised. The decisions referred to in the opinion of the majority relate to mere matters of regulation of business which is not necessarily of public character. Such lines of business covered by those decisions may be regulated, as they are not of a public nature, whereas the use of a public highway for profit is not of a private nature, but is one in which private rights are not involved and the public alone is concerned therein. Hence the power to regulate necessarily includes the right to restrict the number of privileges to be granted.

The only decision bearing directly on the construction of a similar statute is the decision of the New Jersey court in *Zellers* v. *Cumberland Traction Co.,* 127 Atl. 268, where it was held, under a statute almost identical with ours, that the Board of Public Utility Commissioners was authorized to limit the number of permits.

I am authorized to say that Mr. Justice WOOD agrees with me in all that I have said on this subject.

KAVANAUGH v. MORGAN.

Opinion delivered October 18, 1926.

1. EVIDENCE—DECLARATION SHOWING INTENTION.—In ejectment where defendant claimed that plaintiff had agreed to discourage competitive bidding and to bid in the land at foreclosure sale at a low price and hold it in trust for him, plaintiff's letters written before the sale, calling attention of prospective bidders to the sale and stating that the bank was interested in seeing that the lands should sell for a good price, were admissible as tending to show plaintiff's intention when he purchased the land at the foreclosure sale.
2. TRUSTS—CONSTRUCTIVE TRUST—EVIDENCE.—Evidence *held* not to establish a constructive trust in land purchased at foreclosure sale by plaintiff, which defendant alleged that he agreed to hold for defendant.

Appeal from Union Chancery Court, First Division; *J. Y. Stevens,* Chancellor; reversed.

Patterson & Rector, Rose, Hemingway, Cantrell & Loughborough, for appellant.

J. N. Saye, H. S. Yocum and *W. T. Saye,* for appellee.

HUMPHREYS, J. This suit was originally brought by one of the appellants, C. C. Kavanaugh, against appellee, S. R. Morgan, and others, to recover possession of a certain lot in the city of El Dorado, Arkansas, upon the alleged ground that he was the owner thereof by deed of conveyance from the Central Bank, said bank having purchased same in a decree of foreclosure of a deed of trust executed to it by S. R. Morgan.

S. R. Morgan filed an answer, denying the material allegations in the complaint, and a cross-complaint alleging that said lot and the other property covered by the deed of trust was foreclosed under an agreement that all of the property described in the deed of trust should be purchased at the foreclosure sale by said bank and held in trust for him until he could dispose of enough thereof at private sale to liquidate the large indebtedness he owed the bank, at which time the remainder should be conveyed to him. He prayed that the cause be transferred to

equity in order that he might have an accounting from the bank, offering to pay any amount he might owe it, and requesting that the lot in question and the other unsold real estate described in the deed of trust and commissioner's deed under the foreclosure decree be returned to him.

The cause was transferred to the first division of the chancery court in said county, where it was tried upon the pleadings and testimony adduced by the respective parties. The court found the issues in favor of appellees, and rendered a decree divesting the title to the unsold real estate out of appellants and vesting same in S. R. Morgan, upon the payment of $11,135.75 to said bank by him within ten days; from which findings and decree an appeal has been duly prosecuted to this court for trial *de novo*.

The record reflects, according to the undisputed testimony, that, prior to the year 1921, S. R. Morgan, who was doing business with the Central Bank, drew drafts in large sums upon parties who did not honor them when presented for payment, and deposited the proceeds to his account in said bank. Before the drafts were dishonored and returned, he had checked out the money. These returned drafts swelled his indebtedness to the bank to the sum of $80,000, and, as he was unable to redeem them, the stockholders of the bank were compelled to double their stock in order to sustain the credit and solvency of said bank. Although a part of his indebtedness to the bank was secured by collateral, a large part of it was unsecured. In order to secure same, upon the urgent solicitation of C. C. Kavanaugh, the president of said bank, S. R. Morgan executed it a deed of trust upon his real estate in El Dorado and Union County. The indebtedness was reduced, by payments and collections on collateral from time to time, to about $53,000, in May, 1921, when foreclosure proceedings upon the deed of trust were instituted in the chancery court of Union County. A default judgment was rendered on August 4, 1921, for $61,537.77 in favor of the bank against S. R. Morgan, and

the real estate described in the deed of trust was ordered sold to satisfy said indebtedness. The commissioner appointed to execute the decree offered the real estate, after due notice, for sale at public auction on September 14, 1921, and the bank became the purchaser thereof for the sum of $10,000.

The sale was confirmed on December 5, 1921. After the sale the indebtedness involved in the foreclosure suit was carried on the bank books as accounts receivable, and the real estate was carried on the books until October, 1922, on the collection account instead of the real estate account. At that time, through the advice of attorneys, the real estate account of the bank was debited with $10,000, the bid for the real estate at the foreclosure sale.

C. C. Kavanaugh certified on December 31, 1921, immediately after the confirmation of the sale, that the bank owned $2,080.20 in real estate; and again, on March 10, 1922, he certified that it owned $4,142.76 in real estate; and again, on June 30, 1922, he certified that it owned $4,338.85 in real estate. In October, 1922, he debited the real estate account with $10,000, bid for the property at foreclosure sale, and on November 13, 1922, the books showed that the bank owned $14,268.05 in real estate. Mr. Kavanaugh gave two explanations as to why he carried the indebtedness of S. R. Morgan in the loans, discounts and collection account after the confirmation of the foreclosure sale, the first being that he did not know that it made any difference, until his attorneys informed him that the amount paid for the real estate at the foreclosure sale should be debited to the real estate account; and the second was that he did it as a matter of convenience, in order to make the accountings to the makers of the collateral notes, to Morgan, and to keep itself and the Bank Commissioner informed. Mr. Kavanaugh further explained that the Bank Commissioner understood how the transaction was handled from the beginning, and that he did not deceive, or intend to deceive, him by carrying the purchase price of the real estate at the foreclosure sale in the collection account and by not debiting

the amount to the real estate account until October, 1922. In this connection he stated that other foreclosure sales had been handled in this way and carried upon their books in the same manner.

After the confirmation of the foreclosure sale the bank paid all of the taxes on the real estate and all expense items pertaining to the real estate, charging same to its own expense account, and not to S. R. Morgan.

The lands in Union County embraced in the sale were wild and unimproved. Prior to the foreclosure sale, S. R. Morgan had leased one piece of the said property embraced in the mortgage to the Ark-Mo Lumber Company and had collected the rent for the term in advance. The term ended in 1923, at which time the bank leased the property to the Ark-Mo Lumber Company and collected the rent thereon. Another piece of said property was held by Downtain, who had purchased same and obtained a warranty deed from S. R. Morgan after he had executed the mortgage to the bank. M. B. Morgan erected three small houses upon another piece of the property, after the foreclosure suit, and, when he refused to account for the rents, this suit in ejectment was brought against the Morgans. There is some dispute as to who had possession of the other city property. Kavanaugh testified that he collected rents on one of the lots until the tenants moved out. M. B. Morgan testified that, after the date of the sale, he continued to look after all of the property, either for the bank or S. R. Morgan, or whoever owned it.

C. C. Kavanaugh wrote to eight different parties, prior to the date of the foreclosure sale, giving notice that the lands embraced in its mortgage, describing them, would be publicly sold on September 14, 1921, in which it was stated that the bank was interested in seeing that the lands should sell for a good price. One of the letters was addressed to Hon. Tom Gaughan of Camden. Gaughan mailed the letter to the Standard Oil Company,

and received a reply to the effect that it had checked the lands over and found nothing of interest to it.

On October 30, 1922, Kavanaugh wrote S. R. Morgan by registered letter as follows:

"S. R. Morgan,
Moore & Turner Building,
Little Rock, Arkansas.

"Dear sir: Referring to your request to Mr. Simpson for an accurate statement of your account, beg to advise that the position which this bank takes, and has always taken, and has repeatedly explained to you, is that it is not seeking any profits out of foreclosure of real estate or collateral sales, but that it would be willing to resell to you any real estate which it has foreclosed and bought in, and surrender to you any collateral which it still holds in pledge, for the consideration of enough in cash to reimburse it for your present indebtedness and for such sums as it has paid out in foreclosure purchases, plus all expenses that it may have been put to. The bank does not hold the real estate which it bought in at foreclosure in trust for you for security for any indebtedness which you may owe it. For instance, it foreclosed its mortgage on El Dorado and Union County property and bought it in at the sale by the commissioner at the consideration of $10,000. This sale was afterwards confirmed, and the report of the said commissioner to the court shows that the Central Bank credited its judgment to the amount of $10,000, and this credit is extended to you on its books. There would have been no object in foreclosing the mortgage and selling the property if it had been the intention of the bank to hold merely as security. With reference to the items of expense, such as attorney's fees, abstract fees, railroad expenses, taxes, etc., which we have paid out on the El Dorado and Union County property purchased at the foreclosure sale, beg to advise that these items were charged to our own expense account at the time the items were paid, and were not charged to your personal account. In writing you a memorandum, these items

were included for the purpose of advising you for how much we would be willing to sell to you the El Dorado and Union County real estate. We are offering the property we bought at foreclosure sale. If you wish to buy it, you can negotiate as any other person may do."

S. R. Morgan did not answer this letter.

In April, 1921, before the foreclosure proceeding was commenced, C. C. Kavanaugh wrote S. R. Morgan the following letter:

"For the future protection of yourself and the bank, we hope you will use your influence with the clerk at El Dorado to prevent unnecessary publicity of the litigation. Judge Hendricks has the papers prepared, and if you think it will accomplish any good in securing this matter out of the newspapers, I would accompany Judge Hendricks to El Dorado. As we see it, neither party would be greatly benefited by any undue publicity of litigation."

Mr. Kavanaugh explained that his reason for writing this letter was to avoid any damage which might result to the bank if publicity was given to the institution of such a large foreclosure proceeding. This concludes the statement of material facts revealed by the undisputed testimony.

The record reflects the following material conflicting testimony:

S. R. Morgan testified, in substance, that he and Kavanaugh agreed that the bank should institute foreclosure proceedings on the deed of trust against Morgan in the circuit court of Union County, take judgment against him for this debt, foreclose its mortgage, buy the property in at the sale for $10,000, thus freeing it from junior judgment liens, then to resell it at a private sale, as opportunity presented itself, apply the proceeds, first, to the payment of its indebtedness to it, and return the residue to him. He also testified that, in order to effectually carry out the plan, he agreed with Kavanaugh that he and his friends would not bid at the sale themselves, but would discourage competitive bidding, thus

permitting Kavanaugh to bid the property in for the sum of $10,000.

Five other witnesses testified that Kavanaugh had told each of them that he bought the property at the foreclosure sale, in trust for S. R. Morgan.

C. C. Kavanaugh testified that the bank never authorized him to enter into an agreement with S. R. Morgan to foreclose its deed of trust and bid the property in and hold same in trust for Morgan; that he did not enter into such an agreement with him; that the foreclosure of the deed of trust was a *bona fide* transaction, and that he bought the property at the sale for the bank, and not in trust for Morgan; that he never told any one, either before or after the foreclosure sale, that he had bought the property in for Morgan and was holding same in trust for him; that, in order to get bidders and make the property bring as much as possible, he wrote eight different parties about the sale, calling their attention to the date of the sale, in which he told them that the bank was interested in the property selling for a good price.

Testimony was introduced by appellees tending to show that the real estate was worth from thirty to fifty thousand dollars at the time of the foreclosure sale. Kavanaugh testified that he bid as much as the property was worth at forced sale, in view of the fact that some of it was in litigation, some had been leased, and that the title had failed to several hundred acres.

Appellant contends for the reversal of the decree because the evidence is not full, clear and convincing enough to have warranted the trial court in decreeing a trust *ex maleficio*. The requirements of the rule in such cases announced in *Tiller* v. *Henry,* 75 Ark. 446, 88 S. W. 573, and recently approved in *Eason* v. *Wheeler,* 167 Ark. 320, 268 S. W. 29, are as follows:

"Constructive trusts may be proved by parol, but parol evidence is received with great caution, and the courts uniformly require the evidence to establish such trusts to be clear and satisfactory. Sometimes it is

expressed that the 'evidence offered for this purpose must be of so positive a character as to leave no doubt of the fact', and sometimes it is expressed as requiring the evidence to be 'full, clear and convincing,' and sometimes expressed as requiring it 'to be clearly established.' * * * Titles to real estate cannot be overturned by a bare preponderance of oral testimony seeking to establish a trust in opposition to written instruments. The conservatism of the courts has prevented the tenure of realty being based on such shifting sands."

The inherent probabilities in the instant case are that C. C. Kavanaugh did not make an agreement with S. R. Morgan to buy the property in at the foreclosure sale and hold it for him as trustee. The bank owned the deed of trust, and it had not authorized its president to make such an agreement. Certainly the president of a bank would not convert a deed of trust, securing a large indebtedness, into a complicated trust to run for an indefinite period, contingent upon being able to sell the property at private sale, without first consulting the directors and obtaining permission to make such an agreement. The transaction would have been one out of the ordinary course of business, and could not have redounded to the benefit of the bank.

A first mortgage was as good, or better, than an oral trust. Again, the plan was designed to strip the land of junior judgment liens, sell same, and, after paying the indebtedness to the bank, to pay the residue to S. R. Morgan. It is not probable that a bank in good standing, or its president, would have entered into an agreement of that kind. The unreasonableness of such a plan having been adopted by the parties is augmented by the fact that the bank paid the taxes upon the property for several years after buying it at the foreclosure sale, as well as the expenses incident to handling the property. Another strong circumstance tending to show that no such agreement was entered into, is that, according to the plan of Morgan, competitive bids at the sale were to be discouraged. The letters written by Kavanaugh

and mailed to prospective bidders, calling their attention to the sale, are in open conflict with Morgan's plan. Appellees contend that the letters were inadmissible, but we think that they were admissible as circumstances tending to show what Kavanaugh's intention was when he purchased the land at the sale. They clearly indicate that no agreement had been entered into by him to throttle competitive bidding and purchase the property for another. Declarations of this kind showing intention are admissible. Wigmore on Evidence, 2 ed., vol. 3, page 822.

Another strong circumstance tending to sustain Kavanaugh's version of the transaction is that Morgan failed to answer the letter Kavanaugh wrote and registered to him, in which he explained that he had not bought the property in trust for him, and in which he reiterated the terms upon which he (Morgan) might buy the property.

The first letter written by Mr. Kavanaugh to Mr. Morgan, and the manner in which the account was carried on the bank books after the confirmation of the foreclosure sale, are circumstances tending to support Mr. Morgan in his statement that there was an oral trust, but the explanation of the letter and the reason assigned for carrying the accounts as they were greatly minimize the force of those circumstances as corroborative evidence. The explanations are reasonable.

It is difficult from the testimony to determine definitely who had possession of the city property after the foreclosure sale was confirmed. M. B. Morgan testified that, after the sale, he continued to look after all of the property for the bank, or S. R. Morgan, or whoever owned it. He seemed to be in doubt whether he was acting in the management of the property for his brother, S. R. Morgan, or the bank. He tried to buy the property upon which he built three houses, from the Central Bank, after the houses were built. Under this condition of affairs, this piece of evidence is worth little

as a circumstance tending to show whether or not there was an oral trust.

The direct testimony upon whether there was an oral trust is conflicting.

In view of the open conflict in the testimony, we are of the opinion that appellees have failed to establish a trust *ex maleficio,* under the rule announced above. The testimony is not full, clear and convincing that the oral trust was agreed upon.

On account of the error indicated the decree is reversed, and the cause is remanded with directions to dismiss the crossbill of appellees for want of equity, and to decree the possession of the property to appellants.

McCULLOCH, C. J., (dissenting). The fact that the court treats as an essential part of appellants' case the declaration contained in Mr. Kavanaugh's letters to prospective bidders at the approaching sale constrains me to record my dissent, which I would not otherwise do upon any difference of opinion on the questions of fact, for I am convinced that the court is in error in holding that such declarations are competent as evidence in the case. They are self-serving—nothing more nor less—and inadmissible. The decision of the majority is in direct conflict with numerous decisions of this court. *Hamburg Bank* v. *George,* 92 Ark. 472, 123 S. W. 654; *Fechheimer-Kiefer Co.* v. *Kempner,* 116 Ark. 482, 173 S. W. 179; *Carter* v. *Younger,* 123 Ark. 270, 185 S. W. 435; *Donaghey* v. *Williams,* 123 Ark. 411, 185 S. W. 778; *Raymond* v. *Raymond,* 134 Ark. 484, 204 S. W. 311; *Davison* v. *Harris,* 165 Ark. 518, 265 S. W. 67. The citation of 3 Wigmore on Evidence, p. 822, in support of the opinion of the majority, is not apt. The author merely lays down the rule that self-serving utterances or declarations are only competent for the purpose of establishing the state of mind, "knowledge, belief, rational emotion, or the like," of the speaker, and not as substantive proof of the facts stated in the utterance. The chancery court found that the proof was sufficient

to establish the trust, and, in my opinion, the state of the proof in the record is such that I do not think those findings ought to be disturbed.

McCONNELL v. McCORD.

Opinion delivered November 1, 1926.

1. APPEAL AND ERROR—PRESUMPTION IN ABSENCE OF EVIDENCE.—Where the record on appeal contained no evidence upon which the cause was heard, but merely the pleadings and record entries, it will be presumed that the evidence supports the decree.
2. APPEAL—CERTIORARI TO COMPLETE RECORD.—A petition for certiorari to reinstate a lost record of the testimony in a chancery case which does not allege that the court had made an order authorizing a stenographer to take testimony and file same, nor state when the stenographer's notes were lost, but merely alleged that the stenographer lost his notes, but that he and bystanders remembered the substance of the testimony, did not state grounds for having the record of the proceedings at the trial brought up.

Appeal from Sebastian Chancery Court, Greenwood District; *J. V. Bourland,* Chancellor; affirmed.

Robert A. Rowe and *Holland, Holland & Holland,* for appellant.

George W. Johnson and *Evans & Evans,* for appellee.

McCULLOCH, C. J. The case is here on appeal from a decree of the chancery court, which recites that the cause was heard on oral and documentary evidence adduced by the respective parties. There was no attempt to preserve the record under the statutory method, by having the stenographer file a certified transcript of the testimony, and there was no order of court authorizing the stenographer to take the testimony and file the transcript as a part of the record. *McGraw* v. *Berry,* 152 Ark. 452, 238 S. W. 613. Nor was the evidence properly preserved in a bill of exceptions certified and filed in apt time. Appellants filed what purported to be a bill of exceptions, supported by the affidavits of bystanders, but we decided, on motion of appellees, to strike this out of

the record, that the same was not properly certified and filed. 170 Ark. 839, 281 S. W. 384. Appellants could have adopted either of the methods of preserving the record, but failed to pursue either method in the proper manner. Therefore we have a record before us which does not properly contain any of the evidence, either documentary or oral, upon which the cause was heard as recited in the decree. There is nothing now in the record but the pleadings and record entries. The presumption must therefore be indulged that the decree is supported by the evidence, and there is nothing on the face of the record now before us to indicate error in the proceedings.

Since the transcript was lodged in this court, appellants have brought up on certiorari the transcript of supplemental proceedings instituted by appellants below for the purpose of reinstating what is designated as the lost record containing the testimony in the case. The original cause was submitted to the court on May 11, 1925, and the decision was rendered and filed on November 14, 1925. The supplemental complaint now before us on certiorari was filed by appellants on March 6, 1926, and it is alleged in the complaint that, at the trial of the cause, the oral testimony was taken down by a stenographer, that the stenographer "claims that he lost, or somebody stole, the record of the proceedings and the notes of all the proceedings," but that said stenographer "remembers the notes taken in shorthand and can reinstate all the record taken in shorthand," and that there were several witnesses who heard the proceedings in the trial, and that the testimony could be reinstated from memory. The prayer of the complaint was that "all the testimony taken in the above entitled case by the court stenographer be reinstated, so that it can be in the Supreme Court in the trial of this case." The court sustained a demurrer to this complaint, and dismissed the complaint, from which decree an appeal was prayed and granted. The complaint did not, we think, set forth any grounds for relief. There is no

allegation that the court had made any order authorizing the stenographer to take down the testimony and file a transcript thereof, nor is there any allegation as to the time when the notes of the stenographer were lost. Hence there was nothing stated in the complaint which, if proved, would have justified the court in permitting the record of the proceedings to be made at that time. If the idea was to obtain relief on the ground of unavoidable casualty preventing the preparation of a bill of exceptions, the facts stated are not sufficient for that purpose, for the allegations of the complaint are that the stenographer remembered the substance of the testimony and that bystanders also remembered the testimony of the witnesses. The failure to perfect the record in apt time was not due to the stenographer's loss of his notes, but was due solely to the fact that appellants failed to obtain a record of the proceedings in apt time by either of the methods authorized by law.

Decree affirmed.

CLARK v. STATE.

Opinion delivered November 1, 1926.

1. WITNESSES—IMPEACHMENT—GENERAL REPUTATION.—Under Crawford & Moses' Dig., § 4187, testimony as to the general reputation of a witness, either for truth or morality, is admissible to impeach him.
2. WITNESSES—IMPEACHMENT—PROOF OF SPECIFIC OFFENSE.—Where a witness was asked if he knew the general reputation of another witness for truth and morality, his answer that, as far as the truth was concerned, witness knew nothing against him, but that he had been arrested for dealing in whiskey, his answer was properly excluded, as amounting only to proof of a specific offense of immorality.
3. WITNESSES—TEST OF CREDIBILITY ON CROSS-EXAMINATION.—The credibility of a witness may be tested on his cross-examination by showing specific instances of immorality.
4. CRIMINAL LAW—EXCLUSION OF TESTIMONY—HARMLESS ERROR.—The exclusion of testimony as to a witness' reputation for moral-

ity *held* not prejudicial error where it was merely cumulative of other testimony that witness' general reputation for morality was bad.

5. CRIMINAL LAW—DEMONSTRATIVE EVIDENCE.—In a prosecution for assault with intent to kill, permitting the State to introduce wearing apparel of the prosecuting witness at the time of assault, by placing same on the body of such witness to assist the jury in understanding the nature and character of the assault, *held* not error, though the assault was admitted, and the nature of the wounds explained by a physician.

6. CRIMINAL LAW—EXCLUSION OF TESTIMONY—PREJUDICE.—An assignment of error in a prosecution for assault with intent to kill for refusing permission to question a witness as to threats alleged to have been made by the prosecuting witness against defendant without showing what the answer would have been, shows no prejudicial error.

7. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Where, in a prosecution for assault with intent to kill, the court gave a correct instruction on self-defense, it was not error to refuse a requested instruction on the same subject, especially where it was not an accurate statement of the law.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; affirmed.

John B. Gulley and *Arthur J. Jones,* for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

WOOD, J. George W. Clark was indicted by the grand jury of Pulaski County for the crime of assault with intent to kill one Vernith Tucker. He was convicted of the crime of aggravated assault, and his punishment fixed by the jury at a fine of $250 and imprisonment in the county jail for six months. Judgment was pronounced in accordance with the verdict, from which this appeal is duly prosecuted.

1. Witness J. L. McKahn was introduced on behalf of the State, and he gave testimony which the appellant deemed material and prejudicial to the appellant. The appellant sought to impeach the testimony by E. H. Hendricks. Appellant's counsel asked Hendricks the following question: "Do you know his general reputation for morality?" Objection was made by the State, and the court remarked, "This is not a morality case."

Appellant saved his exceptions to the remarks of the court. Counsel then asked, "Do you know his general reputation for truth and morality?" and witness answered, "Yes," and stated, "As far as the truth is concerned, I never knew anything against him. We have arrested him for dealing in whiskey. Q. His reputation for morality is bad? A. In that line—yes." The State moved to exclude the testimony of the witness as to the morality of McKahn. The court sustained the motion, to which ruling the appellant excepted.

On cross-examination the witness stated that he had no reason to doubt McKahn where his oath was concerned; that all he knew was that he had arrested McKahn on a whiskey charge.

In the recent case of *Blevins* v. *State,* 170 Ark. 765, 281 S. W. 17, we ruled that, under our statute, § 4187, C. & M. Digest, a witness may be impeached by evidence that his general reputation for truth or morality renders him unworthy of belief. Under this statute, testimony is admissible as to general reputation either for truth or morality. But an examination of the testimony shows that there was no prejudicial error to the appellant in the court's ruling, for the reason that the witness, in answer to questions, stated that he knew the general reputation of the witness McKahn for truth and morality, and that he knew nothing against his reputation for truth, and that he had no reason to doubt him where his oath was concerned. The witness further stated that McKahn's reputation for morality was bad, but all he knew about that was that he had arrested McKahn on a whiskey charge. Thus, the examination as to morality was narrowed to the specific offense of selling whiskey. A witness cannot be impeached by direct evidence showing that he had been guilty of specific acts of immorality. *Dean* v. *State,* 130 Ark. 322, 197 S. W. 684. Evidence introduced primarily for the purpose of impeachment must be confined to the general reputation of the witness for truth or morality. But the credibility of a witness, on cross-examination of such witness, may be tested by showing

specific instances of immorality. *Lockhart* v. *State,* 136 Ark. 473, 207 S. W. 55. Moreover, the ruling of the court was not prejudicial, because other witnesses had testified that McKahn's general reputation for morality was bad, and the testimony therefore of witness Hendricks would have been but cumulative.

2. The appellant complains of the ruling of the court in permitting the State to introduce the shirt, overcoat and other articles of wearing apparel worn by Vernith Tucker, the prosecuting witness, at the time of the alleged assault upon him by the appellant. In the case of *Pate* v. *State,* 152 Ark. 553-557, 239 S. W. 27, we ruled that the garments worn by the deceased at the time she was shot were admissible to show the location of the wounds. See also *Stepp* v. *State,* 170 Ark. 1061, 282 S. W. 684; *Hornsby* v. *State,* 163 Ark. 396, 260 S. W. 41, and cases there cited.

The exhibition of the clothing worn by the prosecuting witness on the night he is alleged to have been assaulted, by placing the same upon his body as it was at the time of the alleged assault, might have assisted the jury in more thoroughly understanding the nature and character of the assault, notwithstanding the assault was admitted by the appellant, and the nature of the wounds was explained by the physician who attended the prosecuting witness on the night he was assaulted.

3. The appellant assigns as error in his motion for a new trial the ruling of the court in refusing to allow the appellant to ask witness for the State, Mrs. Maude Clark, if McKahn had not made a statement that he would get even with the defendant, and if McKahn had not made threats against the defendant. The appellant does not show that the witness, if permitted to do so by the court, would have answered the above questions in the affirmative. The appellant therefore does not show any prejudicial error in this ruling of the court. See *Dixon* v. *State,* 162 Ark. 584-587, 258 S. W. 401.

4. The appellant prayed the court to instruct the jury as follows: "The court instructs you that, if you

find from the evidence that the prosecuting witness, Tucker, struck the defendant, and that the prosecuting witness at the time was attempting to do him injury, or, if it reasonably appeared to the defendant, viewed from his standpoint alone, by words or acts, that Tucker was making an unlawful attack upon him, then and in that event the defendant had a right to use whatever means was necessary to protect himself from serious bodily injury, and although it subsequently appeared that the defendant used more force than was actually necessary to protect himself from serious bodily injury."

The court, on its own motion, gave the following instruction: "If you believe from the evidence that the defendant, without any fault or negligence on his part, was himself assaulted by the prosecuting witness, Tucker, with such violence so as to make it appear to the defendant at the time, while he was acting without fault or carelessness on his part in coming to such a conclusion, that Tucker manifestly intended and endeavored to kill him or to do him some great bodily harm, and that the danger was imminent and impending, then, and in that case, you are instructed that the defendant was not bound to retreat, but had the right to stand his ground under such circumstances and to repel force, and, if need be, to kill his adversary to save his own life or prevent his receiving great bodily injury."

The instruction given by the court fully covered the subject-matter of appellant's prayer for instruction. The court therefore did not err in refusing to grant appellant's prayer. Furthermore, the appellant's prayer was not an accurate statement of the law on his plea of self-defense, while the instruction given correctly declared the law on that subject.

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

FLANNIGAN v. BEAVERS.

Opinion delivered November 1, 1926.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Evidence *held* to sustain a finding that defendant had been in adverse possession of land in suit more than seven years.
2. MORTGAGES—DEFECTIVE EXECUTION—CURATIVE STATUTE.—A mortgage which was not executed and acknowledged as required by § 5542, Crawford & Moses' Dig., was cured by Acts 1923, p. 43.
3. ADVERSE POSSESSION—SUFFICIENCY OF POSSESSION.—Where the beneficiary in a trust deed bought property at an invalid trustee's sale and conveyed same by warranty deed to defendant, who immediately entered into possession and occupied it openly, continuously and adversely for more than seven years before suit against him, *held* his possession was a bar to recovery.
4. ADVERSE POSSESSION—EXTENT.—Adverse possession of a part of a tract of land under color of title to the whole is sufficient to give title to the whole if maintained for the statutory period.

Appeal from Columbia Circuit Court; *L. S. Britt,* Judge; affirmed.

Joe Joiner and *A. D Stevens,* for appellant.

McKay & Smith, for appellee.

SMITH, J. Appellants are the heirs-at-law of Simon Flannigan, who died in 1899, and, at the time of his death, was in possession of a 120-acre tract of land in Columbia County, which he and his wife were occupying as their homestead. Flannigan and his wife had executed a deed of trust on this land to one S. O. Couch, but that instrument had not been acknowledged in a manner to conform to the act of March 18, 1887, entitled "An act to render more effectual the constitutional exemptions of homesteads," which appears as § 5542, C. & M. Digest. This deed of trust contained a power of sale, and, pursuant to the authority thereof, the trustee sold the land, and Couch became the purchaser. This trust deed was dated October 28, 1910, and in 1913 appellee, Neely Beavers, purchased the land from Couch, and immediately entered into possession.

This suit was brought against Beavers to recover possession of the land. It was alleged in the complaint,

and testimony was offered tending to show, that the indebtedness secured by the deed of trust was paid before the foreclosure sale. It was also alleged that the trustee's sale was void because notice of the sale was not published as required by the deed of trust, and it was also insisted that the deed of trust was void because the land mortgaged was the homestead of Flannigan, and had not been acknowledged as required by § 5542, C. & M. Digest.

A number of interesting questions are discussed in the briefs, which we find it unnecessary to decide, because the defendant Beavers defended his possession upon the ground that he had been in the open, actual, adverse and hostile possession of the land for a period of more than seven years, and this issue was submitted to the jury, and the finding in appellee's favor is conclusive of this question of fact.

Appellants offered testimony tending to show that the indebtedness secured by the deed of trust had been paid, and also that, long after the alleged void foreclosure of the deed of trust, a grandson of Flannigan was left in possession of the land as the cotenant of the other heirs of Flannigan, and that he remained in the possession of a portion of the land until a few years before the institution of this suit—a period less than seven years before the suit was brought. On the other hand, the testimony on the part of Beavers was that this grandson of Flannigan occupied the land as the tenant of Beavers. This was of course a question of fact, which is concluded by the general finding of the jury.

The argument for the reversal of the judgment which was pronounced in Beavers' favor is that the deed of trust was void because it had been paid, and because it was not executed and acknowledged as required by § 5542, C. & M. Digest, which last argument is answered by reference to act 80, Acts 1923, page 43, which was an act to cure conveyances defective under § 5542, C. & M. Digest. An act of similar purport was upheld by this court in the case of *Hanson* v. *Brown,* 139 Ark. 60, 213 S. W. 12.

It is further argued for the reversal of the judgment of the court below that, even though the deed of trust had not been paid and was valid under the act of 1923, the foreclosure sale and the trustee's deed were void because proper notice thereof was not given, and the case of *Stallings* v. *Thomas,* 55 Ark. 326, 18 S. W. 184, is cited in support of that contention. The insistence is that, if this foreclosure sale is void, then Couch became only a mortgagee in possession by his purchase at the trustee's sale and his entry thereunder, and that Beavers, having purchased from Couch, acquired only such rights as Couch had, which were nothing more nor less than that of a mortgagee in possession.

The deed from Couch to Beavers was a warranty deed, in usual form, and purported to convey the absolute title to the land, and it was at least color of title, and the testimony on behalf of Beavers was to the effect that he immediately entered into the possession of the land and occupied it openly, continuously and adversely for a period much longer than seven years before the institution of this suit, and, in our opinion, this possession was a bar to plaintiff's right to recover the land.

It becomes unnecessary therefore to determine whether the indebtedness secured by the deed of trust had been paid, or to determine whether the deed of trust to Couch was void through failure to follow the directions of the power of sale incorporated in the deed of trust. There was a trustee's sale, and a deed was executed pursuant thereto to Couch, who conveyed to Beavers, and these conveyances were color of title, and the jury has found that Beavers' possession was at all times adverse and hostile and continued for a period of more than seven years before the institution of this suit.

Adverse possession of a tract of land, under color of title to the whole, is sufficient to give title to the whole if maintained for the statutory period. *Wheeler* v. *Foote,* 80 Ark. 435, 97 S. W. 447.

We hold there was color of title, and the jury has found that more than seven years' possession was had

thereunder, and that the same was adverse and hostile, and, this being true, the plaintiffs' cause of action was barred, and the judgment of the court below is therefore correct, and is affirmed.

HOME LIFE & ACCIDENT COMPANY v. SCHICHTL.

Opinion delivered November 8, 1926.

1. APPEAL AND ERROR—PRESUMPTION IN FAVOR OF DECREE.—Where the chancellor made no special finding of facts, it will be presumed on appeal that he found in favor of the appellee upon all disputed questions, wherever essential to the support of the decree.
2. APPEAL AND ERROR—CHANCELLOR'S FINDING—PREPONDERANCE OF EVIDENCE.—The Supreme Court will accept the finding of the chancery court as conclusive unless against the preponderance of the evidence.
3. FRAUDULENT CONVEYANCES—EVIDENCE.—In a suit by a mortgagee, holding a deficiency judgment after foreclosure, to set aside a conveyance by the mortgagor to his wife on the ground of fraud, a finding of the chancellor that the mortgaged land was of greater value than the debt secured was not against the preponderance of the evidence.
4. FRAUDULENT CONVEYANCES—FINDING OF CHANCELLOR—EVIDENCE.—In a suit by a mortgagee holding a deficiency judgment after foreclosure to set aside a conveyance by the mortgagor to his wife for fraud, a finding that the conveyance was made without actual intent to defraud and that the mortgagor was not then insolvent, *held* not against the preponderance of the evidence.
5. FRAUDULENT CONVEYANCES—VOLUNTARY CONVEYANCE.—A conveyance made without consideration is valid against creditors and purchasers if its execution is free from fraud, either actual or presumed.
6. FRAUDULENT CONVEYANCES—VOLUNTARY CONVEYANCES—PRESUMPTION.—As to subsequent creditors, there is no presumption of fraud in a voluntary conveyance by a debtor, but as to existing creditors there is a presumption in such case.
7. FRAUDULENT CONVEYANCES—PRESUMPTION AS TO SECURED CREDITOR.—The presumption as to existing creditors which arises upon proof of a voluntary conveyance by a debtor does not arise in the case of a secured creditor, who will be held to have looked only to his security for collection of his debt.

8. FRAUDULENT CONVEYANCES—PRESUMPTION OF FRAUD.—There is no conclusive presumption of fraud as to existing creditors where a debtor executed a voluntary conveyance, if he was not at the time insolvent.

9. FRAUDULENT CONVEYANCES—PRESUMPTION OF FRAUD—REBUTTAL.—In a suit by a mortgagee holding a deficiency judgment after foreclosure to set aside a voluntary conveyance by the mortgagor to his wife, where the court found that there was neither insolvency nor intention to defraud, the presumption of fraud, if any, was overcome by the proof.

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

Daggett & Daggett, for appellant.

Mann & McCulloch, for appellee.

McCULLOCH, C. J. In September, 1919, John N. Schichtl, one of the appellees, became the owner in fee simple of a tract of land in Lee County, Arkansas, containing 643 acres, known as the Sullivan place, the consideration for the purchase being the sum of $40,000, of which $10,000 was paid in cash to J. K. Sullivan, the vendor, and annual installment notes were executed for the balance, with a mortgage on the land to secure the same. Sullivan subsequently assigned the notes to appellant. About the same time, Schichtl purchased an adjoining tract of land containing about 1,100 acres, known as the Highland place, the consideration for the purchase being $28,500, which was all paid in cash except $5,000, a note and mortgage on the land securing the same being executed, and this note also was assigned to appellant. Neither of these debts was paid, and on June 22, 1922, appellant, being still the legal holder of said notes, instituted actions in the chancery court to recover judgment against Schichtl and to foreclose the lien on said tracts of land. The amount of the several debts for which the decree was rendered was $31,950, the indebtedness against the Sullivan Place, and $5,000, the indebtedness against the Highland place. This decree was rendered on September 27, 1922, and a sale of said lands was ordered to pay the debt. The sale was made by the court's commissioner on January 23, 1923, and appellant became the

purchaser of the Sullivan place for the consideration of $15,000, and of the Highland place for the sum of $5,000, the amount of the indebtedness against that place.

It appears from the undisputed proof adduced in the present litigation that, during the time that Schichtl owned these lands and a year or two before the foreclosure of the mortgages, he collected from the St. Francis Levee District the sum of $20,000 as damages caused by the taking of a right-of-way along the Mississippi River for reconstructing the levee. Out of this fund thus collected, Schichtl spent $9,000 in the erection of a gin on the Sullivan place, and he also erected three houses on the farm, the cost thereof not being disclosed in the evidence. Schichtl was also the owner of 630 acres of wild and unoccupied lands in Lee County, the value thereof not being shown in the record in the present case, and, during the pendency of the foreclosure proceedings and prior to the rendition of the decree in the case, he conveyed those lands to his wife, Annie G. Schichtl, one of the appellees, for the recited consideration of ten dollars and love and affection and funds which she had previously advanced to him.

Appellant commenced this action in the chancery court of Lee County on August 11, 1923, to set aside the said conveyance of John N. Schichtl to his wife and to subject the lands to the payment of the unpaid balance of appellant's debt represented by the decree against John N. Schichtl. It was alleged in the complaint that the conveyance was executed by Schichtl to his wife without any valuable consideration and with fraudulent intent to cheat, hinder and delay appellant as his creditor. The answer contained denials of all the allegations of fraudulent intent in regard to the conveyance in question. The cause was heard upon oral testimony and upon an agreed statement as to some of the material facts in the case, and the chancery court rendered a decree in favor of appellees, dismissing appellant's complaint for want of equity.

There was a sharp conflict in the testimony upon some of the material facts, principally as to the mar-

ket value of the Sullivan place and the Highland place at the time of the execution of the deed by Schichtl to his wife which is alleged to have been executed with fraudulent intent. The chancellor made no special findings of fact, but we must assume that he found in favor of appellees upon all disputed facts which are essential to the support of the court's decree.

It is undisputed that the consideration for the purchase of these lands in September, 1919, aggregated the sum of $68,500; that the lands were worth that sum at that time, and that Schichtl spent $9,000 in improving the lands by building a gin thereon, making a total valuation of $77,500. There is proof of further improvement of the Sullivan place by building three houses, but we find no statement in the record of the cost of those houses. If the $20,000 received by Schichtl from the St. Francis Levee Board should be deducted from the total valuation stated above in arriving at the true valuation, it would leave an aggregate valuation on the two farms of $57,500. According to the testimony in the case, the appraisers for the levee boards fixed the value of the lands taken at $250 an acre, and no improvements on the farm were taken into the right-of-way. The aforementioned settlement with Schichtl was made upon that appraisement.

The amount of the indebtedness against the two tracts of land at the time of the conveyance now under investigation was about $37,000. The commissioner's sale of the two farms left a deficiency decree of something over $16,000. There was, as before stated, a conflict in the testimony concerning the value of the Sullivan place and the Highland place at the time of the conveyance under consideration, but we must accept the finding of the chancery court as conclusive, unless it is against the preponderance of the evidence. The testimony adduced by the appellees concerning the value of the two farms at the time of the execution of this deed was from $50,000 to $60,000, and the testimony adduced by appellant tended to show that the value of the two tracts at that time was from $35,000 to $40,000. According to the preponderance

of the evidence, the value of the lands at that time was considerably above the amount of Schichtl's indebtedness to appellant. The finding of the chancellor that the value was as much as that shown by the testimony of witnesses adduced by appellees is not against the preponderance of the testimony, and we must therefore accept that finding as correct. In addition to that, it appears from undisputed evidence that, after appellant became the owner of the Highland place, it sold timber therefrom at the price of $2,000. It is undisputed that Schichtl had no other indebtedness of any character except that to appellant, as above stated. Schichtl testified, as his reason for making the conveyance to his wife, that she had been in very bad health for two or three years, and constantly needed money, and that he conveyed the lands to her so that she could be prepared to take care of herself. He testified that he had no idea of defrauding appellant, and supposed that it would realize a sufficient sum from the sale under the mortgages to collect its debt.

It is thus seen that we have a finding of the chancery court in accordance with the preponderance of the evidence to the effect that the deed of conveyance under investigation was executed without any actual intention to defraud creditors, and that the grantor was not insolvent at the time of the execution of the deed. The question then presented is, whether or not there was constructive or legal fraud conclusively presumed from the execution of the deed without consideration other than the grantor's affection for his wife, the grantee. It should be noted, in the beginning of the consideration of this question, that our statute (Crawford & Moses' Digest, § 4874) renders invalid only those conveyances "made or contrived with the intent to hinder, delay or defraud creditors * * * or as against creditors and purchasers prior and subsequent." A conveyance, even without consideration, is valid against creditors and purchasers if its execution is free from fraud, either actual or presumed. Nearly every phase of the subject of fraudulent conveyances has been dealt with in

numerous decisions of this court. The subject was treated at length by Mr. Justice COMPTON in delivering the opinion of the court in *Bertrand* v. *Elder*, 23 Ark. 494. Reference was there made to the opinion of Chancellor Kent in *Reade* v. *Livingston*, 3 Johns. Ch. Rep. 479, where it was directly decided that a voluntary conveyance of property is, as against existing creditors, conclusively presumed to be fraudulent, and that no circumstances will be permitted to repel the presumption. But that decision was directly rejected by this court in the following language: "Though the decision in this case is not unsupported, the decided preponderance of authority, both in this country and in England, is against it, and establishes a rule less rigid, and, in our opinion, more consistent with the sound interpretation of the statute of frauds." After a full discussion of the authorities, the court said:

"The principle, as we apprehend, to be extracted from the decisions in England and America, is that the voluntary conveyance of a party to his wife or child, though he be indebted at the time, is *prima facie* only, and not conclusively, fraudulent, in respect to the claim of an existing creditor, and that the presumption thus raised may be met and repelled by proof on the other side. The question of fraud must depend on all the circumstances of the case, looking to the state and condition of the grantor, the extent of the property conveyed, and the direct tendency of the conveyance respecting the claims of creditors."

Numerous decisions of the Supreme Court of the United States are cited in support of that statement of the law.

In the case of *Driggs & Co.'s Bank* v. *Norwood*, 50 Ark. 42, S. W. 323, 7 Am. St. 78, Mr. Justice SMITH, speaking for the court, used the following language, which is in line with that used in the case cited above: "Every voluntary alienation of his property by an embarrassed debtor is presumptively fraudulent against existing creditors. Indebtedness raises a presumption

of fraud, which becomes conclusive upon insolvency. But, as to subsequent creditors, a voluntary conveyance by a person in debt is not *per se* fraudulent. To make it so, proof of actual or intentional fraud is required." We find in Judge BATTLE's opinion in the case of *Rudy* v. *Austin,* 56 Ark. 73, 19 S. W. 111, 35 Am. St. 85, the following statement, which is not only a most lucid exposition of the law on the subject, but has been often referred to in subsequent decisions:

"A debtor has the right to make reasonable provisions in property for his wife or children, according to his state and condition in life. But, in doing so, he must retain in his possession property amply sufficient to pay all his debts. If he does so fairly and honestly, the child or wife for whom the provision was made is not bound to refund the advancement for the benefit of creditors, in the event the parent or husband should subsequently fail or become unable to pay the debts he owed when the provision was made. The law requires every man to be just before he is generous. If he makes a voluntary conveyance while he is in debt, it presumes that it is fraudulent as to existing creditors, and the burden is on those claiming under the conveyance to repel the presumption. If he be insolvent, unable to pay his debts, the presumption that it is fraudulent as to antecedent creditors is conclusive."

The line as to the presumption of fraud is thus clearly drawn between attacks by prior existing creditors and subsequent creditors. The statute *supra* protects creditors of both classes, but there is a distinction as to presumption in the rules of evidence in the two classes of cases. As to subsequent creditors there is no presumption, and the burden of proof as to fraud rests upon the attacking creditor, whilst in the case of existing creditors there is a presumption of fraud arising from a voluntary conveyance by the insolvent debtor. *Williams-Echols D. G. Co.* v. *Bloyd,* 169 Ark. 529, 276 S. W. 1. The proof in this case and the finding of the court thereon is that Schichtl, the grantor, was not insolvent at the time he

made the conveyance to his wife, therefore there is no conclusive presumption of fraud under the rule stated by Judge BATTLE, even though appellant be placed in the same category with reference to presumptions as a prior existing creditor. There are authorities to the effect that a contingent liability, or one dependent upon a future contingency, is not to be treated as an existing debt within the meaning of the rule as to presumptive evidence. *Severs* v. *Dodson,* 53 N. J. Eq. 633, 34 Atl. 7. There are, however, authorities to the contrary. *Thomson* v. *Crain,* 73 Fed. 327; *Sallaske* v. *Fletcher,* 73 Wash. 593, 132 Pac. 648; *Crocker* v. *Huntsinger,* 113 Wis. 181, 88 N. W. 232. Some of those authorities, particularly the Washington case *supra,* do not relate to the statute on fraudulent conveyances, but merely to a statute which provides that a conveyance by one of the spouses to the other of community property "shall not affect any existing equity in favor of creditors of the grantor," and no reference is made to the question of fraud. We are not, however, dealing merely with the question whether the indebtedness is one which literally existed at the time of the conveyance alleged to have been executed with fraudulent intent, but the question is whether or not the indebtedness is held under circumstances which would call into operation a presumption of fraud. We have a case now of mortgage indebtedness, and the real question, so far as the case relates to presumption, is whether or not such conclusive presumption should be indulged in favor of the holder of the secured debt. The reason for indulging presumptions does not apply, we think, under those circumstances, and the authorities support the view that there is no presumption under those circumstances. May on Fraudulent Conveyances, p. 163; Bigelow on Fraudulent Conveyances, p. 188; *Welch* v. *Mann,* 193 Mo. 304, 92 S. W. 98; *Cromby* v. *Young,* 26 Ont. 194. The reason for this distinction in putting secured creditors in the same category as subsequent creditors is that, whatever presumption is to be indulged, the creditor, in selecting his security, has, unlike a general creditor, disregarded

other property of the debtor and looked only to his security for the collection of his debt, hence he is entitled to no presumption of fraud in the conveyance of other property. Such a creditor is one who has already been given a preference over others, and is not in the attitude of an existing general creditor, hence his reliance is deemed to have been founded on his security rather than on the solvency of the debtor. It seems to us that this is a sound distinction, but, at any rate, the trial court has necessarily found in this case that there was no insolvency on the part of the debtor and no intention to defraud; therefore, even if there was a rebuttable presumption, it has been overcome by the proof. This view of the law is not in conflict with our decision in *First National Bank* v. *Herring,* 159 Ark. 317, 252 S. W. 37, which was a case of undisputed insolvency. Nor is it in conflict with the decision of this court in *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913, and *James* v. *Mallory,* 76 Ark. 509, 85 S. W. 472. In both of those cases the court dealt with the question of actual insolvency of the debtors, who were indebted to numerous general creditors, and in each instance such conditions were found by the court to exist. The term "embarrassed debtors," used in *Wilks* v. *Vaughan, supra,* was evidently meant in the sense of insolvency in fact, which the court found was the condition of the debtor at the time the conveyance under investigation was executed. In *James* v. *Mallory, supra,* the court treated a mortgage creditor as an existing creditor, but, in doing so, it was in response to the argument that the renewal of a prior debt constituted a subsequent debt. The question now under consideration in regard to the status of a mortgage debt was not presented to us in the argument. In that case, as in *Wilks* v. *Vaughn, supra,* there were numerous general creditors, and the debtor was insolvent at the time the conveyance was executed, and the court found that there was constructive fraud based on actual insolvency. In the present case there was neither insolvency nor actual fraudulent intention.

The finding of the chancery court is, as we have already said, not against the preponderance of the testimony, and therefore should be affirmed. It is so ordered.

HART, J., (dissenting). Judge SMITH and I dissent in this case because we believe that, when the evidence is viewed in the light most favorable to appellee, we have the case of an insolvent debtor, or one whose embarrassment resulted in insolvency, making a voluntary conveyance of a part of his lands to his wife, which prevented appellant from collecting its debt.

Under our former decisions, such disposition is conclusively fraudulent as against existing creditors; and a mortgagee whose debt is due at the time of the voluntary conveyance is an existing creditor. In *Wilks* v. *Vaughan,* 73 Ark. 175, Chief Justice HILL, speaking for the court, said:

"It is thoroughly settled in equity jurisprudence that conveyances made to members of the household and near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; and, when they are voluntary, they are *prima facie* fraudulent, and, when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors."

This holding has been quoted with approval in our later decisions. *McConnell* v. *Hopkins,* 86 Ark. 225, 110 S. W. 1039; *Brady* v. *Irby,* 101 Ark. 573, 142 S. W. 1124; *Simon* v. *Reynolds-Davis Gro. Co.,* 108 Ark. 164, 156 S. W. 1015; *Burke* v. *New England National Bank,* 132 Ark. 268, 200 S. W. 1018; *Davis* v. *Cramer,* 133 Ark. 224, 202 S. W. 239; *Farmers' State Bank* v. *Foshee,* 170 Ark. 445, 280 S. W. 380; and *Papan* v. *Nahay,* 106 Ark. 230, 152 S. W. 107.

These cases are cited in 27 C. J. 643 in support of the text, which is as follows:

"In other jurisdictions, if the conveyance is voluntary, it is only *prima facie* fraudulent; but, where the debtor is insolvent at the time of the transfer, or his embarrassment results in insolvency, such conveyances

are conclusively presumed to be fraudulent as against existing creditors, although there is no actual fraudulent intent."

As above stated, the undisputed facts bring this case within the rule. In June, 1922, appellant brought suit against John H. Schichtl to foreclose a mortgage given to secure an indebtedness which was due and unpaid. On the 20th day of September, 1922, John H. Schichtl made the voluntary conveyance in question to his wife. Appellant, who was the plaintiff in the foreclosure suit, proved its mortgage debt; and, no proof having been adduced therein by appellees, who were the defendants in the suit, judgment was rendered against them for the amount of the mortgage debt, and a foreclosure decree was entered of record on September 27, 1922. The lands were sold under the foreclosure decree on January 23, 1923, and appellant became the purchaser, as stated in the majority opinion. This left a deficiency decree of over $16,000. Schichtl had no property out of which to satisfy the deficiency judgment except the property he conveyed to his wife just seven days before the decree in the foreclosure suit.

Our later decisions support the above interpretation. In *Brady* v. *Irby,* 101 Ark. 573, 142 S. W. 1124, Mr. Justice FRAUENTHAL delivered the opinion of the court, and said: "But it is also well settled that a voluntary transfer of property by one in debt is presumptively fraudulent as to creditors then existing; and if the debtor is, at the time of such gift, insolvent, or if the gift is of such amount, or made under such circumstances, that it will hinder or delay or defraud existing creditors of such donor, then such voluntary conveyance or transfer becomes conclusively fraudulent and invalid as to such existing creditors."

At the conclusion of the discussion it was said: "From this it results that we have here a case where a husband, engaged in business and involved in debt resulting in insolvency, made a voluntary transfer of property to his wife. Under the law, it follows that, as

against existing creditors, such transfer was fraudulent, no matter how pure the motive which induced it, because, from the testimony, the result of such transfer was to reduce the assets of the husband to such an extent as to delay and hinder his creditors in the collection of their debt. *May* v. *State Nat. Bank, supra.*"

In *Simon* v. *Reynolds-Davis Grocery Co.,* 108 Ark. 164, the court said: "While the burden of proof is upon the plaintiff who alleges fraud to show it, yet that burden has been discharged where, as in this case, he shows that an embarrassed debtor, pending a suit against him by his creditors, has made conveyance of all the land he owned, except his homestead, to his sons, for a consideration which, upon the face of the conveyance, appears to be a grossly inadequate one. Such circumstances are sufficient to raise a suspicion of fraud and to cast a doubt upon the legality of the transaction, and the burden is then on the one holding under the deed to show a consideration. (*Leonard* v. *Flood, supra*)."

In *Farmers' State Bank* v. *Foshee,* 170 Ark. 451, 280 S. W. 382, the court said: "It impresses us that the purpose of all these conveyances of the property of W. F. Foshee was to place the property beyond the reach of his creditors. The result of all the conveyances was that the property, which was the property of W. F. Foshee when the debts were contracted, became, through the various deeds, the property of Mrs. Foshee, the wife and mother. The law is well established in this State, and by the authorities generally, that 'where an embarrassed debtor makes conveyances to members of his own family—his near relatives—such conveyances are looked upon with suspicion and scrutinized with care; when voluntary, they are *prima facie* fraudulent; and, when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors.' *Wilkes* v. *Vaughan,* 73 Ark. 174-179; *Harris* v. *Smith,* 133 Ark. 250-260; *Davis* v. *Cramer,* 133 Ark. 224."

If, as stated in the majority opinion, the language referred to in *Wilks* v. *Vaughn, supra,* refers to insolvency at the time the voluntary conveyance is made, the result would be the same. The words "when the embarrassment of the debtor proceeds to financial wreck" would certainly be a definition of insolvency, or they would mean nothing and had better never have been used.

As we have already seen, the conveyance was made just seven days before the foreclosure decree, and no attempt was made to disprove the amount of the mortgage. This shows that Schichtl knew that he owed the amount of the debt secured by the mortgage, and that a decree of foreclosure would be entered when the case was reached on the call of the calendar. There is no claim that there was any fraud in the foreclosure sale. It was made in due course, and the voluntary conveyance to his wife left Schichtl without any property to satisfy the deficiency decree. Thus it will be seen that the embarrassment of Schichtl proceeded to financial wreck within four months after the voluntary conveyance was made, and no new cause contributed to this result. These facts are undisputed; and it does not make any difference what caused the depreciation in the value of lands between the date of the execution of the mortgage and the date of the foreclosure sale, for it was a depreciation common to all lands, and existed at the time the voluntary conveyance was made. No matter how pure his motives were, Schichtl made the voluntary conveyance to his wife at a time when he was being sued for a debt past due, which he was unable to pay, and the embarrassment resulted in his financial wreck within four months.

That appellant was an existing creditor is settled by *James* v. *Mallory,* 76 Ark. 509, 89 S. W. 472. In that case the court said: "If he (James) was insolvent at the time, and voluntarily conveyed away his property without consideration, the conveyance is void as against creditors, even though he used no actual intent to defraud."

The court then said that the conveyance of James to Mallory & Company, although absolute in form, was not, under the facts, in extinguishment of the debt, but as security therefor. Hence it was said that Mallory & Company must be treated as creditors whose debts existed at the time of the fraudulent conveyance.

In 27 C. J., 472, it is said that existing creditors are, as the words imply, persons having subsisting obligations against the debtor at the time the fraudulent alienation was made.

In accordance with this rule is the case of *Papan* v. *Nahay,* 106 Ark. 230, 152 S. W. 107. There a voluntary conveyance was made by a person against whom a suit for unliquidated damages was pending. No defense was made to the action, and it resulted in a judgment against the defendant. The plaintiff was held to be an existing creditor.

Indeed, in the absence of authorities, it would seem to be rather a strange and novel doctrine to hold that the holder of a note and mortgage, which are past due, and whose satisfaction is being sought by a pending suit, is not an existing creditor.

SLOAN v. STATE.

Opinion delivered November 8, 1926.

1. SEDUCTION—CORROBORATION OF PROSECUTRIX.—One cannot be convicted of seduction on the testimony of a prosecuting witness unless she is corroborated both as to the promise of marriage and the fact of sexual intercourse.
2. SEDUCTION—SUFFICIENCY OF CORROBORATION.—Corroboration of the prosecutrix in a seduction case is sufficient if it tends to support her testimony and satisfies the jury that she is worthy of credit.
3. SEDUCTION—SUFFICIENCY OF CORROBORATION.—Evidence *held* sufficient to corroborate the prosecutrix in a seduction case.
4. SEDUCTION—PRESUMPTION OF CHASTITY.—In a prosecution for seduction, the prosecutrix is presumed to be chaste, and the burden is on the defendant to show the contrary.

5. CRIMINAL LAW—MISLEADING INSTRUCTION.—Specific objection should be made to an instruction thought to be misleading.

6. SEDUCTION—EVIDENCE OF PREPARATION FOR WEDDING.—In a prosecution for seduction it is not error to permit the prosecutrix to testify as to her preparations for the wedding.

7. SEDUCTION—EVIDENCE OF PREPARATION FOR WEDDING.—In a prosecution for seduction, testimony of a witness that she made a dress for the prosecutrix, without permitting witness to state what prosecutrix told her the dress was for, *held* proper.

8. CRIMINAL LAW—VERDICT—ASSESSMENT OF PUNISHMENT.—Where the court instructed the jury in a seduction case that the punishment for seduction was not less than one nor more than five years and a fine of not exceeding $5,000, as provided by Crawford & Moses' Dig., § 2414, and the jury brought in a verdict imposing a fine of $500, it was not error to refuse to receive the verdict and to direct the jury to retire and fix the penalty.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

W. H. Neal and *C. M. Wofford,* for appellant.

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant, for appellee.

HART, J. Reves Sloan prosecutes this appeal to reverse a judgment against him for seduction.

Under our statute, the defendant in a seduction case shall not be convicted upon the testimony of the prosecuting witness unless corroborated by other evidence as to the promise of marriage and the fact of sexual intercourse. *Lasater* v. *State,* 77 Ark. 468, 94 S. W. 59; *Bethel* v. *State,* 162 Ark. 76, 257 S. W. 740; *Jones* v. *State,* 166 Ark. 324, 266 S. W. 262; and *Babers* v. *State,* 168 Ark. 1055, 272 S. W. 659.

The prosecutrix testified to the promise of marriage and seduction. It is earnestly insisted, however, that her testimony is not sufficiently corroborated. Under the authorities cited above, the corroboration is sufficient if it consists of such facts or circumstances as tend to support the testimony of the prosecuting witness and shall satisfy the jury that she was worthy of credit.

In the case at bar, the prosecuting witness testified that she yielded to the defendant because she loved him,

and he promised to marry her. As a result of their illicit intercourse, a child was born to her on November 5, 1925, when she was about sixteen years of age. The last intercourse that she had with the defendant was on the 5th day of February, 1925, and all this occurred in Crawford County, Arkansas.

According to the testimony of Joe Webb, the defendant and the prosecuting witness kept company from 1923 to early in 1925. About the first of February, 1925, the defendant told the witness that the father of the prosecutrix was raising a little hell, and that he was going to get the chance to raise a little more pretty soon. Soon after this the defendant quit going with the prosecuting witness.

Another witness testified that the defendant admitted, on the witness stand in a carnal abuse case, that he had had illicit intercourse with the prosecuting witness. It was shown that, for two years, the defendant and the prosecuting witness constantly kept company together, and that the other boys quit going with the prosecuting witness.

The prosecuting witness testified that she had her wedding dress made about a certain date, and another witness testified that she knew the dress had been made for the prosecuting witness. When all these facts are considered in connection with the testimony of the prosecutrix, we think the evidence was legally sufficient to support a judgment of conviction.

The next assignment of error is that the court erred in giving instruction No. 3, which tells the jury that it is necessary to prove that a woman has illicit intercourse with a man other than the defendant in order to prove that she is unchaste. We do not think so. The instruction only means to tell the jury that the statute considers that women are chaste, and imposes on the defendant in a seduction case the burden of showing to the contrary. This is in accordance with the law laid down in *Wilhite* v. *State,* 84 Ark. 67, 104 S. W. 531. We do not deem it necessary to copy the instruction in the opinion.

In addition to what we have said, it may be stated that, if the defendant thought the instruction was calculated to mislead the jury, he should have made a specific objection to it. When the instructions are considered as a whole, it clearly intended to instruct the jury in accordance with the principles of law laid down in the cases cited above.

The next assignment of error is that the court erred in permitting a witness for the State to testify that she made a dress for the prosecuting witness and that the prosecuting witness told her for what purpose the dress was being made. An examination of the record shows that the prosecutrix testified that this witness had made a wedding dress for her. The witness was not allowed to state what the prosecutrix had told her, but was only allowed to testify that she had made a dress for the prosecutrix. In a prosecution for seduction, it is not erroneous to permit the prosecutrix to testify as to her preparations for the wedding. *Jones* v. *State,* 166 Ark. 324, 266 S. W. 262. As we have just seen, the witness was only permitted to testify that she made the dress, and was not permitted to state what the prosecutrix told her the dress was made for. Hence this assignment of error is not well taken.

The last assignment of error relates to the circuit court's action in refusing to receive a verdict which assessed a fine of $500 against the defendant. Our statute provides that any person convicted of seduction shall be imprisoned in the penitentiary not less than one year nor more than ten years, and fined in any amount not exceeding $5,000. Crawford & Moses' Digest, § 2414.

When the jury brought in the verdict imposing a fine and leaving off imprisonment in the State Penitentiary, the court told the jury that this verdict could not be accepted, except by agreement on both sides, and instructed the jury to return to their jury room with the following statement: "Gentlemen, you will have to go back to your jury room and fix this penalty."

The court had already told the jury, in its original instructions, what punishment was imposed by the statute

for the crime. When the court refused to receive the verdict finding the defendant guilty and fixing his punishment at a fine only, and told the jury to go back and fix the penalty, it evidently had in mind the punishment fixed by statute, and did not in any wise attempt to direct the jury to return a verdict of guilty, nor did it in any wise express an opinion upon the weight of the evidence. The court simply meant to tell the jury that, if it found the defendant guilty, it had no discretion in the matter of fixing punishment except within the limits of the statute. If counsel for the defendant thought otherwise, he should have made a specific objection to the ruling of the court, and no doubt the court would have made the matter as plain to the jury as the defendant had requested.

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

EADES v. MORRILTON LUMBER COMPANY.

Opinion delivered November 8, 1926.

1. ACKNOWLEDGMENT—IMPEACHMENT—BURDEN OF PROOF.—In a suit to foreclose a mortgage, one who attacks an officer's certificate of acknowledgment has the burden of proving that the mortgage was not acknowledged.
2. ACKNOWLEDGMENT—IMPEACHMENT—CONCLUSIVENESS OF FINDING.—A finding that an acknowledgment of a mortgage was duly taken *held* not against the preponderance of evidence.
3. MORTGAGES—BURDEN OF PROVING COERCION.—In a suit to foreclose a mortgage, the burden of proof is on a defendant claiming that she signed the mortgage through coercion.
4. MORTGAGES—DURESS—EVIDENCE.—In a suit to foreclose a mortgage, the claim of defendant's wife that she was coerced into signing a mortgage of the homestead *held* not supported by preponderance of the evidence.
5. ACKNOWLEDGMENT—DISQUALIFICATION OF OFFICER.—An acknowledgment of a mortgage taken by a notary who was stockholder and director of the mortgagee corporation is not invalid by reason of that fact.

6. MORTGAGES—RECORD.—When a mortgage with a certificate of acknowledgment, as required by the statute, is presented to the recorder, it is his duty to record it, and such record is notice to subsequent mortgagees.

Appeal from Conway Chancery Court; *W. E. Atkinson,* Chancellor; affirmed.

STATEMENT BY THE COURT.

The Morrilton Lumber Company brought this suit against J. A. Eades and Almedier Eades, his wife, to obtain judgment upon a promissory note and to foreclose a mortgage given to secure the same.

The suit was defended upon the ground that Almedier Eades signed the mortgage through coercion on the part of her husband, and that neither her husband nor herself acknowledged the mortgage, and that they gave a subsequent mortgage to W. M. Eades on the same property to secure an indebtedness which they owed him. W. M. Eades filed a separate answer, in which he claimed to have a prior lien on the property sought to be foreclosed in the action.

A. C. Neal, manager of the Morrilton Lumber Company, was a witness for it. According to his testimony, the Morrilton Lumber Company furnished materials to J. A. Eades for the purpose of building a home on a two-acre tract of land near Morrilton, Conway County, Arkansas. J. A. Eades failed to pay it for the materials, and it caused a lien under the statute to be filed on said land. Neal made an agreement with Eades to carry the account with interest at the rate of ten per cent. per annum until the fifteen months provided by the statute within which the lumber company might enforce its lien had nearly expired. When the time for enforcing the statutory lien for the materials furnished had nearly expired, Neal informed Eades that he would have to execute a mortgage on the land for the payment of the amount due, or the lumber company would foreclose its statutory lien for the materials. Eades then executed a note to the Morrilton Lumber Company for $688.41, with interest at the rate of ten per cent. per

annum from date until paid, and executed the mortgage sought to be foreclosed in this action.

On the day the mortgage was executed, Neal and M. H. Dean went to the home of J. A. Eades, and Eades and his wife signed the note and mortgage at a table or desk in a room of their home, near the front porch. Mr. Dean and Mrs. Sue Stamper, an aunt of Mrs. Eades, were on the front porch at the time the note and mortgage were signed. After J. A. Eades and his wife had signed the note and mortgage, Mr. Eades and Neal walked out on the porch, and Neal handed Mr. Dean the mortgage. Eades and Neal stepped off the porch and walked around the house. After being gone five or six minutes, they returned, and Neal and Dean left, and took the mortgage with them. Dean filled out the acknowledgment to the mortgage as a notary public, and it was then duly filed for record.

According to the testimony of M. H. Dean, he was on the porch, and saw J. A. Eades and his wife sign the note and mortgage. After Eades and his wife had signed the note and mortgage, Neal handed them to Dean, and all the parties went out on the front porch. Dean first took the acknowledgment of J. A. Eades, Neal and J. A. Eades then walked around the house, and were gone several minutes. While they were out of the presence of Mrs. Eades, Dean took her acknowledgment to the mortgage. She seemed to be in a pleasant frame of mind, and there was nothing to indicate to Dean that she had signed the same on account of the coercion of her husband.

On cross-examination, Dean admitted that Mrs. Sue Stamper was on the porch when he took the acknowledgment of the parties to the mortgage, and also that, at the time, he was a stockholder and a member of the board of directors of the Morrilton Lumber Company. Both Dean and Neal admitted that Eades objected to a clause in the mortgage providing for a waiver of his right of redemption as shown in the written mortgage, and that this clause was stricken from the mortgage before it

was signed. The original mortgage shows that the redemption clause was stricken from it. The record of the mortgage shows that the redemption clause was in the mortgage as recorded. This was explained by the recorder as being due to the fact that the record contained a printed form of mortgage similar to the one in question, and that the officer who recorded the mortgage failed to mark out the redemption clause as shown on the printed form of the record.

J. A. Eades was a witness for himself. According to his testimony, Neal demanded that they sign a mortgage to secure the amount due the Morrilton Lumber Company, on the 10th day of June, 1922, and threatened to foreclose the statutory lien of said company for materials if a note for the amount and a mortgage to secure the same were not signed on that day. Eades went home and told his wife that she had to sign the note and mortgage that day, in order to prevent the Morrilton Lumber Company from foreclosing its lien for materials on their home. His wife seemed to get in a flurry about it, and said she would not do any such thing. Eades told her that it had to be done that evening. He used no bad language to his wife, but simply told her that she must sign the mortgage. His demand amounted to a threat, and his wife knew that, if she did not sign the mortgage, something else might happen. Since the execution of the mortgage, Eades has paid $200 on the amount due on January 13, 1923, and $67.40 on January 3, 1924. According to his testimony, neither Eades nor his wife acknowledged the mortgage. Eades saw Dean there with Neal, but did not know that he was a notary public or that he came to take their acknowledgments to the mortgage.

According to the testimony of Mrs. Eades, Dean stopped out in the front yard, and she and her husband signed the note and mortgage in the front room. Dean did not come in the house at all, and did not take her acknowledgment to the mortgage. Her husband and A. C. Neal were in the room when she signed the mort-

gage. She did not sign it of her own free will. She heard her husband tell Neal that he would not sign the mortgage unless the waiver clause was stricken out, and this was done. Her husband had demanded that she sign the mortgage, and she did not sign it of her own free will and accord. We quote from her cross-examination the following:

"Q. I will ask you, Mrs. Eades, if you will say Mr. Eades demanded and caused you to do things against your will other than, as you say, in the execution of this mortgage and note? A. No sir. He demanded and forced me to sign this. He said they were going to close us out, and we had to sign to keep from being closed out. That was all the demand that he made. That if we didn't sign it they would close us out. Have not read the answer to the complaint that was filed. Q. When was it that Mr. Eades made this statement to you? A. The day you folks came out there. Q. In whose presence did he make this statement? A. My aunt and myself and him, the only ones present."

Again, she was asked if her husband was angry or attempted to use any force, and she replied that her husband said that they would have to sign the mortgage to keep from being put out of their home, but never used any bad words to her.

Mrs. Sue Stamper was also a witness for the defendants. According to her testimony, Dean was in the yard and she was on the front porch when J. A. Eades and his wife signed the mortgage in the front room of their home. She could see all the parties during the whole time that Neal and Dean were there, and knows that Dean never took the acknowledgment of either of them to the mortgage.

Other facts will be stated or referred to in the opinion.

The chancellor found the issues in favor of the plaintiff, and a decree of foreclosure was entered of record. To reverse that decree, the defendants have duly prosecuted this appeal.

J. A. Eades and *J. F. Koone,* for appellant.

M. H. Dean, for appellee.

HART, J., (after stating the facts). Counsel for the defendants contend that the chancery court erred in finding that M. H. Dean took the acknowledgment of J. A. Eades and Mrs. Almedier Eades, his wife, to the mortgage. The burden of proof was on the defendants to establish this fact. *Miles* v. *Jerry,* 158 Ark. 314, 250 S. W. 34; *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653; *Thompson* v. *Kinard,* 158 Ark. 1057, 272 S. W. 1057; and *Hildebrand* v. *Graves,* 169 Ark. 210, 275 S. W. 1024. Bearing in mind that the burden of proof in this respect was upon the defendants, we do not think that the finding of the chancellor in favor of the plaintiff upon this point is against the preponderance of the evidence. It is true that J. A. Eades and his wife, and their aunt, Mrs. Stamper, all testified that their acknowledgment to the mortgage was not taken by Dean. Eades says that he simply supposed he came as an attorney-at-law for Neal. It appears from the record that Eades is a lawyer. At least he knew that the plaintiff had a lien for material under the statute, which was enforceable. It is difficult to perceive why the plaintiff would let this statutory security expire by limitation, and take a mortgage which would be valueless, as far as third persons were concerned, without acknowledging or recording it.

According to the testimony of the defendants, Dean never attempted to take their acknowledgment to the mortgage. He was a lawyer, and it is difficult to perceive why he would not at least have asked them to acknowledge the execution of the mortgage. Eades admitted that he signed it of his own free will, and inferably admits that he would have acknowledged it if he had been asked to do so. After the execution of the mortgage, he made two payments on it.

Dean testified in a most forceful manner that he took the acknowledgment of J. A. Eades and his wife. He said that, after Eades and his wife had signed the mortgage, Neal handed it to him on the front porch, and he

at once took the acknowledgment of Eades. Eades and Neal then walked off of the porch around the corner of the house, and, while they were absent, Dean took the acknowledgment of Mrs. Eades, and she seemed to sign the mortgage without any compulsion or restraint whatever. She seemed to be in a perfectly good humor, and seemed to have no objection to having her acknowledgment to the mortgage taken.

It is true that Neal was not present when Dean says that he took the acknowledgment of Mrs. Eades to the mortgage, but, according to his testimony, he and Eades had gone around the house for the purpose of allowing Dean to take the acknowledgment of Mrs. Eades in the absence of her husband.

According to the testimony of M. H. Dean, he had had considerable experience as a notary public, and was also a lawyer of several years standing. It would be unreasonable to think that he would have allowed his company to have given up a perfectly valid statutory security, good against every one, for a mortgage that would only be good between the parties to it.

Again, it is insisted that Mrs. Eades was induced to sign the mortgage through the coercion of her husband. Under the authorities above cited, the burden of proof in this respect was also upon her. It is true that both she and her husband testified that she signed the mortgage through coercion; but, when their testimony is considered in its entirety, we are of the opinion that it is not legally sufficient to establish this fact. Mrs. Eades admitted that her husband used no bad language to her, and that he simply told her that she would have to sign the mortgage or else the statutory lien of the plaintiff for materials would be foreclosed and they would be thereby deprived of their home. As above indicated, this testimony falls short of establishing coercion.

Finally, it is insisted that the mortgage is invalid as to W. M. Eades because M. H. Dean, who took the acknowledgment of J. A. Eades and his wife to the mortgage, was a stockholder and director of the Morrilton

Lumber Company. This court has held that the taking of an acknowledgment to a deed or mortgage is an act ministerial in character, and that, where it does not appear from the face of the instrument or the certificate of acknowledgment that the officer before whom the acknowledgment was taken was a stockholder in a corporation, the acknowledgment will not be held invalid on that account. *Davis* v. *Hale,* 114 Ark. 426, 170 S. W. 99. In addition, there must be shown fraud, coercion, or undue influence, as decided in the case just cited.

When a deed or mortgage with a certificate of acknowledgment as required by statute is presented to the recorder, it is his duty to record it, and such record is constructive notice to subsequent mortgagees. Any other rule would destroy the reliability of the public records and lead to most mischievous results. *Bank of Benson* v. *Hove,* 45 Minn. 40, 47 N. W. 449; and *Titus* v. *Johnson,* 50 Tex. 224.

It follows that the decree of the chancellor must be affirmed.

J. B. COLT COMPANY *v.* MITCHAM.

Opinion delivered November 8, 1926.

1. PATENTS—REGULATION BY STATE.—Const. of U. S., art. 1, § 8, giving Congress power to promote the progress of science and useful arts, *held* not to deprive the States of the right, under their police power, to regulate the form and prescribe the effect of negotiable instruments given for patented articles.
2. CONSTITUTIONAL LAW—VALIDITY OF STATUTE—UNLAWFUL DISCRIMINATION.—Crawford & Moses' Dig., § 7956, making notes given in payment of patented articles or rights void unless they show their consideration on their face, *held* not invalid as discriminatory, in view of § 7959, excepting merchants and dealers who sell patented things in the usual course of business.
3. COMMERCE—REGULATION OF SALE OF PATENTED ARTICLES.—Crawford & Moses' Dig., § 7956, prescribing the form of a note to be given for patented articles, *held* not an unlawful interference with interstate commerce, in contravention of art. 1, § 8, of Const. of U. S.

4. BILLS AND NOTES—CONSIDERATION—FORM OF NOTE.—A note given for a patented article, not executed in the form prescribed by Crawford & Moses' Dig. § 7956, is void.
5. COMMERCE—PATENTS.—A State law which discriminates against goods outside the State, either in respect to the commerce clause or the patent clause of the Constitution of the United States, is unconstitutional.
6. BILLS AND NOTES—PATENTED ARTICLE—EFFECT OF NOTE.—A note for a patented article which is void because not executed in the form prescribed by Crawford & Moses' Dig., § 7956, may be used in the evidence in arriving at the terms of the contract.
7. BILLS AND NOTES—PATENTED ARTICLE—EFFECT OF STATUTE.—Crawford & Moses' Dig., § 7956, prescribing the form of a note for patented articles, limits the seller's right of recovery to the terms of the contract, and makes available to the purchaser any breach thereof.

Appeal from Union Circuit Court; *L. S. Britt,* Judge; affirmed.

STATEMENT OF FACTS.

J. B. Colt Company sued L. D. Mitcham in the circuit court to recover $234.10, alleged to be due on a promissory note. The suit was defended on the ground that the note sued on was given for a patented carbide generator and appliances without showing upon its face that it was executed in consideration of a patented article, as required by statute.

The record shows that J. B. Colt Company is a foreign corporation, and that L. D. Mitcham is a resident of the State of Arkansas. L. D. Mitcham executed a written order, addressed to J. B. Colt Company at its New York City office, for one carbide generator and appliances. The written order was transmitted by a traveling salesman to the office of the J. B. Colt Company in New York City, and there accepted in writing by it. The article specified in the order was shipped by the company from New York City to L. D. Mitcham in Union County, Arkansas, and the latter executed his note for $234.10 in payment therefor. The note was not executed on a printed form, and did not show on its face that it was executed in consideration of a patented article.

The circuit court, sitting as a jury, found that the note sued on was void, and that the plaintiff was not entitled to recover thereon. From the judgment rendered, the plaintiff has duly prosecuted an appeal to this court.

Stewart & Oliver, J. M. Shackleford, Jean & Jones and *Wilfred C. Roszel,* for appellant.

S. E. Gilliam, for appellee.

HART, J., (after stating the facts). The validity of § 7956 of Crawford & Moses' Digest is the only question raised on appeal.

It is conceded that the constitutionality of the act has been sustained in the following cases decided by the Supreme Court of this State and of the United States: *Tilson* v. *Gatling,* 60 Ark. 114, 29 S. W. 35; *Wyatt* v. *Wallace,* 67 Ark. 576, 55 S. W. 1105; *Wood* v. *Carl,* 75 Ark. 328, 87 S. W. 621, and 203 U. S. 358; *Ozan Lumber Co.* v. *Union County National Bank,* 207 U. S. 251; *Columbia County Bank* v. *Emerson,* 86 Ark. 155, 110 S. W. 214; *Ensign* v. *Coffelt,* 102 Ark. 568, 145 S. W. 231; *Jonesboro Trust Co.* v. *Nutt,* 118 Ark. 368, 176 S. W. 322; and *Alley* v. *Riley,* 203 U. S. 347.

It is also conceded that, in the case last cited and in *Patterson* v. *Kentucky,* 97 U. S. 501, it was expressly decided that art. 1, § 8, of the Constitution of the United States, giving to Congress the power to promote the progress of science and useful arts, does not deprive the States of the right, under their police power, to regulate the form and prescribe the effect of negotiable instruments given for patented articles. The decision in the case of *Woods* v. *Carl,* 203 U. S. 358, was also based upon the same construction of this provision of our Constitution by the Supreme Court of the United States. In *Columbia County Bank* v. *Emerson,* 86 Ark. 155, 110 S. W. 214, it was held that the exception contained in the act, applicable to merchants and dealers who sell patented things in the usual course of business, contained in § 7959, does not render the act invalid as being an unlawful discrimination; and the case of *Ozan Lumber Co.* v. *Union*

County National Bank, 207 U. S. 251, was cited in support of the decision.

Counsel for the plaintiff, however, rely for reversal of the judgment upon art. 1, § 8, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce among the several States, and they contend that this court and the Supreme Court of the United States have left open this question because it was unnecessary to a decision of the contentions made in any of the cases heretofore decided.

We do not agree with counsel in this contention. In the case of *Tilson* v. *Gatling,* 60 Ark. 114, 29 S. W. 35, the court used this language: "That such an act does not violate § 8, art. 1, of the Constitution of the United States, giving to Congress the power 'to regulate commerce with foreign nations, and among the several States,' etc., and to 'promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries,' we think is settled by the better reason, and the weight of authority."

In *Wyatt* v. *Wallace,* 67 Ark. 575, 55 S. W. 1105, the court had under consideration the act in question, and expressly held that a note given by a citizen of this State for an interest in a patent right, which does not show upon its face that it was given therefor, is void. It is true that the case contains no discussion of whether the act in question is in contravention of the interstate commerce clause of the United States Constitution just referred to, but it is of some importance that the same judge wrote the decision in this case as delivered the opinion in *Tilson* v. *Gatling, supra.*

Again, in the case of *Woods* v. *Carl,* 75 Ark. 328, 87 S. W. 621, the court had the statute in question under consideration, and referred to the case of *Tilson* v. *Gatling,* 60 Ark. 114, 29 S. W. 35, as holding that the statute did not invade the power of Congress to promote the progress of science and useful arts by securing to inventors the exclusive right to their discoveries.

Continuing, the court said: "It is difficult to perceive any distinction between the validity of the two statutes in that regard; for, if the Legislature had the rightful power to pass one of the statutes, it had also the power to pass the other. If the jurisdiction of Congress over the subject of patents and patent rights is so extensive as to exclude the power of a State to declare void, unless made in certain form, written obligations given in consideration of sales of patent rights, or patented articles, then it also follows that the State is powerless to alter the established rules of the law merchant so as to permit defenses, not applicable to other negotiable paper, to be made to such paper given in consideration of sales of patent rights or patented articles."

Following this discussion, the court said: "In *Wyatt* v. *Wallace,* 67 Ark. 575, the precise question was presented there as presented here, and the court held that there could be no recovery upon the note sued on."

This court is committed to the doctrine that the main purpose of the act was to enable the maker of a negotiable instrument, given for patent rights or patented articles, to make the same defense thereto against any holder thereof that could be made against the original holder or party to whom it was given. *Roth* v. *Merchants' & Planters' Bank,* 70 Ark. 200, 66 S. W. 918; *Warmack* v. *Askew,* 97 Ark. 19, 132 S. W. 1013; and *Brenard Mfg. Co.* v. *McRee's Model Pharmacy,* 287 S. W. 187. Hence it is held in these cases that the failure to comply with the statute does not affect the validity of the sale, but renders only the note absolutely void.

It has been held further that, though the note may be void, the vendor may recover whatever may be due him on the contract of sale from the vendee. In the case of *Roth* v. *Merchants' & Planters' Bank,* 70 Ark. 200, 66 S. W. 918, to support the principle of law controlling the decision, the case of *Iron Mountain & Helena Railroad* v. *Stansell,* 43 Ark. 275, and other cases of like character, are cited. In the Stansell case it was held that, in an action for money due on a contract, change tickets

issued by the defendant in violation of the statute and delivered in payment of the debt, though illegal, may be used as evidence of the amount due on the contract. The court said that they were a written confession that the maker had received the value expressed in them.

In *Todd* v. *Wick Brothers & Co.,* 36 Ohio St. 370, one of the cases cited with approval in *Woods* v. *Carl,* 75 Ark. 320, 875 S. W. 621, it is said:

"The right to regulate the form and prescribe the effect of paper taken in commercial transactions has always been regarded as belonging to the State, and such right has been exercised in this State during the whole period of its existence."

Hence it was held that the act under consideration in that case was not in conflict with § 8 of the first article of the Constitution of the United States nor with the act of Congress enacted in pursuance thereof, relating to the granting of letters patent.

It is well settled by the decisions cited above and numerous other cases of like character that a state of law which discriminates against goods outside the State, either in respect to the commerce clause or the patent clause contained in § 8, art. 1, of the Constitution of the United States, is unconstitutional. We do not understand, however, that the Supreme Court of the United States has gone to the extent claimed by counsel for plaintiff, or has denied the power of the State to prescribe a form for notes given for patent rights or patented articles where such act does not directly affect interstate commerce.

As we have already seen, the effect of our former decisions is to hold that the State, by the passage of the act under consideration in the case at bar, has gone no further than to prescribe the form of notes given for patent rights and patented articles. The act is general in its application, and has not in any wise attempted to discriminate against goods manufactured and sold by owners residing in other States to persons in this State. The validity of contracts of sales of such goods has been

expressly upheld by this court in sustaining the constitutionality of the statute. Under our decisions, while no recovery can be had upon the note unless it is in the prescribed forms, still the note is capable of being used in evidence in arriving at the terms of the contract.

After all, the practical effect of our former decisions in construing the statute is to limit the right of recovery to the terms of the contract, and to give the purchaser of the patent right or patent article the right to avail himself of any defense he may have to the action. In the absence of such a statute, the purchaser would have that right against the owner of such goods, whether sold to him from within or without the State. So, too, in the absence of such a statute, only an innocent purchaser for value of the note before maturity would be afforded any protection against fraud in the procurement of the note or other infirmities attached to it, such as that the patent was void as not being novel and useful. In short, an innocent purchaser for value of the note will stand in the shoes of his vendor.

The result of our views in that we adhere to our former decisions in the interpretation of the statute, and hold that its enactment was a valid exercise of the police power, and that interstate commerce is only incidentally and remotely affected by it. It follows that the judgment will be affirmed.

POPE v. STATE.

Opinion delivered November 8, 1926.

1. HOMICIDE—MURDER IN SECOND DEGREE—EVIDENCE.—Evidence *held* sufficient to sustain conviction of murder in the second degree for cutting and stabbing deceased with a knife.
2. HOMICIDE—JURY QUESTION.—Conflicts in the testimony as to whether defendant or deceased was the assailant *held* for the jury.
3. CRIMINAL LAW—INCOMPETENT EVIDENCE—HARMLESS ERROR.—An incompetent answer by a witness in a prosecution for murder, not

responsive to the question asked, *held* not prejudicial where it was excluded on objection by defendant.

4. HOMICIDE—GENERAL REPUTATION.—A witness testifying that the general reputation of deceased was both good and bad cannot be questioned as to the details of the life of deceased having no relation to the killing, and an inquiry as to whether deceased's reputation was good among wealthy planters and bad among the poorer classes was properly excluded.

5. CRIMINAL LAW—CONDUCT OF COUNSEL—ACTION OF COURT.—Where the prosecuting attorney interrupted a witness who was being examined by defendant's counsel by directing him to tell what he knew and not what he believed, an instruction not to consider such remark cured any error.

6. WITNESSES—IMPEACHMENT OF ACCUSED ON CROSS-EXAMINATION.—In a prosecution for murder, cross-examination of defendant as to whether he had not cut other men, and one man in particular, which defendant admitted, was proper to test his credibility as a witness.

7. HOMICIDE—SELF-DEFENSE—INSTRUCTION.—In a prosecution for murder it was proper to instruct the jury that, if defendant armed himself with intent to kill deceased, and brought on a difficulty, the defendant could not invoke the law of self-defense, unless he abandoned or attempted to abandon the difficulty before striking the fatal blow.

8. CRIMINAL LAW—MODIFICATION OF INSTRUCTION AS TO SELF-DEFENSE.—A requested instruction on self-defense was properly modified by striking out as argumentative the statement that "in a contest betwen a powerful individual and a weaker, the necessity of taking life in self-defense will be more apparent and easily discovered."

Appeal from Clark Circuit Court; *J. H. McCollum*, Judge; affirmed.

McMillan & McMillan, for appellant.

H. W. Applegate, Attorney General, and *Darden Moose*, Assistant, for appellee.

SMITH, J. Appellant was convicted of the crime of murder in the second degree, under an indictment charging him with the crime of murder in the first degree, alleged to have been committed by cutting and stabbing one Newt Nelson with a knife.

One of the errors assigned for the reversal of the judgment is that the testimony is insufficient to support

a conviction for murder in any degree. This assignment of error may be answered by giving the version of the killing which Charles Anderson detailed to the jury. According to this witness, he and deceased were covering a house, when appellant walked up to where they were working, but said nothing. A stepson of the witness asked appellant if there was anything he wanted, when appellant said he wanted nothing, and walked away. Appellant went to town, and, in about half-an-hour, returned, and called to deceased, and stated that he had received a letter which he wanted deceased to read to him. Deceased climbed down from the house and proceeded to read the letter, which had been written to appellant by Bill Meador, who owned the farm on which both appellant and deceased lived. The landlord resided in another county. This letter stated that the writer had been advised that appellant, who was a sharecropper, had not fairly divided the corn grown by him when he gathered it, and, when this letter was read, appellant accused deceased of writing the letter to their landlord which had advised that appellant had not fairly divided the corn. Deceased denied writing to Mr. Meador, but appellant persisted in asserting that deceased had done so, when deceased said, "No sir, I will swear that I did not write the letter." As deceased made this remark appellant drew and opened his knife, and, when witness saw this, he yelled, "Run, Uncle Newt, Mr. Pope's going to cut you," and he saw Pope strike deceased in the back, and deceased ran, and was soon out of the range of witness' vision. When witness saw that appellant was about to assault deceased, he commenced climbing down from the roof of the house where he was working, but, before he could reach the parties, the "fight," as he called it, was over, and deceased was staggering down the hill from the house and appellant was walking rapidly away.

Surgeons who attended deceased testified that there were ten wounds on the body. One was across the right wrist, there was a cut in the thigh, one in the right side over the kidney, there were stab wounds in the breast,

and on the stomach, and the remainder of the wounds were in the back.

It was shown that appellant purchased, on the day of the difficulty, the knife with which deceased was killed. There was also testimony to the effect that there was bad blood between the men, and each had made threats against the other.

We think this testimony sufficient to support the verdict returned by the jury.

The testimony on the part of appellant was to the effect that he was assaulted by deceased, and that he attempted to retire from the difficulty, and that he finally cut deceased in his necessary self-defense. But these conflicts in the testimony were, of course, questions for the jury.

It is assigned as error that the court permitted witness Dickey to make erroneous and prejudicial statements in the presence of the jury. This witness was a white man, and so is appellant, while deceased was a colored man. This witness testified that appellant had made threats of violence against deceased. He also testified that deceased was a quiet and peaceful man. The witness was cross-examined at length concerning the sources of the information upon which his opinion that deceased's reputation was good was based. He was interrogated concerning the statement which he had made to the effect that he would not believe anything bad about deceased if a dozen witnesses testified to that effect, and he was interrogated concerning the time and place when and where he had heard appellant make threats against deceased, and the witness answered that "The day before Newt was killed he came to my house—his mailbox is in front of my house, and I saw him coming up to the mailbox, and it was raining, and the mail rider happened to come along, and I called him and told him to come in, I wanted to see him, and I told him about the threats Ed had made. I says 'Watch that man; I know that man,' and I says 'He'll grab you some day and cut you all to pieces.'" Counsel for appellant

objected to this answer, and stated that he had not asked the witness to relate the conversation between himself and deceased. The court inquired, "What did you ask him?" Counsel for appellant answered, "I asked him where it was he had the conversation with Ed Pope." The court then directed the witness to answer that question, and the witness replied, "I told him, Judge, as near as I can, where." Counsel then said: "I want to ask that this statement of the conversation with Newt be excluded," and the court replied: "Very well. It will be excluded." It is insisted that the statement of the witness, set out above, was voluntary, was not responsive to the question asked, and was highly prejudicial, and that the prejudice of the remark was not cured by the ruling of the court.

It is true, of course, that it was incompetent for the witness to detail his conversation with deceased and the advice he gave him about watching appellant, but the witness was being closely cross-examined touching threats which he had testified were made by appellant and with the obvious purpose of discrediting the witness. The question asked by the court indicated that the court was not clear as to the scope of the question, and the answer given by the witness, after the question was explained to the court by counsel, indicated that the witness thought he had answered the question asked. This answer was, of course, broader than the question, and included the incompetent conversation between witness and deceased, but the entire answer was excluded, upon motion of counsel for appellant that this be done. We hold therefore that, while the testimony was incompetent, the prejudice was removed by its exclusion. *Mo. Pac. Rd. Co.* v. *Keller,* 168 Ark. 626, 271 S. W. 7; *Hale* v. *State*, 146 Ark. 580, 226 S. W. 527.

Appellant called one Dave Anderson to testify concerning the general reputation of deceased. This witness testified that he knew the reputation of deceased for being a quarrelsome and arbitrary man, and that his reputation was both good and bad. He testified that

he had heard some people say it was bad, while others said it was good. The witness was then asked if the people who said deceased's reputation was good were not the wealthy planters. An objection to this question was sustained, and this ruling is assigned as error.

It is the insistence of appellant that the showing could have been made, had the court permitted it to be done, that deceased had a dual reputation, that among well-to-do persons and persons of influence deceased was polite and obsequious, while his attitude towards white people of the poorer class and towards colored people was overbearing and offensive.

We think no error was committed in the ruling made. The court permitted the introduction of testimony tending to show the general reputation of the deceased, and it is this which may be shown. Many circumstances may, collectively, make up this reputation, but it is the sum total of them all, or the general reputation, which may be shown. It was not proper therefore to inquire into the details of the life of deceased having no relation to the encounter which caused his death, and the inquiry was therefore properly confined to the general reputation of the deceased.

At § 222 of the chapter on "Homicide," in 13 R. C. L., page 919, it is said: "Where character evidence is offered in support of the contention that the deceased was the aggressor, or to characterize and explain his acts, the defense is restricted to proof of general reputation in the community where the deceased lived, and may not show particular acts or conduct at specified times. It may not be shown that the deceased had engaged in frequent fights in which he used deadly weapons, and therewith made deadly assaults on his antagonists. But, on the issue whether or not the accused had reasonable ground to believe himself in imminent danger, he may show his knowledge of specific instances of violence on the part of the deceased. But in no case may a witness state his opinion of the character of the deceased or

how the latter would have acted under any particular set of circumstances."

It is insisted that prejudicial error was committed by the prosecuting attorney in lecturing A. E. Jackson, one of the eye-witnesses to the encounter, who was called as a witness for appellant. Counsel for appellant asked this witness the following question: "When they quit (fighting), what was done by either or both of them?" The witness answered: "Well, when they quit, Mr. Pope ran across the track, and I believe the negro threw at him, maybe—" The prosecuting attorney interrupted the witness with the remark, "Wait a minute. We want you to tell what you know about him, not what you believe." Counsel for appellant objected to the interruption of the witness and to the lecturing of the witness by the prosecuting attorney, and asked that the statement of the prosecuting attorney be excluded from the record and the jury told it was improper. The court responded to this request of counsel by saying, "I will tell the jury they will not consider the statement of the prosecuting attorney made to the witness." We think this ruling cured the error, if any there was, in the remark of the prosecuting attorney.

On the cross-examination of appellant he was asked if he had not cut other men, and particularly if he had not stabbed a man named Crow, and the witness answered that he had. Exceptions were saved to these questions and answers. There was no error in this ruling. Such testimony was held competent in the recent case of *Whittaker* v. *State,* 171 Ark. 762, it being there held that it is within the discretion of the trial court to permit, within reasonable limits, an inquiry, on cross-examination, into the character and antecedents of the defendant for the purpose of testing his credibility as a witness, when the examination is limited to such antecedents as throw light on the credibility of the witness.

The court gave, over appellant's objection, an instruction numbered 11, which reads as follows: "If you believe from the evidence in this case, beyond a

reasonable doubt, that the defendant, armed with a deadly weapon, sought the deceased with the felonious intent to kill him, or sought or brought on, or voluntarily entered into, the difficulty with the deceased, with the felonious intent to take his life, then the defendant cannot invoke the law of self-defense, no matter how imminent the peril in which he found himself placed, unless the defendant abandoned or attempted to abandon the difficulty before the fatal blow was struck."

It is objected that this instruction assumed that defendant armed himself with a knife, and that the knife was a deadly weapon, and tells the jury, after so assuming, that appellant could not invoke the law of self-defense unless he abandoned or attempted to abandon the difficulty before the fatal blow was struck.

We do not think the instruction open to the objection made to it. On the contrary, the instruction submitted the question to the jury whether appellant had armed himself with a deadly weapon and had sought out deceased with the previous intent to kill him, or had brought on or had voluntarily entered into the difficulty, and the testimony on the part of the State warranted the submission of these questions. Having submitted these questions, the instruction told the jury that, if there was an affirmative finding, appellant could not invoke the law of self-defense unless he had abandoned or had attempted to abandon the difficulty before the fatal blow was struck. This instruction correctly declared the law, as has been stated by this court in several decisions.

The court refused to give, at appellant's request, an instruction numbered 3, which reads as follows: "If you believe from the evidence that the killing was done by Ed Pope while defending himself against an attack by Newt Nelson, it is your duty, in deciding upon the character of the defense, to carefully examine and consider all the circumstances of the difficulty, the true situation of the parties at the time, their respective feelings and intentions as shown by their acts, their threats and their relative strength and power (because, in a contest

between a powerful individual and a weaker, the necessity of taking life in self-defense will be more apparent and easily discovered)." The court refused to give this instruction as requested, but amended it by striking out the portion inclosed in parentheses.

We think no error was committed in thus modifying the instruction, because the part stricken out was argumentative in form. In the case of *Prewitt* v. *State,* 150 Ark. 279, 234 S. W. 35, an instruction was asked which contained almost the identical language which was stricken from the instruction in the instant case. In the Prewitt case, *supra,* the instruction was not modified, but was refused, and we said this was not error, and in so holding we said: "The instruction was argumentative in form. It was, of course, proper for the jury to consider the circumstances there recited, but this court has said in many cases that it is not good practice to single out and specially direct the attention of the jury to particular circumstances, thereby appearing to emphasize the circumstances named."

Upon a consideration of the whole case we find no error prejudicial to defendant, and the judgment will therefore be affirmed.

CAHILL v. BRADFORD.

Opinion delivered November 8, 1926.

1. NEGLIGENCE—CONCURRING NEGLIGENCE.—Where a pedestrian's injuries were caused by the concurring negligence of the drivers of two cars, he may sue one or both of them, although he can have but one satisfaction.
2. EVIDENCE—OPINION OF WITNESS.—Testimony of a witness that skid marks were marks of a certain automobile in collision *held* admissible as against the objection that it was a conclusion of the witness, where the position of the cars had not been changed when the witness saw them, and he could see which car had skidded and the place from which it began to skid and the place where it stopped.

3. EVIDENCE—OPINION OF WITNESS.—The opinion of a witness is admissible where the subject-matter to which his testimony relates cannot be reproduced or described to the jury as it appeared to the witness and the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending and understanding.

4. MASTER AND SERVANT—COURSE OF EMPLOYMENT.—Whether the driver of defendant's service car, who, at the time of the collision which occasioned plaintiff's injuries, had detoured one block to go on an errand of his own and was returning to defendant's place of business, was engaged in the master's service at the time the injury occurred, *held* properly submitted to jury.

6. TRIAL—INSTRUCTIONS IGNORING ISSUES.—Instructions which ignored the contention that defendant would be liable although the negligence of his driver in a collision was not the sole cause of the injury, if such negligence so contributed to the injury that it would not otherwise have happened, were erroneous where there was evidence tending to prove that plaintiff's injuries were occasioned by the concurring negligence of the drivers of both cars.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; reversed.

W. H. Pemberton and *W. R. Donham,* for appellant.

Price Shofner and *T. M. Mehaffy,* for appellee.

SMITH, J. M. E. Bradford is engaged in business as the M. E. Bradford Tire Company, and sells automobile tires in the county of Pulaski, and, as a part of the business, conducts what is called a road service, which consists in delivering tires and inner tubes on the roads and highways of the county as well as on the streets of the city of Little Rock, and, in connection therewith, owns and uses a number of service cars, with a driver for each car, who put on and installed the tires and inner tubes whenever he was called upon for such service.

Appellant Cahill was injured by the operation of one of these service cars, and brought this suit to recover damages to compensate the injury. He alleged, and offered testimony tending to show, that on the 9th day of June, 1924, he was standing on the sidewalk at the southwest corner of Second and Ferry streets, in the city of Little Rock, when the driver of one of the

Bradford service cars, while driving the car at a high and dangerous speed, and without having control of the car, drove the car on to the sidewalk where plaintiff was standing, pushing and forcing him entirely across the sidewalk and against a brick building which stands at the said corner, thereby breaking and crushing plaintiff's leg.

The answer contained a general denial of these allegations, and alleged the fact to be that, at the time of plaintiff's injury, the driver of the car was engaged in the discharge of a private errand of his own which had no relation to his employment, and that this was done without the knowledge or consent of defendant. It was further alleged that the driver was proceeding at a moderate speed, and was keeping a proper lookout, and was driving west on Second Street, where he approached the intersection of that street with Ferry Street, when another car, being driven south on Ferry Street, at a fast and dangerous speed, was suddenly propelled against the right fender and running-board of defendant's automobile, with great force and violence, causing the course of defendant's car to be changed to the left and south, and bending the rods and the steering apparatus of defendant's car, causing it to be run upon the sidewalk; that the collision was so sudden and violent that defendant's driver had no opportunity to avoid the collision, and the injuries sustained by plaintiff were caused solely by the careless and negligent operation of the automobile which ran into and against defendant's automobile.

There was a verdict and judgment for the defendant, from which the plaintiff has appealed.

Suit was brought against defendant Bradford alone, although there was testimony from which the jury might have found that the plaintiff's injury was occasioned by the concurring negligence of the drivers of both cars. This, of course, the plaintiff had the right to do, as the law is well settled that, if one is injured as the result of the concurring negligence of two or more joint tort-

feasors, the injured party may, at his election, sue one or more or all of them, although he can have only one satisfaction for his injury.

Among the witnesses who testified in defendant's behalf was J. P. See, who stated that "the skid marks were evidently the marks of the Ford, and it looked to me like the car had been pushed or jammed toward the sidewalk. These marks that I saw were skid marks where the car had been jammed toward the sidewalk. I mean swiped sideways."

This evidence was objected to by the plaintiff, on the ground that the witness was permitted to state a conclusion, whereas he should have described the conditions which he saw and left the inferences therefrom to be drawn by the jury.

We think this objection is not well taken. The position of the cars had not been changed, after the plaintiff's injury, when the witness saw them, and he could, of course, see and know what car had skidded and the place from which it began to skid and the place where it stopped. He said this was true because he saw the skid marks. This was not necessarily a matter of opinion. Preceding the language objected to—the language quoted—the witness had stated, as a part of the same answer, that the car (Bradford's) was hit about the end of the right fender. It would have required descriptive powers of a high order to have reproduced the scene witnessed by See without stating what he saw in the manner he did.

In the case of *Little Rock Traction & Electric Co.* v. *Nelson,* 66 Ark. 494, 52 S. W. 7, it was said: "As a general rule, witnesses who are not required to testify as experts must state facts, and not conclusions. The opinions of such witnesses are admissible on conditions which are correctly stated in *Commonwealth* v. *Sturtivant,* 117 Mass. 122, 137, as follows: 'First, that the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; and, second, that the facts upon which the witness is called upon to express his opinion are such

as men in general are capable of comprehending and understanding.' According to this rule, opinion evidence is not admissible when the fact is susceptible of being adequately exhibited to the jury in the ordinary way.''

There is involved in the answer of the witness a mixture of fact and opinion, but the portion of the answer which is objected to as an opinion is a part of the description of the conditions which the witness saw. It may have been difficult for him to have otherwise reproduced the scene to the jury, and the statement as a whole was one which men in general could comprehend and understand.

It is insisted that the court erred in submitting to the jury the question whether the driver of defendant's car had so far departed from the scope of his employment as to discharge defendant from liability for the negligence of the driver. It is a close question, under the facts of this case, whether this question should have been submitted to the jury. Defendant's driver had been to the Rock Island depot, which is on Third Street, to deliver tires, and had started to return to defendant's place of business, which is also on Third Street but a number of blocks west of the depot. The driver's most direct route would therefore have been to return via Third Street, but, instead of this, he was returning on Second Street, a street which is adjacent to and parallel with Third Street. If only this had been shown, we would hold, on the authority of the cases of *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, and *Bizzell* v. *Hamiter,* 168 Ark. 476, 270 S. W. 602, as a matter of law, that the detour was so slight that there had been no departure from the master's business. The testimony shows, however, that some white man had given to defendant's driver, who is a colored man, a suit of clothes, which required altering, and that the driver was on the way to the shop of a tailor on Second Street to have the alteration made. This was a matter of which the master had no knowledge or concern and which had no relation to the driver's employment, and we have

concluded therefore that there was a question for the jury, whether the servant was pursuing the general course necessary to accomplish the purposes involved in his master's business at the time the injury occurred. The instructions given conformed to the opinion of this court in the case of *Healey* v. *Cockrill, supra,* where the authorities were reviewed and the law of the subject declared.

As has been said, the defendant interposed two defenses. The first was the one which we have just discussed and have said was properly submitted to the jury. The second was that the injury was caused solely by the negligence of the driver of the car which collided with defendant's car. That car was a Star car, and is referred to by the witnesses under that name. Defendant's car was a Ford roadster.

The instructions given by the court, at the request of the plaintiff, were to the effect that defendant would be liable if the injury was caused by the negligence alone of the driver of defendant's car or as a result of the concurring negligence of the driver of defendant's car and that of the driver of the Star car. Without further recitation of the testimony, it may be said that the testimony is sufficient to support a finding either that the negligence of defendant's driver was the sole cause of the injury or that the injury was occasioned by the concurring negligence of the drivers of both cars. On behalf of defendant the testimony was to the effect that the negligence of the driver of the Star car was the sole cause of the injury.

It is insisted that the instructions given on behalf of the defendant do not properly take into account the theory that defendant would be liable if the injury to plaintiff was the result of the concurring negligence of the two drivers, an objection which was specifically made to a number of the instructions given at the defendant's request.

We have concluded that the objection is well taken, and that the instructions given at defendant's request are erroneous for this reason.

The court gave, at defendant's request, instructions numbered 2, 3, and 10, which read as follows:

"2. You are instructed that, before you can find the defendant liable in this case, it must be shown by the greater weight of testimony: First, that the defendant was guilty of negligence that caused the injury; second, that he was in the employ of the defendant at the time; and, third, that the injury was committed at a time when the servant was in the prosecution of his master's business; and if the plaintiff has failed to show either of these by a fair preponderance of evidence, then your verdict must be for the defendant.

"3. The burden of proof is on the plaintiff to make out his cause by a fair preponderance of the evidence, and you are therefore instructed that, if he has failed to show either that the defendant's driver was guilty of negligence that caused the injury, or that the injury was caused while the driver was in the prosecution of defendant's business, in either event your verdict will be for the defendant."

"10. You are instructed that, before the plaintiff is entitled to recover in this case, he must show by a fair preponderance of the evidence, not only that the defendant's servant was negligent, but that his negligence, without the intervention of any other independent agency, caused the injury, and, if he has failed to do this, your verdict must be for the defendant."

It is insisted, in defense of these instructions, that, when read in connection with the instructions given at the request of the plaintiff, the law of the case was submitted as a harmonious whole, and that these instructions were necessary to make it plain that it was essential, before defendant could be held liable for the injury, for the jury to find that the injury was due to the negligence of defendant's servant, either alone or in concurrence with that of the driver of the other car.

We think, however, in view of the specific objection made to these instructions, that they cannot be thus reconciled with the instructions on the subject given at the request of the plaintiff. *Garrison Co.* v. *Lawson,* 171 Ark. 1122. Each of these instructions told the jury under what conditions the verdict should be for the defendant, and none of them took into account the fact that the defendant would be liable, although the negligence of his driver was not the sole cause of the injury, if such negligence so contributed to the injury that it would not otherwise have happened.

We think instruction numbered 10 is especially objectionable, in view of the issues of fact in the case, and for the error in giving this instruction, as well as instructions numbered 2 and 3, the judgment of the court below must be reversed, and the cause remanded for a new trial, and it is so ordered.

STOVER v. STATE.

Opinion delivered November 8, 1926.

1. INTOXICATING LIQUORS—MAKING MASH—EVIDENCE.—Evidence *held* sufficient to sustain a conviction of making mash for distillation of intoxicating liquor.
2. CRIMINAL LAW—REMARK OF COURT—PREJUDICE.—A remark of the court in a liquor prosecution that "this is a case in which it looks like we are not going to get the witnesses here for the defendant," made because of failure of several of defendant's witnesses to answer upon call of the case, *held* harmless, especially in view of immediate admonition to the jury to disregard the remark.

Appeal from Clark Circuit Court; *James H. McCollum,* Judge; affirmed.

Fletcher McElhanon and *R. W. Huie, Jr.,* for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Clark County for the

crime of making mash for the distillation of intoxicating liquor, and was adjudged to serve a term of one year in the State Penitentiary as a punishment therefor, from which judgment an appeal has been duly prosecuted to this court.

Appellant assigns two alleged errors as grounds for a reversal of the judgment, the first being that the evidence is not sufficient to support the verdict, and the second, that the trial court made an improper remark in the presence and hearing of the jurors which prejudiced his rights.

(1). The testimony introduced by the State was to the effect that the sheriff of the county and two other officers discovered a still a mile and a-half or two miles east of appellant's home about a week before he was arrested. During the interim the still was moved to a point about three-quarters of a mile west of appellant's home. After the removal of the still, the officers discovered two barrels containing mash near it, and a pot about twenty-five yards from the barrels. Early the next morning they returned to the scene and concealed themselves behind some bushes. In the neighborhood of 8 o'clock A. M., the sheriff and one of the officers, W. D. Cook, observed appellant carrying water from a nearby branch to the barrels, and, from his swinging movement, thought that he was stirring the mash in the barrels. Their view was obstructed to some extent by intervening bushes. The other officer, H. L. Bachelor, was about ten or fifteen feet from his brother officers, and had a better view than they had. He testified that appellant passed within ten or fifteen steps of him, with a bucket on his arm; that he made two trips to the branch for water, which he poured in the barrels, then stirred the mash in the barrels with a stick; that he observed appellant closely, taking particular notice of his very unusual mustache, and noticed, particularly, that appellant was the man who carried the water and stirred the mash. The officers went back to the still the following morning, and found that the mash had been run off, and that the worm

had been attached to the pot, which was hot, having been fired up. They also found some whiskey in a tin can. After pouring out the mash and whiskey and destroying the still, they repaired to a point near appellant's home, and again concealed themselves. A short time after sunup, appellant approached the house, in a drunken condition, and was arrested by the officers. His clothing was wet up to his waist. His excuse for being away from home so early was that he had been out hunting for a neighbor's cow.

The testimony recited above is ample to support the verdict. Appellant was positively identified as the man who was mixing the mash, and the circumstances warranted the inference that he was guilty of making mash fit for the distillation of intoxicating liquor.

(2). On the call of the case for trial, several of appellant's witnesses failed to answer to their names, whereupon the court said, "This is a case in which it looks like we are not going to get the witnesses here for the defendant." The remark was made in the presence of all of the jurors on the regular panel, and was objected to and excepted to at the time by appellant. The court told the jury that he did not intend to reflect upon appellant, and for them to disregard the remark entirely in their consideration of the case.

We do not see how the remark could have prejudiced the rights of appellant, but, if it tended to do so, the immediate admonition of the court necessarily removed any resultant prejudice.

No error appearing, the judgment is affirmed.

HUGHES-SPEITH PIPE LINE COMPANY v. MCWILLIAMS HARDWARE & FURNITURE COMPANY.

Opinion delivered November 8, 1926.

1. GARNISHMENT—EFFECT OF SUBSEQUENT JUDGMENT AGAINST GARNISHEE.—A garnishee cannot avoid liability for funds garnished by reason of having subsequently paid all funds in his hands belonging to defendant by order of court to the receiver in another suit against defendant, where the garnishee failed to contest the payment to the receiver on the ground of the prior garnishment having imposed a lien on the funds.
2. PLEADING—AMENDMENT—DISCRETION OF COURT.—Refusal to permit an amendment to an answer which conflicts with the original answer, and was not requested until the case was called for trial, *held* within the court's discretion.

Appeal from Union Circuit Court, Second Division; *W. A. Speer,* Judge; affirmed.

Marsh & Marlin, for appellant.

Mahony, Yocum & Saye, for appellee.

HUMPHREYS, J. On December 20, 1924, appellee brought suit in the second division of the Circuit Court of Union County against J. J. Page, upon a note for $487.50, with interest at 10 per cent. per annum until paid, for which amount it prayed judgment.

Based upon the allegation in the complaint that appellant was indebted to J. J. Page in the sum of $500, it prayed for and obtained a writ of garnishment, which was duly issued and served upon appellant upon the same day the suit was brought.

On the 9th day of March, 1925, judgment by default was rendered against J. J. Page upon the note, and appellant was given until April 15, 1925, to file an answer to the writ of garnishment. On said date it filed the following answer:

"Comes now the Hughes-Speith Pipe Line Company, garnishee herein, and, for its answer to the writ of garnishment herein served on the 20th day of December, 1924, states that, on and after the service of the writ of garnishment in this cause, it had and held in its hands and possession goods, chattels, moneys, credits and effects

accrued to the credit of J. J. Page on account of oil run from a certain oil and gas lease located in Union County, Arkansas, as follows, to-wit:

"The northwest quarter of the northwest quarter of section 23, township 16 south, range 15 west, in the sum of $487.50.

"That, subsequent to the service of the writ of garnishment in this cause, and prior to a judgment by default obtained herein on the 9th day of March, 1925, in the case of T. L. Senter, plaintiff, *v.* J. J. Page, defendant, in the Union Chancery Court, Second Division, it was, on the 24th day of December, 1924, ordered by said court to pay over to and deliver to V. L. Robie, the duly appointed receiver in said cause, all sums of moneys then in its hands and possession, and authorized said receiver to collect and receive all moneys accruing on account of oil runs from said above described lease.

"That, pursuant to and in accordance with said order of the Union Chancery Court, Second Division, all sums arising or becoming due to the said J. J. Page, on account of oil runs from the above described lease, by this garnishee, were by this garnishee paid to the said V. L. Robie, receiver, and his successor, Windell Utley, receiver in said cause of F. L. Senter, plaintiff, *v.* J. J. Page, defendant, same being cause No..... of the Union Chancery Court, Second Division.

"That, on account of its having complied with said order of court, it did not, at the time of the rendition of the judgment in this cause on the 9th day of March, 1925, have or hold in its hands or possession goods, moneys, chattels, credits or effects, of any nature or character, owing or belonging to the defendant, J. J. Page.

"Wherefore, having answered, garnishee prays that it be discharged from further answering, for all its cost herein, and all other proper relief."

On April 23, 1925, appellee filed a demurrer to the answer of the garnishee, and a motion for judgment, upon the grounds that the facts stated in the answer were insufficient to constitute a defense to the writ. The

cause was called for trial on May 20, 1925, whereupon appellant filed a motion for permission to amend its answer as follows:

"Comes now Hughes-Speith Pipe Line Company, garnishee herein, and prays leave to amend its answer herein, and for cause states:

"That, by error or oversight, it omitted from its answer, as garnishee herein, the allegation that, at the time of service of the writ of garnishment herein, the defendant, J. J. Page, owed and was indebted to it in the sum of $4,500 as balance due on a certain mortgage debt secured by mortgage recorded in book....., page ....., of the records of Union County, Arkansas, and that said mortgage debt was due and unpaid and is yet unpaid, and that it has the right to offset the amount of $487.50 on said indebtedness. That same was the value of one-half of oil run from said lease during the last 15 days.

"That said facts are true, and that same should have been alleged in the original answer of the garnishee herein.

"That said answer was proffered by Tom Marlin of the firm of Marsh & Marlin, who was not at the time furnished with the above facts, the same not being called to his attention at the time of said answer.

"Wherefore he prays leave to amend the said answer herein to incorporate said facts herein."

The motion was duly verified.

The trial court denied the motion of appellant to amend its answer, sustained the demurrer to its original answer, and rendered a judgment against it for $487.50, from which is this appeal.

The two questions to be determined on this appeal are, whether the original answer stated facts sufficient to entitle the appellant to a release from the writ of garnishment, and whether the trial court abused its discretion in refusing to allow appellant to amend its answer.

The original answer was insufficient as a defense, because appellant made no showing that he contested the claim of the receiver to the money he owed J. J. Page in the suit in the chancery court, wherein F. L. Senter was plaintiff and J. J. Page was defendant. It should have appeared in that suit and defended against the payment to the receiver therein of the amount it owed J. J. Page, upon the ground that the writ of garnishment issued in the instant case and served upon it December 20, 1924, fastened a lien upon said fund in its hands. The failure to plead its action on its part rendered its original answer herein ineffectual. *Hartford Fire Ins. Co.* v. *Citizens' Bank of Booneville,* 166 Ark. 551, 206 S. W. 675, 39 A. L. R., 1458.

The defense tendered in its proposed amendment to the original answer was inconsistent with the defense contained therein. In fact, it was in direct conflict with the allegations in the original answer. It was also a belated request, not having been made until the case was called for trial. We cannot say, under these circumstances, that the court abused its discretion in not allowing the amendment to be made. *Cumbie* v. *St. L. I. M. & S. R. Co.,* 105 Ark. 406, 151 S. W. 237.

No error appearing, the judgment is affirmed.

CATE-LANIEVE COMPANY v. PLANT.

Opinion delivered November 15, 1926.

1. ATTACHMENT—INTERVENTION—TITLE OF INTERVENER.—An intervener claiming property seized under a writ of attachment against a third person must prevail, if at all, upon the strength of his own title.
2. MORTGAGES—BILL OF SALE DISTINGUISHED.—A bill of sale of logs, on its face an absolute conveyance, though intended as security for money advanced for payment of the logs, is not a chattel mortgage nor subject to the mortgage registration laws.
3. SALES—CONSTRUCTIVE DELIVERY OF LOGS.—Where logs were purchased from plaintiff by an agent of a lumber company and a

bill of sale was given to one advancing money for purchase of the logs, which are held by the lumber company and converted into hoops for the one advancing the money, the delivery was sufficient to pass title to the latter.

4. SALES—CONSTRUCTIVE DELIVERY.—Constructive delivery on the sale of a chattel is sufficient to pass title, and the intention of the parties, when manifested by any overt act, is controlling.

Appeal from Prairie Circuit Court, Northern District; *George W. Clark,* Judge; reversed.

Emmet Vaughan and *E. L. Westbrooke,* for appellant.

John E. Miller, Culbert L. Pearce and *Craig & Wimmer,* for appellee.

McCULLOCH, C. J. Appellee was the plaintiff below in an action at law instituted against R. W. Bowen to recover upon a promissory note executed by the latter. An order of attachment was duly issued at the time of the commencement of the action, and the writ was levied on 459 sawlogs as the property of Bowen. Appellant interpleaded in the action, claiming to be the owner of the attached property. Bowen made default, and a judgment was rendered against him on the note, and the attachment was sustained. The issue between appellant and appellee on the former's interplea was tried before the court sitting as a jury, and the trial resulted in a finding and judgment against appellant.

Appellant is a foreign corporation, engaged in the hoop business at Memphis, Tennessee. The Des Arc Hoop & Lumber Company is a domestic corporation, owning and operating a plant at Des Arc for the manufacture and sale of hoops and other timber products. R. W. Bowen is the president and acting manager of the Des Arc Hoop & Lumber Company. The lumber company purchased logs from various persons and manufactured them into hoops and lumber and sold the product to appellant and other dealers in those lines of business. It was the custom between appellant and the lumber company that, when the latter purchased logs for the manufacture of hoops, appellant furnished the money to

pay for same and the lumber company gave appellant a bill of sale for the logs purchased. The logs were then transported to the mill at Des Arc, and hoops manufactured therefrom were shipped to appellant. Appellant took the hoops at the prevailing market price at the time of shipment, which was agreed upon between the parties from time to time, and the price was credited to the lumber company on appellant's books, the amount advanced to purchase the logs having been already charged to the lumber company, and settlement between the two corporations was made on the basis of the difference between the amount advanced by appellant for the purchase of the logs and the market price of the hoops delivered.

Appellee was originally the owner of the logs in controversy, and sold them to the lumber company, R. W. Bowen acting for the company in the purchase. The logs were then banked on Black River, and, after the sale and purchase, were thrown into the river and rafted and then floated down Black River into White River, and thence down White River to Des Arc. On the day the logs were purchased from appellee they were scaled, and appellee executed the following certificate to appellant:

"7/27/23.

"Cate-LaNieve Co.,
Memphis, Tenn.:

"R. W. Bowen has this day scaled 459 elm logs which are clear from all incumbrance.

"T. C. & R. L. Plant,
"By T. C. Plant, Bald Knob, Ark."

The scale of the logs, showing 53,226 feet, was forwarded to appellant by the lumber company, together with a bill of sale for the logs, duly executed by Bowen as president of the lumber company, and appellant sent a check for $852.61, the purchase price of the logs, and this check was delivered to appellee in payment. The bill of sale was dated July 28, 1923, and was in absolute terms conveying the logs to appellant.

The order of attachment in this case was levied on the logs after they reached the mill at Des Arc. Bowen testified that he purchased the logs for his company, and was acting for the latter throughout the transaction. Bowen and the secretary of appellant company, Mr. Bigelow, both testified concerning the method of doing business between appellant and the lumber company, and their testimony is undisputed. Appellee did not introduce any evidence, but relied upon the supposed failure of appellant to make out a case showing title to the property in controversy. The trial court found, as before stated, in favor of appellee, and the primary question presented on this appeal is whether or not the evidence is legally sufficient to support the finding of the court.

Counsel for appellee rely upon the settled rule of law, that an interpleader claiming property seized under a writ of attachment against a third person must prevail, if at all, upon the strength of his own title.

The bill of sale executed by the lumber company to appellant is, on its face, an absolute conveyance, but the evidence tended to show that it was really intended as security for the money advanced by appellant for the payment of the price of the logs. This fact is mentioned for the reason that counsel for appellee treat it as of primary importance in sustaining the judgment of the court. Their argument in support of the judgment is that the bill of sale was nothing more nor less than a chattel mortgage, and that it was void against third parties because not filed or recorded. The answer to this contention is that the instrument was not in form of a mortgage, even though so intended by the parties, and is not controlled by registration laws governing mortgages. *Martin* v. *Schichtl,* 60 Ark. 595, 31 S. W. 458; *Priddy & Chambers* v. *Smith,* 106 Ark. 79, 152 S. W. 1028, 44 L. R. A. (N. S.) 285; *Williams-Echols D. G. Co.* v. *Bloyd,* 169 Ark. 529

The case stands, then, the same as if the bill of sale was in fact what it purported to be on its face,

an absolute conveyance, and the case turns upon the question of fact whether or not there was a sufficient delivery of the property to pass the title. Bowen, the defendant in the attachment, has never been the owner of the property, for, according to the undisputed evidence, he was acting for his company in making the purchase. When the title passed out of the appellee, the original owner, it went to the purchaser, Des Arc Hoop & Lumber Company, and thence passed to appellant under the bill of sale, if there was a sufficient delivery to consummate the conveyance. There is no question of fraud involved in the case, and appellee is not claiming as an innocent purchaser. He is merely an attaching creditor, and, if there was sufficient delivery, either actual or constructive, to pass the title, then the judgment, of course, should have been in favor of appellant. It has always been the rule of this court that constructive delivery on the sale of a chattel is sufficient to pass title, and that the intention of the parties, when manifested by any overt act, is controlling. *Cocke* v. *Chapman*, 7 Ark. 197; *Durr* v. *Henry*, 44 Ark. 301; *Shaul* v. *Harrington*, 54 Ark. 305, 15 S. W. 835; *Lynch* v. *Daggett*, 62 Ark. 592, 37 S. W. 227; *Guion Mercantile Co.* v. *Campbell*, 91 Ark. 240, 121 S. W. 164; *Elgin* v. *Barker*, 102 Ark. 482, 153 S. W. 598; *Vance* v. *Bell*, 153 Ark. 229, 240 S. W. 8. In *Shaul* v. *Harrington, supra*, it was said: "If the vendee may leave the vendor in possession to enjoy temporarily the full fruits of ownership, as was done in Twine's case, and yet be allowed the opportunity to maintain his title, as he may in this State, the reason is all the stronger for allowing the vendor to retain possession as bailee for the vendee's profit and benefit."

The testimony in this case shows unmistakably that the intention of the parties was to transfer the title of the property to appellant, and that the lumber company, as the vendor, should retain possession merely for the profit and benefit of the vendee, so this brings the case squarely within the rule announced by the court in *Shaul* v. *Harrington, supra*. The facts of the case also come

clearly within the rule announced by the court in *Lynch* v. *Daggett, supra,* and in that case the facts with regard to delivery were the same, the only difference in the cases being that one was in fact an absolute sale, whereas, in the present case, the bill of sale was intended as security; but, as we have already seen, that distinction is immaterial. The case also falls within the control of our decision in *Vance* v. *Bell, supra,* where there was a bill of sale executed without actual delivery or visible change of possession, and the property remained in possession of an employee of the vendor. The trial court held, the same as in this case, that there was no delivery, but this court reversed the judgment, holding that the delivery was complete.

It follows that the judgment of the circuit court was, upon the undisputed facts in the case, incorrect, and the same must be reversed. Appellant having given bond for the attached property, and the case having been fully developed in the trial below, it is unnecessary to remand the cause for a new trial, and judgment will be entered here in favor of appellant. It is so ordered.

McCONNELL *v.* ARKANSAS COFFIN COMPANY.

Opinion delivered November 15, 1926.

1. LIMITATIONS OF ACTIONS—RUNNING ACCOUNT.—An account sued on which merely stated charges and credits is not a "mutual open account current," within Crawford & Moses' Dig., § 6964, making the course of action thereon to accrue from the time of the last item, but is a mere open running account.
2. LIMITATION OF ACTIONS—PAYMENT ON RUNNING ACCOUNT.—Partial payments made on a running account, generally without specifying any particular item, interrupt the running of the statute, so as to constitute a new point from which the statute begins to run as to the whole account.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; affirmed.

A. M. Dobbs, for appellant.

Daily & Woods, for appellee.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover a balance of $2,459.27 on open account for merchandise sold and delivered, and appellant pleaded the statute of limitation as to all the items of the account except the last ones, aggregating $943.30, as to which liability was admitted. There is no controversy as to the original correctness of the account, the only question in the case being whether recovery is barred by limitation. The cause was tried before the court sitting as a jury, and there was a finding in favor of appellee for the full amount of the balance on the account.

The case was heard on an agreed statement of facts, from which it appears that appellee was a wholesaler and appellant a retailer, and that numerous purchases were made by appellant from appellee, beginning with December 11, 1919, and ending November 1, 1921, the total of all the items being the sum of $3,360.10, and payments were made thereon in the aggregate of $900.83, reducing the balance of the account to $2,459.27. It is further shown in the statement of facts that the various bills of goods were shipped on separate orders of appellant, made from time to time; that the invoice for each separate shipment was mailed out and the amount thereof was due and payable ninety days from date; that appellee kept a ledger account of the sales, item by item, the said account consisting solely of charges on one side and credits of payments on the other; that payments were made on the account after the last item, and within three years before the commencement of the action, and that there was "no agreement or understanding between the parties as to what portions of the account the respective payments should be applied," but that the payments were made by appellant and credited by appellee generally on the account, and not to any particular item.

It is plain that the action is not one upon "mutual open account current," within the definition of the statute (Crawford & Moses' Digest, § 6964) which makes

the accrual of the cause of action run from the last item on the account, for the reason that this account was merely one of charges on one side and credits of payments on the other. *McNeil* v. *Garland,* 27 Ark. 343; *Parker* v. *Carter,* 91 Ark. 162, 120 S. W. 836. The account sued on was just an open running account, consisting of various items, and the real question in the case is whether or not the payments generally upon the account interrupted the running of the statute so as to constitute a new point from which the statute began to run. According to the statement of facts, the payments were made on the account, and not in discharge of any particular item.

The doctrine contended for by counsel for appellee is aptly stated in the decision in *Day* v. *Mayo,* 154 Mass. 472, 28 N. E. 898, as follows:

"Where a partial payment is made on account of an existing indebtedness, the whole debt upon which such payment is made is thereby taken out of the statute of limitations up to that time. The identity of the debt sued on with that upon which the payment was made must, of course, be established. But, if it is shown that the payment was made to apply upon an indebtedness consisting of many items, all of them will thereby be saved from the effect of the statute. The payment is an acknowledgment of the existence of the indebtedness, and raises an implied promise at that time to pay the balance."

This court has adopted the same rule. In *Nunn* v. *McKnight,* 79 Ark. 393, 96 S. W. 193, the decision of this particular question was not essential to a disposition of the issues in the case, but Judge RIDDICK, who wrote the opinion of the court, stated his own personal view to be that a payment generally on account would "make a new point for the running of the statute as to the whole account." In *Pettus* v. *Rawles,* 131 Ark. 125, 198 S. W. 874, we distinctly recognized the rule that a payment of that kind would arrest the statute, but we found that, under the circumstances of that particular case, there was not such a payment made. In *W. T. Rawleigh Co.*

v. *Pritchard,* 151 Ark. 390, 236 S. W. 833, we decided outright that a general payment on account, without specifying any particular item, constituted such a payment on the whole account as would arrest the running of the statute. Counsel for appellant insist that this rule would only obtain in the case of an account stated, but we do not think that the rule can be thus limited, for a payment made generally on a running account is as much a recognition of the continued existence of the whole debt as if it were upon an account stated.

Our conclusion is that the court was correct in its ruling, and the judgment is therefore affirmed.

HESTER v. ARKANSAS RAILROAD COMMISSION.

Opinion delivered November 15, 1926.

1. CARRIERS—REGULATION OF MOTOR BUSSES.—By Acts 1921, p. 177 *et seq.*, the Railroad Commission is authorized to regulate the operation of common carriers, including motor busses and similar vehicles operated for hire on public highways.
2. HIGHWAYS—REGULATION OF USE.—The use of public highways for business purposes is not a matter of common right which any citizen may enjoy at will, but it is a privilege which the State may either extend or withhold.
3. AUTOMOBILES—MOTOR BUSSES—SURETY BONDS.—A regulation of motor busses by the Railroad Commission under authority of Acts 1921, p. 177 *et seq.*, is not invalid in requiring that an indemnity bond be signed by an authorized surety company.
4. AUTOMOBILES—MOTOR BUSSES—REQUIREMENT OF SURETY BONDS.—Where the Railroad Commission, under authority of Acts 1921, p. 177 *et seq.*, required bus operators to furnish corporate surety bonds before giving license to operate, the fact that the bond required could not be given by an applicant, and that the business could not stand the expense of a corporate surety bond, did not render the regulation invalid on account of unreasonableness.
5. LICENSES—VALIDITY OF REGULATION.—The validity of the regulation of a business operated under a license cannot be made to depend upon the ability of the applicant to comply therewith.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

Sidney L. Graham, for appellant.

H. W. Applegate, Attorney General, and *Brooks Hays,* Assistant, for appellee.

McCULLOCH, C. J. Appellants have each been engaged in the business of operating motor cars or busses on the public highways of Pulaski County, and they attack the validity of the regulation prescribed by the Arkansas Railroad Commission requiring all persons operating such business to deposit with the Commission "a liability or indemnity contract, written by some solvent insurance or indemnity company authorized to do business under the laws of the State of Arkansas, agreeing to indemnify the legal liability of said owner or licensee of said motor or jitney bus on account of personal injury, in the sum of $5,000, to any one person, and $10,000 for any single accident where more than one person is injured or killed, and $1,000 on account of property damage to any one." Appellants each applied to the Railroad Commission for a permit, or license, to operate busses, and offered to give bond in the sums named in the rules prescribed by the Commission, executed by personal sureties, but the Commission declined to approve the bond or to issue a permit, and appellants resorted to an action in the Pulaski Circuit Court to compel the Commission to accept the bond. Relief was denied in the circuit court, and an appeal has been prosecuted to this court.

Appellants introduced testimony, in the hearing before the Railroad Commission, to the effect that the premium rate for a bond such as that required was $270 per annum; that the income of one of appellants from the business amounted to eighty or ninety dollars per month, and that of the other about $120 per month. This was urged as a reason for treating the requirement as unreasonable and oppressive.

The statutes of this State (Acts 1921, p. 177) plainly authorized the Commission to regulate the operation of

common carriers, and we have held that this authority extends to the operation of motor busses and vehicles of that kind being operated for hire on a public highway. *Mason* v. *Inter-City Terminal Ry. Co.,* 158 Ark. 542; *Railroad Commission* v. *Independent Bus Line, ante* p. 3. The contention in the present case is, however, that the regulation that requires a bond executed by a surety company, and not permitting bonds executed by personal sureties, is arbitrary and unreasonable, and should not be upheld. The validity of this regulation must be tested in the light of established law, to the effect that the use of the public highways for business purposes is not a matter of common right which any citizen may enjoy at will, but it is a privilege which the State may either extend or withhold. *Pine Bluff* v. *Arkansas Traveler Bus Co.,* 171 Ark. 727.

The regulation is not invalid merely because it prescribes the kind of surety to be given on the bond. The fact that appellants are unable to give the bond required, or that the particular business in which they are engaged will not stand the expense of a surety company bond, does not render the provision unreasonable. If the inability of an applicant for license to comply with the regulation concerning the same were sufficient to render the regulation invalid, then there could be no regulation at all. The validity of the regulation of a business operated under a license cannot be made to depend upon the ability of the applicant to comply.

Counsel for appellants rely upon the case of *Jitney Busses Association* v. *Wilkes-Barre,* 256 Pa. 452, 100 Atl. 954, as sustaining their contention, and the case does seem to hold that such a provision is unreasonable and void, but the decision does not appeal to us as being sound, and we decline to follow it.

There are many decisions upholding the right of a State or municipality to regulate carriers on the public highway, and such regulations are generally sustained, but there are only a few cases which relate to the particular point involved in the present case, namely, the

requirement to give bond with a surety company as surety. There are several decisions of the Supreme Court of Washington, beginning with the case of *State* v. *Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 S. W. 837, which uphold a regulation identical with the one now under consideration. Other authorities are to the same effect. *Lutz* v. *New Orleans,* 235 Fed. 978; *New Orleans* v. *LeBlanc,* 139 La. 113, 71 So. 248; and *Ex parte Sullivan,* 77 Texas Cr. App. 72, 178 S. W. 537. In *Packard* v. *Banton,* 264 U. S. 140, the court had under consideration the validity of a New York statute requiring persons engaged in the business of carrying passengers for hire in motor vehicles to file with the State Tax Commission either a bond with personal sureties or one of a surety company for the payment of any judgment recovered against such persons. It was alleged in the case that the rate fixed by surety companies for such a bond was $960, that the net income of the applicant's business in operating the vehicle was only thirty-five dollars a week, and that the regulation was oppressive and void. The court, in upholding the validity of the regulation, said: "The operator, under the statute, however, is not confined to this method of security, but instead may file either a personal bond with two approved sureties, or a corporate surety bond. Appellant says that he cannot procure a personal bond, but it does not appear that he might not procure the corporate surety bond at a less cost." Counsel for appellants quote this language in support of their contention, but such is not, we think, the effect of the language used. That was merely an argument used by the court in upholding that particular regulation, and it is not an authority in support of appellant's contention that the regulation now under consideration is void because the bond must be executed by a surety company. The concluding language in that opinion goes very far in support of the present regulation, and it reads as follows: "The fact that, because of circumstances peculiar to him, appellant may be unable to comply with the

requirement as to security without assuming a burden greater than that generally borne, or excessive in itself, does not militate against the constitutionality of the statute. Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by Government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition, and may justify a degree of regulation not admissible in the former."

Our conclusion therefore is that the regulation is valid, and that the circuit court was correct in so holding.

Judgment affirmed.

HART, J., dissents.

GORDON v. CAMDEN CURB & GUTTER DISTRICT NO. 1.

Opinion delivered November 15, 1926.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—LIABILITY.—The rule that improvement districts are not liable for damages from changes in the grade of streets is applicable to gutters and sidewalks, which are included in the generic term "street."
2. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—LIABILITY.—Improvement districts are not liable to an abutting property owner receiving personal injury while removing furniture and fixtures from a building flooded from the street, as such injury did not result directly from improper construction of the paving or curb and gutter.
3. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—LIABILITY.—Improvement districts are not liable for negligence in failing to provide sufficient openings for flow of water and in selecting particular places where openings are to be made.
4. EMINENT DOMAIN—PROPERTY DAMAGED FOR PUBLIC USE.—Where property is taken or damaged for public use, compensation from the public must be awarded; but where the damage results from the negligence of those who are acting for the public, there is no remedy for compensation except as against the wrongdoer.

Appeal from Ouachita Chancery Court, Second Division; *George M. LeCroy,* Chancellor; affirmed.

Hardy & Machin, for appellant.

Gaughan & Sifford, for appellee.

McCULLOCH, C. J. Two separate improvement districts were formed in the city of Camden, one for the purpose of paving Adams Street, and the other for the purpose of constructing curb and gutter. Appellant is the owner of a lot in the district, on which there is a two-story business building fronting on Adams Street, and each of the districts instituted an action in the chancery court of the county to foreclose liens for delinquent taxes on property in the district, including the property of appellant, who appeared in each case and filed an answer, traversing the allegations of the complaint with respect to the right to recover delinquent assessments, and also filed a cross-complaint seeking to recover damages from each of the districts. All of the questions with respect to the recovery by the several districts of delinquent taxes have passed out of the case, but the court sustained a demurrer to the cross-complaint of appellant, and dismissed the same. The cases were tried together, and are presented here in the same brief.

The cross-complaint in each of the cases is identical in language, and the material part is as follows:

"That the plaintiff, in constructing the curb and gutter on said street, carelessly and negligently selected the point in front of the said lot and place of business as the lowest level for the curb and gutter on said street; that south of his said lot and place of business is a gradual elevation to where the Iron Mountain Railroad crosses said street, and the surface of the street at said railroad crossing is eight feet higher than the surface of the street in front of his said lot, house and place of business; and that Adams Street north of his said lot, house and place of business has a gradual elevation for a distance of two hundred yards to Jackson Street, and that the surface of Adams Street at the intersection of Jackson Street is twenty-five feet higher than the surface of the pavement in front of the place where his said lot, house and place of business are situated, and that,

by and through the careless, negligent and wrongful manner in which said curb and gutter was constructed, without necessary openings or outlet for drainage of water, when a rain occurs the water flows in such volume and with such rapidity down said street from the intersection of said Jackson Street, and in such volume from the crossing of the Iron Mountain Railroad, as to overflow said lot, house and place of business, and that by reason thereof he has suffered great injury to his property and business, to his great damage in the sum of two thousand dollars. That, in the year 1923, said plaintiff, without the consent of the said defendant, had Adams Street paved and a curb put down on either side of said street in front of his said building occupied by him at that time as a place of business, and is still occupied by him.

"Defendant further states that said injury to his property, as above stated, is continuing damage, and he will continue to suffer damage to his property and business so long as said pavement, curb and gutter remain in its present condition. That by reason of the careless and negligent manner in the construction of said curb and gutters on said street, causing his house and place of business to overflow as stated, while he was engaged in removing his furniture and fixtures in said building, in order to try and save and protect his stock of merchandise from loss or damage, he sustained an injury to his person by becoming ruptured; that from said injury he has suffered great pain, and that he has been partially disabled to do his work that he could do before said injury; and, by and through the negligence of the said plaintiff, as above stated, he has been damaged in the sum of twenty-five hundred dollars."

All reference in the cross-complaint to the grade of the pavement and of the curb and gutter comes within the decision of this court in *Eickhoff* v. *Street Improvement District,* 120 Ark. 212, 179 S. W. 367, holding that improvement districts are not liable for damages resulting to property owners from changes in the grade of a

street. The court held in that case that the same rule applied to gutters and sidewalks, for the reason that they are included in the generic term "street."

Of course, there could be no liability of either of the districts under the charge in the cross-complaint that appellant sustained personal injuries in removing his personal property out of the building when it was flooded with water, as that injury could not be said to have directly resulted from improper construction of the paving or the curb and gutter.

The only other ground for recovery set forth in the complaint is that the districts were guilty of negligence in failing to provide sufficient openings for the flow of water, and in selecting the particular places where the openings were to be made. These allegations constitute merely charges of negligence on the part of the districts, and this court has held that an improvement district is not liable in damages on that account. *Moreland* v. *Board of Imp. of Sewer District,* 94 Ark. 380, 127 S. W. 469, 21 Ann. Cas. 957; *Wood* v. *Drainage District,* 110 Ark. 416, 161 S. W. 1057.

It is contended that, upon the facts stated in the complaint, the districts are liable on the ground that the property was "damaged for public use" within the meaning of the Constitution (art. 2, § 22), and that compensation for this damage must be awarded. The allegations are sufficient to show no more than that the damage resulted from negligence, and not for public use. The distinction is that, where property is taken or damaged for public use, compensation from the public must be awarded; but, where the damage results from the negligence of those who are acting for the public, there is no remedy for compensation except as against the wrongdoer. This is the doctrine of our decisions, and they apply with force to the facts of this case as set forth in the cross-complaint. No cause of action was stated against either of the districts, and the court properly sustained the demurrer.

Affirmed.

PEOPLE'S LIFE INSURANCE COMPANY v. BRITT.

Opinion delivered November 15, 1926.

1. APPEAL AND ERROR—REVIEW—DIRECTION OF VERDICT.—Where both parties moved for a directed verdict, the only question for decision is whether the testimony was sufficient to sustain the court's findings of fact, and whether the testimony was sufficient to sustain the court's action.
2. INSURANCE—QUESTION FOR JURY.—Evidence, in action on a life insurance policy, *held* sufficient to sustain findings that general agents of the insurer were authorized to accept notes for the first life insurance premium, and that the policy was not invalidated though the notes were never paid.
3. INSURANCE—PAYMENT OF PREMIUM—BURDEN OF PROOF.—Where the plaintiff in a suit on a policy of life insurance alleged that, at the time of insured's death, the premiums were paid, which defendant denied, the burden of proof was on the plaintiff.
4. INSURANCE—PAYMENT OF PREMIUM—SUFFICIENCY OF PROOF.—Plaintiff's burden of proof, in a suit on a life insurance policy, that the first year's premium was paid, was sufficiently met by proof of issuance of policy, of payment of part of the premium in cash by the insured, and of the execution of a note for the balance thereof as net premium to insurer's general agents.
5. INSURANCE—AUTHORITY OF GENERAL AGENTS.—General agents of life insurance companies are authorized generally to transact their business, collect premiums, accept notes to themselves in lieu of cash, and to bind the insurer thereby, and, when a note is accepted and cash payment waived by general agents, the insurer is bound, even though the general agents never pay it.

Appeal from Mississippi Circuit Court, Chickasawba District; *G. E. Keck,* Judge; affirmed.

Little, Buck & Lasley, for appellant.

G. W. Barham, for appellee.

WOOD, J. This is an action by M. R. Britt, administrator of the estate of W. A. Carroll, against the People's Life Insurance Company to recover on a life insurance policy issued December 14, 1923, by the Century Life Insurance Company of Indianapolis, Indiana, insuring the life of W. A. Carroll in the sum of $2,000. The plaintiff set up the policy, and alleged that the assured died on July 13, 1924; that the defendant succeeded to the rights and liabilities of the Century Life Insurance

Company, and that the terms of the policy had been complied with on the part of the assured and the plaintiff. The defendant denied that it succeeded the Century Life Insurance Company, and denied that it was liable under the terms of the policy. It alleged that the policy had been forfeited and canceled for the nonpayment of the first premium. The facts which the testimony of the plaintiff tended to prove are substantially as follows:

W. A. Carroll died on July 13, 1924, and the plaintiff was duly appointed administrator of his estate. He held the life insurance policy in controversy issued by the Century Life Insurance Company of Indianapolis, Indiana, which company's business the defendant took over. Lester & Lester of Memphis, Tennessee, were general agents for the Century Life Insurance Company. T. C. Carroll was its local soliciting agent under them at Blytheville, Arkansas. The policy was issued December 14, 1923, sent to Lester & Lester, who, on December 21, 1923, inclosed the same to T. C. Carroll for delivery and settlement. They stated in their letter that the premium was $70.84, composed of a commission of $46.05 and "net" $24.79. The letter expressed the hope that the local agent would be able to get a settlement in cash of at least enough to cover the "net" to the company. The assured paid all in cash except $24.79, for which amount he executed his note payable to Lester & Lester at the First National Bank of Blytheville, Arkansas, with interest at the rate of six per cent. per annum from maturity until paid. The note was dated January 15, 1924, and was due April 4, 1924. The policy was delivered and was in the hands of the assured at the time of his death on July 13, 1924. Proof of death was made, and payment on the policy was refused. The policy was introduced in evidence, and it contained, among other provisions, the following:

"Payment of Premiums: All premiums are due and payable annually in advance at the home office of the company in the city of Indianapolis, Indiana, or to a designated collector, on or before date due, but, in any

case, only in exchange for the company's receipt therefor, signed by the president or secretary of the company and countersigned by such collector. Upon default in payment of any premium, or any note or interest thereon, whether such note be given for the first or subsequent premium, this policy shall be null and void and all premiums forfeited to the company, except as herein provided. After the first year, premiums may be paid in semi-annual or quarterly installments in advance at the company's rates therefor, but, except as herein provided, the payment of any premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable."

"Reinstatement: At any time after any default in premium payment, upon written application by the insured and presentation at the home office of evidence of insurability satisfactory to the company, this policy, unless previously surrendered for its cash value, may be reinstated upon the payment of arrears of premiums, with compound interest thereon at the rate of five per cent. per annum, and the payment or reinstatement of whatever indebtedness to the company existed hereon at the date of such default, with interest from that date."

"Policy in Force: No obligation is assumed by this company upon this policy until the first premium hereon has been actually paid during the lifetime and good health of the insured."

The local soliciting agent testified that it was the custom for him to deliver and collect the premium and make the settlement. He was to get as much money as possible and take a note for the balance, payable in sixty or ninety days, and that was done in this case. This witness further testified that he received the following letter from Lester & Lester, at Memphis, Tennessee:

"February 12, 1924.

"My dear Mr. Carroll:

"Hoped to hear from you with reference to the two policies that you promised you would either get the policy or the settlement on same. The company is demand-

ing either the policy or the money, and I had hoped that, when the weather got better, you would be able to get in touch with these parties and clean up the past due business. You remember, I accepted the notes of your brother's 'nets' in order to help you along. Now, Mr. Carroll, be candid with me, and if you feel that they will not be able to pay these notes, when they are due, I positively will not be able to advance the money to the company as they demand, unless I have the assurance that I will get the money back. The company has sent me your policy, and, owing to the condition of your account and you having gone with another company, I feel that you should send me the 'net' on your policy, and I will gladly forward same to you, or send me an indorsed note that I can handle. Your net amounts to $15. If you will send me a check for $15, or authorize me to draw on you for the amount, I will gladly forward the policy. Hoping to hear from you with some good news by return mail. "Yours very truly,

"Lester & Lester,

"By E. C. Lester."

C. T. Tuck testified that he was the secretary and manager of the Century Life Insurance Company at the time the company issued the policy in controversy. Lester & Lester accepted the note of W. A. Carroll as evidence of the deferred part payment of the premium. No payment whatever was made to the company on this premium. Witness did not understand that the note was accepted as payment of the premium, but only as evidence of payment to be made in future. The company would expect the assured to pay the note if he wanted his policy to continue in force. The annual premium on this policy was not paid to the life insurance company or any one else for them. The witness was asked why the company issued and delivered the policy to Carroll without such payment having been made, and answered, "because, under the terms of the policy, the same was void if the first premium was not paid by the insured." This witness further stated that the policy had been

lapsed and canceled by nonpayment of the premium before the business was actually transferred to the defendant company. The policy was canceled in this way: the policy record was kept on card system. When a policy was canceled, the card was taken from the files of policies in force and placed in the file of cards of lapsed policies. The card for this policy was taken from our file and placed in canceled and lapsed policy files prior to April 4, 1924, and notice given by letter to the insured on that date to that effect, and urging the assured to reinstate the same. The policy in controversy was not taken over by the defendant, for the reason that it had forfeited for the nonpayment of the first premium and had been canceled by the Century Company on its books prior to the purchase of the assets of that company by the defendant company. There was in evidence a letter dated September 8, 1924, and addressed to W. A. Carroll, Blytheville, Arkansas, as follows:

"Dear sir:

"On August 28 I mailed you a letter with reference to a note given by you to Lester & Lester, insurance agents. Amount $24.79, with interest of 6 per cent. from January 15. No further indulgence will be given you in this matter, as you have not even shown us the courtesy of a reply to our courteous letter, and I will expect a remittance not later than five days from the date hereof.

"Yours truly,
"Universal Detective Bureau,
"By W. D. Carpenter."

There was also introduced in evidence a letter dated September 11, 1924, as follows:

"Memphis, Tennessee, September 11, 1924.

"People's Life Insurance Company,
Frankfort, Ind.

"Attention Mr. C. T. Tuck.

"Gentlemen: Yours of the 5th received, also copy of letter with reference to Wm. A. Carroll's policy. This man, W. A. Carroll, was written by T. C. Carroll, his

brother, and he mailed me a note for the net, $24.79, which was due April 1, 1924. T. C. Carroll failed in business at Blytheville, and, after writing his brother and several others, mailed me a batch of notes for the nets and skipped the country without paying anything.

"I am inclosing you the note which was mailed to this office, and I have been unable to get any satisfaction from W. A. Carroll or C. T. Carroll, his brother, that wrote it. I am confident that he never paid a cent to his brother. If he did, his brother has never paid a cent to this office. You remember, I returned T. C. Carroll his policy for cancellation.

"I hope there will be no liability on this policy, because it was certainly an outrage the way this fellow has acted. If there is any other information that I can get to evade the payment of this claim, I shall do my utmost in the matter. It might be well for you not to mention to the lawyer about this note, as it was only mailed to me after I had mailed the policy to him for delivery, collection and settlement, and immediately after receiving this note covering the net, as per his contract, he skipped the country. I see now where a bond is necessary on these agents, and I shall insist on a bond from every one from now on.

"Very truly yours,
"Lester & Lester,
"By E. C. Lester."

These letters were introduced by stipulation of the parties to the effect that W. D. Carpenter and the Universal Detective Bureau were acting under the direction of Lester & Lester, insurance agents, and that the letter was written for the purpose of attempting to collect a note signed by Wm. A. Carroll; that the note was executed and delivered to Lester & Lester in part payment of an insurance premium growing out of and due on a policy of life insurance, the application for which was taken by Lester & Lester and the policy was issued on the life of Wm. A. Carroll; that W. A. Carroll mentioned in the letter of September 8 is the same as Wm.

Abner Carroll, the assured. C. T. Tuck testified that the note of the assured which witness sent to Lester & Lester was not returned to him, nor was a return of the policy demanded, because they could not locate the insured.

Upon the above testimony the plaintiff and the defendant each asked a directed verdict in their favor. The court thereupon discharged the jury, and the defendant asked the court to find certain facts and to make certain declarations of law and to enter a judgment in its favor. The court refused the defendant's motion, and, on its own motion, found the facts as follows:

"The court finds that the deceased died within one year after the issuance of the policy sued on. The court further finds that the present defendant has taken over the business of the Century Life Insurance Company, and is liable upon all policies that the other life insurance company would be liable upon. The court finds that the first year's premium in this case was paid unconditionally, and that the policy was in force for the term of one year, and was in force at the time of the death of the deceased. The court finds that there was nothing on or about the note given that would indicate that it was a part payment of the policy; that the note was given to and accepted by Lester & Lester, and was not given to or accepted by the company; that Lester & Lester and the soliciting agent had a right to take notes of this kind; that this note was not an obligation to the company, but was an obligation to Lester & Lester, and therefore the company had no right to cancel the policy, and their effort to do so could have no effect upon the same. The policy was in full force and effect at the date of the death of the deceased, and the plaintiff in this case is entitled to recover the amount sued for. The court further finds that M. R. Britt was, at the time of the institution of this suit, and at the time of the trial of same, the duly appointed and acting administrator of the estate of William Abner Carroll, deceased." And, on motion of the plaintiff, the court gave the fol-

lowing declaration of law: "Where general agents of a life insurance company are clothed with authority generally to transact the company's business in the State, and to collect premiums and to accept notes to themselves in lieu of cash, the company looking to them instead of the policyholder for the cash, they are authorized to bind the company by accepting notes in lieu of cash; and, when they accept a note and waive cash payment, the company is bound by the act of such general agents, whether these general agents ever pay the company or not." The court thereupon rendered a judgment in favor of the plaintiff, from which is this appeal.

The appellant and the appellee moved the court to take the case from the jury by each moving for a directed verdict in their favor. The only question therefore for decision is whether or not the testimony was sufficient to sustain the court's findings of fact, and whether, upon such findings, the court erred in its declaration of law. We are convinced that there was substantial testimony to sustain the court's findings of fact. It could serve no useful purpose as a precedent to comment upon the testimony in detail. It is set forth above, and speaks for itself.

The appellee alleged in his complaint that, at the time of the death of the assured, all premiums that were due upon said policy had been paid. The appellant denied this allegation. The burden of proof therefore was upon the appellee. Appellee has sufficiently met this burden by testimony showing that the policy was issued and delivered to the assured; that the assured paid part of the premium in cash and executed his note to Lester & Lester, general agents of the company issuing the policy, for the balance of the premium. It will be observed that the policy provides that "all premiums are due and payable annually in advance at the home office of the company." While there is a provision in the policy which would authorize the execution of a note in payment of the first premium, yet the testimony in the record was sufficient to warrant the trial court

in finding that the first premium due on this policy was not paid by the assured's note to the company. The note itself, executed by the assured in part payment of the premium on the policy, was in the name, not of the company issuing the policy, but of the general agents of the company, Lester & Lester. The note was not executed in the full amount of the first premium. It was taken in the exact amount of the "net" sum demanded by the company as indicated by the letter of Lester & Lester of December 21, 1923, to Carroll. This letter shows that the amount of premium was $70.84, and that of this amount $46.05 went as commission to Lester & Lester and the balance of $24.79 was the "net" to be paid to the company. The court was warranted in finding that this sum, designated as "net" in the letter of Lester & Lester, represented the amount of cash which the company was to receive out of the first premium. This letter of December 21, 1923, of Lester & Lester, taken in connection with the letter of February 12, 1924, fully warranted the court in finding that the company issued the policy and that the same was delivered to the assured with the understanding that he had paid the first year's premium when he paid the amount of the general agent's commission in cash and executed his note to the general agents for the balance of such premium. The court was fully warranted in inferring from these letters that the company was demanding the "net" (the amount for which the note was executed) in cash. Now, the note itself which Lester & Lester had accepted in part payment of the premium was not due until April 1, 1924. Therefore the company could not have been demanding a payment of the note, but, as indicated by the letter of February 12, the company was demanding a return of the policy or the money. This clearly shows that the company had issued the policy and delivered the same, expecting its agents, Lester & Lester, to pay in cash the net sum due it out of the first premium, after deducting their commission. In other words, the trial court had the right to infer from these letters that Lester &

Lester, its general agents, had undertaken to collect the first premium and had themselves become responsible to the company for the payment of the first premium. If such was not the arrangement, why would the company be demanding of them the return of the policy or the payment of the net or cash before the note was due, which the appellant now claims was taken in part payment of the premium? Certainly, the above was the only legitimate inference to be drawn from the letters of the Century Company's general agents. The fact that the notes were executed in the name of the general agents and that they were attempting, long after the death of the assured, to collect these notes, as indicated by their letter of September 11, 1924, and their stipulation in the record, tends further to prove that the above was the arrangement between the general agents, Lester & Lester, and the Century Company. If such was not the arrangement, certainly it called for some explanation on the part of the appellant showing that such was not the arrangement between the Century Company and its general agents at the time the policy was issued and delivered to the assured. If such was not the arrangement, Lester & Lester knew that fact. They have not testified. There is no testimony on the part of the appellants to show that the note was not what it purported to be—an obligation to Lester & Lester. The court was warranted in finding that the note was not an obligation to the Century Company, but was an obligation to Lester & Lester, and that the first premium was paid. If the premium was paid, the company had no right to cancel the policy.

The court therefore correctly declared the law applicable to the facts which the testimony above set forth tended to prove. The case cannot be distinguished in principle on the facts from the case of *Mutual Life Insurance Company* v. *Abbey,* 76 Ark. 328, 88 S. W. 950, where we announced the law which the trial court followed in its declarations of law as above set forth. That case rules this.

The judgment is therefore correct, and it is affirmed.

SPENCER v. PIERCE.

Opinion delivered November 15, 1926.

1. EVIDENCE—PAROL CONTRADICTING WRITING.—A witness will not be permitted by parol evidence to contradict his own deed.
2. EVIDENCE—SECONDARY EVIDENCE.—A witness will not be permitted to testify as to the contents of a deed not produced, where it is not shown to have been lost or destroyed or that it could not be produced.
3. EVIDENCE—HEARSAY.—Testimony of a witness as to what his uncle told him concerning a certain conveyance *held* hearsay and inadmissible in a suit to recover possession of the land.
4. EJECTMENT—COMMON SOURCE OF TITLE.—Where the parties to ejectment claim from a common source, it is unnecessary for the plaintiffs to trace their title beyond such common source.
5. EJECTMENT—COMMON SOURCE OF TITLE.—Where the parties to ejectment claim from a common source, plaintiffs are entitled to recover if they prove the better title from the common source.
6. EJECTMENT—COMMON SOURCE OF TITLE.—Plaintiffs in ejectment *held,* under the evidence, to have established the better title to the land from the common source, and to be entitled to judgment for possession and damages.
7. TENANCY IN COMMON—RIGHT OF ACTION.—Plaintiffs, entitled to recover a half interest in land, may maintain an action against defendants wrongfully in possession, which inures to the benefit of their cotenants.

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

H. J. Denton, for appellant.

WOOD, J. This is an action by the plaintiffs below, appellants here, against the defendants below, appellees here, to recover the possession of all that part of the northwest fractional quarter of section 11 in township 18 north, range 12 west, lying north and east of what is known as Dry Branch. The appellants alleged that they were the owners of the land and other lands adjoining the same. They deraigned title from the Government by mesne conveyances from the patentee of the land, J. H. Wolf, to J. L. Spencer, and by the last will and testament of Spencer to the appellants. They alleged that the appellees were in unlawful possession

of the land in controversy, and had been, to appellants' damage in the sum of $1,000. They prayed judgment for possession and damages, and that their title be "established, quieted and confirmed."

The appellees answered denying the material allegations of the complaint, and deraigned title from J. H. Wolf through mesne conveyances to them. The appellees alleged title by adverse possession of the lands for a period of more than twenty years. They also alleged that appellees' predecessors in title and the appellants' predecessors had only an undivided interest in the lands; that the lands had been divided between them by deed, which was lost; that the appellants and appellees therefore elected to take a certain agreed line as set out in the deeds, which gave to the appellees the lands claimed by the appellants in this action. They prayed that the appellees' title to the lands be "established, quieted and confirmed." The cause was begun in the law court and was, without objection, transferred to the chancery court. It was conceded by counsel for the appellees in the court below that the Government survey and plat of the land in question would take the land from the appellees. The appellees claimed the land in controversy by adverse possession under lines which they alleged had been agreed upon by the predecessors in title of the appellants and the appellees.

The testimony on behalf of the appellants tended to prove that, by agreement between F. F. Pierce, the predecessor in title of the appellees, and Guy W. Spencer, representing himself and the other appellants, a survey of the lands was made to locate the section line between sections 2 and 11. Guy Spencer testified on behalf of the appellants, in substance, that the appellants acquired title to the lands in controversy by purchase and warranty deed to the northwest fractional quarter of section 11, township 18 north, range 12 west, Baxter County, Arkansas, and that F. F. Pierce, predecessor in title of the appellees, acquired title by purchase to part of section 2, township 18 north, range 12 west, adjoining

the land of appellants. After the death of witness' father, witness entered into an agreement with F. F. Pierce to have the dividing line legally surveyed. This was in the fall of 1919, in F. F. Pierce's store in Norfolk, in the presence of Dick Martin and J. N. Ware. Pierce accused the witness of cutting some of his timber. Witness agreed to have the survey made to establish the line between them, and Pierce agreed to pay half the expense and to abide by the result of the survey. Pierce refused to abide by the survey, and he held possession of the lands in dispute about nine years, and the land is worth seven dollars per acre. The appellants had paid taxes on the land in controversy. The appellees had not paid the taxes on any part of this land. Pierce's renter cultivated the land on both sides of Dry Branch in 1922 and 1923.

The testimony of a surveyor shows that there were nine acres of land in section 11, township 18, range 12 north, and east of Dry Branch. Witnesses Martin and Ware corroborated the testimony of Guy Spencer to the effect that F. F. Pierce and Guy Spencer agreed to have a survey made so as to establish the line between their lands. Ware testified that Pierce and Spencer were willing to have the survey made and to abide by it. The survey was made, and Spencer got about eight acres off Pierce's land, worth from fifty to sixty dollars per acre, and Pierce got three acres off of Spencer's land. Pierce and his estate had been in possession of the land for about eight years, and the Spencers had been in possession of and cultivating for the past eight years that part of the southeast quarter of section 2 west of Dry Branch. Witness cultivated the land in section 11 west of Dry Branch claimed by Spencer, but did not tend the land west of Dry Branch, in the southeast quarter of the southwest quarter of section 2, township 18, range 12, because Spencer told witness to leave that out—that they did not claim it after the survey was run. Spencer was cutting some cedar timber a half mile west of Dry Branch, on a line between the Spencer place and

the Bud Jones place, owned by Pierce. The dispute over the line between Pierce and Spencer arose about the cutting of this cedar.

The testimony on behalf of the appellants shows that Pierce was with the surveyors and Guy Spencer at the time the survey was being made. Will Bryant, a witness on behalf of the appellees, testified that he moved on the land in controversy in 1901. Three years of the time T. J. Baker owned it, and then J. L. Spencer bought it, and witness stayed one year after that. He cultivated the land afterward owned by J. L. Spencer, and did not cultivate any land east of Dry Branch. Jake Wolf owned that land. He sold it to J. H. Caldwell, and Caldwell had the land east of Dry Branch cultivated. Witness showed J. L. Spencer the line when he bought the land. He did not show him any land east of Dry Branch. Jeff Baker had witness put in a fence on Dry Branch, and later another fence was put on the other side. Two fences divided the two farms. Baker told witness that the creek was the line between them. At the time witness showed Spencer the line, witness had no description of the land to go by. Witness cultivated a part of the land in section 2 west of Dry Branch on the Spencer farm. Lewis and Caldwell did not cultivate any land in section 2 west of Dry Branch while witness was over there.

S. C. Pierce testified that he was the administrator of the estate of F. F. Pierce, and had charge of the lands belonging to the Pierce estate in the northwest fractional quarter of section 11 east of Dry Branch. He had not authorized any one to cultivate lands west of Dry Branch, in the southeast quarter of the southwest quarter of section 2.

Over the objections of the appellants, J. H. Wolf was permitted to testify that he sold to T. J. Baker, in 1899, that part of the northwest fractional quarter of section 11, township 18, range 12 west of Dry Branch, and pointed out Dry Branch as the line. Witness retained possession of the land east of Dry Branch and

exercised the right of ownership over it for three years thereafter. Witness sold the lands in controversy to James Caldwell in 1902, and pointed out to him, among other lands, all that part of the northwest fractional quarter of section 11, township 18, range 12 west, east of Dry Branch, and put him in possession. Witness remembered seeing a deed for part of section 2 from L. J. Wolf to M. J. Wolf, in which Dry Branch was made the line. Witness' uncle told witness that Dry Branch was the line between the lands conveyed to T. J. Baker and J. H. Caldwell. Dry Branch was not mentioned in the deed to T. J. Baker as the line. Witness told him that Dry Branch was the line.

Witness Schoggin testified that he saw a deed from Wolf to T. J. Baker conveying the northwest fractional quarter in section 11, and other lands. The deed did not mention Dry Branch as the line. It conveyed the northwest fractional quarter in full and without any reservation. There was never a legal survey of the land between the Spencer and Pierce lands up to the time of the institution of this suit. Theo Bryant testified that he was familiar with the lands in controversy. Pierce was in possession of it when he first knew it. During the eight years that witness knew the lands and cultivated part of them, no legal survey was made of the lines.

It was shown that the deed from Baker to (Rance) J. L. Spencer calls for an undivided half interest of the lands in controversy.

The trial court found that the appellants failed to show a record title, and entered a decree dismissing the appellants' complaint for want of equity, from which is this appeal.

1. The testimony of J. H. Wolf, to the effect that he sold that part of the northwest fractional quarter of section 11, township 18 north, range 12 west, lying west of Dry Branch to T. J. Baker, is incompetent and cannot be considered. Likewise, his testimony to the effect that, in 1902, he sold the land in controversy to James Caldwell

and pointed out to him all that part of the northwest fractional quarter of section 11, township 18 north, range 12 west, east of Dry Branch, and put him in possession thereof, is incompetent and cannot be considered. This testimony tended to contradict the deed from Wolf to T. J. Baker, which does not mention Dry Branch as the dividing line between the land conveyed to Baker and the land conveyed to Caldwell. The terms of the deed are controlling. The testimony of this witness to the effect that he saw a deed from his uncle, Jake Wolf, to M. J. Wolf in which Dry Branch was made the line, is incompetent for the reason that, if such deed was in existence, it was the best evidence. It was not shown that this deed was lost or destroyed, nor that it could not be produced. The testimony of this witness that his uncle, M. J. Wolf, told witness that this Dry Branch was the line between these lands conveyed to Baker and Caldwell was pure hearsay and cannot be considered.

Since the appellants and appellees claimed from a common source, it is unnecessary for the appellants to trace their title beyond this common source. *Naill* v. *Kirby,* 162 Ark. 140, 257 S. W. 735. The appellants therefore are entitled to recover if they have proved a better title to the lands in controversy from J. H. Wolf than the title of the appellees through the same source. 19 C. J., p. 1061, § 39 (8).

The appellants adduced in evidence a deed from J. H. Wolf to T. J. Baker in which Wolf conveyed to Baker an undivided half interest in the northwest fractional quarter of section 11, township 19 north, range 12 west, and a deed from T. J. Baker to J. L. Spencer conveying the same lands, and the will of J. L. Spencer devising these same lands to the appellants. While the appellees assert that there has been a complete chain of title from J. H. Wolf to the land in controversy, they fail to show a record title from J. H. Wolf through mesne conveyances to F. F. Pierce, under whom they claim. Appellees exhibit no mesne conveyances in which lands embracing the lands in controversy are described con-

veying title from J. H. Wolf to F. F. Pierce under whom appellees claim. The appellants therefore have shown a superior title to that of the appellees.

But the appellees also claim title by adverse possession. A preponderance of the testimony tends to prove that there was a dispute between F. F. Pierce and Guy Spencer concerning the boundary between their adjoining lands and that they entered into an agreement to have a survey made to determine the true boundary line between them. According to the boundary line established by this survey, the lands in controversy were included in the northwest fractional quarter of section 11, township 18 north, range 12 west, described in the deed from Wolf to Baker and from Baker to Spencer. The land in controversy was not wild land, and the proof is not sufficient to show that the appellees had been in adverse possession thereof under color of title for seven years. The appellees therefore were trespassers, and the appellants are entitled to judgment against them for possession and for whatever damages they have sustained at the hands of the appellees. See *White* v. *Cotton,* 131 Ark. 273-282, 199 S. W. 116.

2. The appellants are entitled to recover an undivided one-half interest in the lands in controversy, and this right of possession and for damages in the appellants enables them to maintain the action against the appellees, which inures also to the benefit of the owners of the other undivided half interest. One tenant in common may maintain an action for the recovery of real property against a third person and trespasser which will inure to the benefit of all his cotenants. 2 Thompson on Real Property, § 1893, and cases cited in note 31. See also *Newman* v. *Bank of Cal.,* 80 Cal. 368, 222 P. 261; *Hooper* v. *Bankhead,* 171 Ala. 626, 54 So. 549; *Winborne* v. *Lbr. Co.,* 131 N. C. 32, 40 S. E. 825; *Mitchell* v. *Mitchell,* 80 Tex. 101, 15 S. W. 705; 19 C. J. 1038; 38 C. J. 12, subdivision III, B, and other authorities cited in brief of counsel for the appellant.* See also *Burgett* v. *Williford,* 56 Ark. 187-192, 35 S. W. 96.

The judgment is reversed, and the cause is remanded with directions to the trial court to enter a decree in favor of the appellants against the appellees for the possession of the property, and for further proof, if the parties so elect, as to the amount of appellant's damages. It appears to us that that feature of the case is not fully developed.

* The following additional authorities are cited by appellant's counsel: *Keith* v. *Keith*, 39 Tex. Civ. App. 363; *Allen* v. *Gibson*, 4 Rand. 468; *LeCroix* v. *Malone*, 157 Ala. 434, 47 So. 725; *Blakely* v. *Du Bose*, 167 Ala. 627, 52 So. 746; *Simmons* v. *Spratt*, 26 Ala. 499, 8 So. 123; *King* v. *Hyatt*, 51 Kan. 504, 32 Pac. 1105; *Horner* v. *Ellis*, 75 Kan. 675, 90 Pac. 275; *King* v. *Bullock*, 9 Dana (Ky.) 41; *Compton* v. *Matthews*, 3 La. 128; *Hutchins* v. *Bacon*, 46 Tex. 408; *Read* v. *Allen*, 56 Tex. 176; *Sowers* v. *Peterson*, 59 Tex. 216; *Moore* v. *Stewart*, 7 S. W., 771; *Thomas* v. *Jones*, 97 N. C. 121, 1 S. E. 693; *Hardy* v. *Johnson*, 1 Wall. 371; *Foster* v. *Hackett*, 112 N. C. 546, 17 S. E. 426. (Reporter).

FINNEY v. STATE.

Opinion delivered November 15, 1926.

1. HIGHWAYS—DEDICATION.—A public road can be established, not only by an order of the county court, but also by dedication on the part of an owner of the land and the assent thereto and use thereof by the public.
2. HIGHWAYS—OBSTRUCTION.—One who purchases land over which a public road has been dedicated by former owners by bill of assurance on file will be held to have notice thereof and to be liable for obstructing same.

Appeal from Pulaski Circuit Court, First Division; *Abner McGehee*, Judge; affirmed.

W. R. F. Paine, for appellant.

H. W. Applegate, Attorney General, and *J. S. Abercrombie*, Assistant, for appellee.

WOOD, J. On April 30, 1925, the owners of the land over which the Batesville cut-off road was built executed a bill of assurance and dedication, with a plat annexed thereto, dedicating to the public for a public road a right-of-way fifty feet wide. This dedication and assurance

was filed by the owners in the office of the recorder of Pulaski County, Arkansas. Thereafter the landowners, during the months of May, June and July, 1925, cleared, grubbed and graded the right-of-way and built concrete tile culverts, permanent bridges with stone and concrete head-walls, on the location as shown by the bill of assurance and plat. The landowners opened up the road to the public travel on August 1, 1925. The road was constantly used by the public as a highway. On May 10, 1926, Harry Cooper purchased a portion of the land over which the highway runs, and, under his direction, P. E. Finney inclosed this land with a wire fence, and, by so doing, obstructed the public travel over the land that had been dedicated to the public by previous owners for a highway. The Batesville cut-off road shortens the length of the old road from a point where it reaches the old road at the east end of Little Rock one and three-fourths miles. It also lessens the maximum grade of the old road, traveling toward Little Rock, from seventeen per cent. to six per cent. That is, the maximum grade on the old road, traveling toward Little Rock, was seventeen per cent. whereas the grade on the cut-off road toward Little Rock is only six per cent.

P. E. Finney was convicted by judgment of the circuit court of Pulaski County on the above facts of the crime of obstructing a public highway, from which judgment he prosecutes this appeal.

The only question for decision is whether or not the road obstructed by the appellant was a highway.

In *Patton* v. *State,* 50 Ark. 53-57, 6 S. W. 227, we said: "It is not absolutely necessary to establish a public highway that its boundary lines be surveyed and that it be opened and appropriated to public use under an order of the county court. It can be established by a dedication on the part of the owner of the soil over which it runs and the assent thereto and use thereof by the public." Act No. 666 of the General Acts of 1923, p. 568, provides as follows: Section 5. Any street or road heretofore dedicated to the public as a public thoroughfare is hereby

declared a public road, and any street or road that may hereafter be dedicated to the public as a public road shall become a public road on being dedicated to the public as a public road, when the bill of assurance making such dedication is properly recorded."

Thus it will be seen that the principle announced by the court in *Patton* v. *State, supra,* in 1887, was enacted into statutory law by the above act. Harry Cooper purchased the land over which the highway had been dedicated by its former owners under the above statute. He therefore purchased with notice of such dedication, and had no authority to direct the appellant to obstruct the highway, and appellant, by so doing, violated the provision of § 2754 of C. & M. Digest, which makes it a misdemeanor for any person to "obstruct any public road by felling any tree or trees across the same, or placing any other obstruction therein."

The judgment is therefore correct, and it is affirmed.

SOUTHERN BAUXITE COMPANY *v.* BROWN-PEARSON CASH FEED STORE.

Opinion delivered November 15, 1926.

1. PRINCIPAL AND AGENT—EVIDENCE OF AUTHORITY.—Evidence *held* to sustain finding that an agent had authority to represent the defendant corporation.
2. CORPORATIONS—LIABILITY FOR ACTS OF AGENTS.—Where a corporation clothes a particular agent with the apparent authority to act for it in a particular business or transaction as to the person dealing with him in good faith, it will be bound the same as if such apparent authority were real.
3. FRAUDS, STATUTE OF—COLLATERAL UNDERTAKING.—A verbal agreement by defendant's agent that an account should be charged to the defendant for the use of a third person is not a collateral undertaking within the statute of frauds.
4. FRAUDS, STATUTE OF—COLLATERAL UNDERTAKING—INSTRUCTION.—Where there was evidence tending to prove that defendant's agent verbally authorized an account to be charged against defendant for the benefit of an employee, it was not error to instruct

that, where a party undertakes to pay for goods to be furnished to his employees, it is an original undertaking and not within the statute of frauds.

5. SALES—LIABILITY OF BUYER.—Where a corporation agreed to pay for mule feed furnished to one paid for his work by it, it is liable for the price, whether he was working as independent contractor or as employee.

6. TRIAL—INSTRUCTION SINGLING OUT PART OF WITNESS' TESTIMONY.—An instruction which singled out a portion of the testimony of a witness and made a recovery to depend on it, to the exclusion of other parts of his testimony, was properly refused.

7. TRIAL—MODIFICATION OF INSTRUCTION.—Where appellant asked an incorrect instruction, it cannot complain of a modification which contains nothing prejudicial to appellant, and would have been proper if a correct instruction had been requested.

8. APPEAL AND ERROR—SCOPE OF OBJECTION.—Where appellant made specific objections to instructions, it will be deemed to have waived other objections.

Appeal from Saline Circuit Court; *Thomas E. Toler*, Judge; affirmed.

STATEMENT BY THE COURT.

Brown-Pearson Cash Feed Store, a corporation, sued the Southern Bauxite Company, a corporation, to recover the sum of $655.62 for merchandise alleged to have been sold to the defendant. The defendant denied that it was indebted to the plaintiff, and denied that it purchased any of the merchandise in question from the plaintiff.

Chester Carter, the manager of the Brown-Pearson Cash Feed Store at Benton, Arkansas, was the principal witness for the plaintiff. In June, 1924, Clem Gaunt, who was working for the Southern Bauxite Company, came into the store of the plaintiff and wanted to buy some feed, and proposed to start an account. Carter agreed to sell him some feed for the plaintiff, and also agreed upon the price of the feed. The first order was delivered by the plaintiff to the defendant on June 25, 1924. Payments were made every three or four days at first, and then it was agreed between the parties that payments should be made every two weeks.

About two weeks after the first order was delivered by the plaintiff to the defendant, Carter went back to

the store of the defendant for the purpose of selling it some oats and also a mixed feed called Omalene. Gaunt told him that J. J. Ferrell was coming down there to take charge of their mules and was also going to bring some more mules. Gaunt said that Ferrell would need some feed for his mules, and that "we [referring to the defendant] will feed them and will get what he wants." Again, Carter was asked what Gaunt said about feeding Ferrell's mules, and said: "He said, send this feed on the bill as the rest, but write under it 'By J. J. Ferrell,' what he gets, and that is the way I have done it all. If I sent them bills, I would send them to the Southern Bauxite Company, by J. J. Ferrell." Carter further stated that he did this under the instruction of Clem Gaunt, who was working for the defendant.

Payments were made from time to time until November 10, 1924. At this time the sum of $655.62 was the balance due plaintiff for the feed furnished. Gaunt, at that time, notified the plaintiff not to furnish any more feed, and no items were furnished after that except upon a special order, which was paid by the defendant.

On cross-examination, Carter was asked if Clem Gaunt did not tell him that the defendant was going to sell its teams to Ferrell, and that the plaintiff could get his business just as it had been selling to the defendant, and he answered: "Well, Clem told me they were going to sell to them. I said, 'You will stand good for the feed?' and he said, 'Yes, run it through just like it had been.' " Later on he stated, on cross-examination, that he understood that he was selling the feed in question to the Southern Bauxite Company, and did not understand that he was selling the feed to Ferrell. When payments were made on the account, he supposed that they were made by the defendant.

Another salesman, who represented the manufacturer of the Omalene feed, was present when Carter and Gaunt had the conversation about the plaintiff furnishing feed to Ferrell and charging the same to the defendant, and corroborated the testimony of Carter. He said

that the sale was made to the Southern Bauxite Company, and that the negotiation took place with Clem Gaunt, the bookkeeper.

J. J. Ferrell was also a witness for the plaintiff. According to his testimony, he carried seventeen or eighteen mules with him and took over eighteen mules from the Southern Bauxite Company when he went to work for it. He executed a mortgage to the Southern Bauxite Company for the mules purchased from it. When his feed would run out, the Southern Bauxite Company would order feed for him with its own feed. Ferrell never had any transactions with the plaintiff.

Clem Gaunt was the principal witness for the defendant. According to his testimony, he was the defendant's bookkeeper, and purchased some feed from the plaintiff for the defendant in June, 1924. About the first of June, 1924, the defendant sold its mules to J. J. Ferrell, and did not buy any more feed from the plaintiff. Gaunt told Carter that Ferrell had purchased the mules from the defendant, and was going to get out ore for it. He further told Carter that he would deduct the price of any feed that Ferrell might buy from the plaintiff from his pay. He denied that he agreed with Carter that the feed which should be furnished by the plaintiff to Ferrell should be charged to the defendant. He said that he had no authority to make such an agreement and no authority to buy feed, except such authority as was given him by the manager of the company. He admitted that the feed which he had bought in June from the plaintiff for the defendant was purchased by the authority of the defendant.

Other evidence was introduced by both parties, but the above is sufficient to show the issues raised by the appeal. The jury returned a verdict in favor of the plaintiff, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

Brouse & McDaniel, for appellant.

W. A. Utley, for appellee.

HART, J., (after stating the facts). It is earnestly insisted by counsel for the defendant that the evidence is not legally sufficient to support the verdict.

Counsel first insist that the evidence is not sufficient to show that Gaunt had any authority to act for the defendant in the purchase of the feed in question. According to the testimony of Carter, Gaunt had been working for the defendant about two months before it opened any account with the plaintiff. Gaunt was known as the bookkeeper of the defendant, and acted for it in opening an account for the purchase of feed in the month of June, 1924. Gaunt admitted that he bought the items on the account in June, 1924, and that he had authority from the defendant to make the purchase. He said, however, that he had special authority from the manager of the company to make the purchase. According to his testimony, he never authorized the plaintiff to furnish feed to Ferrell and charge the same to the plaintiff. According to the testimony of Carter, he did make such an agreement. The jury found in favor of the plaintiff and, by its verdict, accepted the testimony of Carter as true. This would make a case where the undisputed evidence shows that Gaunt had the authority to open an account with the plaintiff for the purchase of mule feed from it. The defendant sold its mules to Ferrell about the first of July, 1924. The plaintiff continued to furnish feed to Ferrell, and charged the same to the defendant by Ferrell. This was pursuant to an agreement between Carter and Gaunt, according to the testimony of the former. Under these circumstances, the jury might have found that Gaunt was acting within the apparent scope of his authority in purchasing the mule feed. The defendant knew that Gaunt had opened an account with the plaintiff for the purpose of the purchase of mule feed by it in June, 1924. If it intended to limit or restrict his authority as to the purchase of feed after the first of July, 1924, it should have notified the plaintiff of that fact. Carter's testimony brings the case within the rule that, where a corporation clothes a particular agent with the apparent

authority to act for it in a particular business or transaction, as to the person dealing with him in good faith, it will be bound the same as if such apparent authority were real. *Moore* v. *Ziba Bennett & Co.,* 147 Ark. 216, 227 S. W. 753; *Thompson* v. *Collier-Reynolds Grocery Co.,* 155 Ark. 355, 244 S. W. 355; *Austin Western Rd. Mch. Co.* v. *Grant Co.,* 164 Ark. 228, 261 S. W. 283; *Empire Rice Mill Co.* v. *Stone,* 155 Ark. 623, 245 S. W. 16; *Arkadelphia Milling Co.* v. *Green,* 142 Ark. 565, 219 S. W. 319; and *Three States Lumber Co.* v. *Moore,* 132 Ark. 371, 201 S. W. 508.

It is next insisted that the evidence is not legally sufficient to support the verdict, because, under the testimony of the plaintiff, it was a collateral undertaking. In making this contention, counsel rely upon the testimony of Carter, in one place, where he asks Gaunt if the defendant will stand good for the feed. Carter, however, explained what he meant by this expression, and said that it was his understanding that the account was to be charged to the defendant, and that it alone would be liable to the plaintiff. The account was charged to the defendant, by J. J. Ferrell, because Gaunt asked Carter to charge it that way, and that, under their agreement, the defendant alone was liable to the plaintiff for the feed purchased and sued for in this action. Hence we hold that this assignment of error is not well taken.

The next assignment of error is that the court erred in giving instruction No. 5, which reads as follows: "You are instructed that, where a party undertakes to pay for goods to be furnished to his employees, it is an original undertaking and not within the statute of frauds as a promise to pay another's debts."

In their brief, counsel say that there was no evidence that Ferrell was an employee of the defendant, and that the evidence shows that he was an independent contractor and not an employee of the defendant. At the trial of the case the counsel for the defendant made a specific objection to the instruction, on the ground that all the evidence showed that Ferrell was an independent

contractor, and that the undisputed evidence showed that, even though the defendant promised to pay the account, it was not an original undertaking. As we have already seen, there was evidence upon which the jury might find that the promise of the defendant to pay the feed account of Ferrell was an original undertaking.

It is also fairly inferable that Ferrell was an employee of the defendant. At one place in his testimony he stated that he worked for the Southern Bauxite Company. The undisputed evidence shows that he was engaged in getting out bauxite ore for the defendant. As far as this case is concerned, it does not make any difference whether he was getting it out as an independent contractor or as an employee. The undisputed evidence shows that he was being paid for his work by the defendant. It would be equally liable whether he was working as an independent contractor or as an employee. The sole question was whether or not the defendant agreed to pay for the mule feed in question. Its defense was that no such an agreement was made, or that, if such an agreement was made, it was void under the statute of frauds. Hence we hold that this assignment of error is not well taken.

The next assignment of error relates to a modification of instruction No. 5, asked by the defendant. The instruction, as requested, reads as follows: "You are instructed that, even though you may find from the evidence in this case that Clem Gaunt told the manager of plaintiff herein that the company would stand good for the feed, this would not be sufficient to bind the defendant company, and you will so find."

The court modified the instruction by adding to it the following: "Unless you further find that the said Clem Gaunt was acting within the scope of his authority."

The instruction as requested by the defendant was erroneous, because it tells the jury that, even though it may find from the evidence that Gaunt told Carter that the defendant would stand good for the feed, this would not be sufficient to bind the defendant, and the

jury should so find. The instruction as requested would be erroneous, because it does not take into consideration the other testimony of Carter, which, if believed by the jury, would make the undertaking of the defendant an original and not a collateral one. The instruction, as requested, was faulty because it singles out a portion of Carter's testimony and makes the right of the plaintiff to recover to depend upon this isolated portion of the testimony. The modification placed upon the instruction by the court was not erroneous if it had been tacked on to a proper instruction. If the defendant had requested the court to instruct the jury that, even though it might find from the evidence of Carter that the company would pay for the feed, this would not be sufficient to bind the defendant, unless it should further find that Gaunt was acting within the scope of his authority, this would have been a proper instruction, and should have been given. As we have just seen, the defendant was not entitled to the instruction as requested at all, and it cannot complain of the modification which did not add anything prejudicial to the defendant's case, and which would have been proper if the defendant had asked a correct instruction. *Harrington* v. *Los Angeles Railroad Co.,* 140 Cal. 514, 74 P. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; and *Southern Railway Co.* v. *Howell,* 135 Ala. 636, 34 So. 6.

In this connection it may be stated that neither of the instructions quoted above are in proper form, but the defendant made specific objections to each of them, and, on that account, will be deemed to have waived other objections to them. *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140, 124 S. W. 1048.

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

KARNES v. RAMEY.

Opinion delivered November 15, 1926.

1. PROCESS—IMPEACHMENT OF FALSE RETURN.—An officer's false return of service of process does not preclude the defendant from showing the truth in a proper proceeding to be relieved from the burden of a judgment or decree based thereon.
2. JUDGMENT—RELIEF AGAINST DEFAULT DECREE.—One who is aggrieved by a judgment rendered in his absence must show, not only that he was not summoned, but also that he did not know of the proceeding in time to make a defense.
3. PROCESS—EVIDENCE AS TO SERVICE.—A recital in a default decree that defendants were duly served with summons in time and manner provided by law, but made default, is *prima facie* evidence of such facts, but defendants may introduce testimony to contradict the recital of the decree, the burden of proof being upon them.
4. PROCESS—NATURE OF OFFICER'S RETURN.—An officer's return showing that defendants were duly served with summons as required by law constitutes his official oath as to facts stated therein.
5. PROCESS—EVIDENCE AS TO SERVICE.—In a suit to set aside a default decree in a mortgage foreclosure suit, defendant's evidence *held* insufficient to overcome the sheriff's official return reciting service of the summons in time and manner prescribed by law, where it was shown that the summons was served by leaving a copy with a member of his family over 15 years of age at his usual place of abode, as provided by Crawford & Moses' Dig., § 1144, subdiv. 3.
6. JUDGMENT—RELIEF AGAINST DEFAULT DECREE.—Where defendants fail to show facts sufficient to overcome the return of service of summons on them in a foreclosure suit and the recital of due service in the decree, they cannot have the decree set aside, although they have a meritorious defense.

Appeal from Carroll Chancery Court, Eastern District; *Lee Seamster,* Chancellor; affirmed.

STATEMENT BY THE COURT.

J. W. Karnes and Mary Karnes brought this suit in equity against R. C. Ramey to set aside a decree of foreclosure against them on a real estate mortgage. The complaint alleges that the foreclosure decree was obtained without service of summons upon them, and also alleges facts which, if established by a preponder-

ance of the evidence, would be a meritorious defense to the foreclosure suit.

It appears from the record that John H. Minick, the son-in-law of the plaintiffs, and his wife, executed a mortgage on real estate in Carroll County, Arkansas, to secure a debt which they owed R. C. Ramey. J. W. Karnes and Mary Karnes, his wife, executed a mortgage on their homestead in Carroll County, Arkansas, to R. C. Ramey to secure the indebtedness of J. H. Minick to said Ramey in the sum of $1,000. The mortgage debt was not paid when it became due, and R. C. Ramey instituted an action in the chancery court against John H. Minick and his wife and J. W. Karnes and Mary Karnes, to foreclose the mortgages on their respective lands.

A decree of foreclosure was entered of record, and judgment was rendered against John H. Minick for the amount of the debt secured by his mortgage, and against J. W. Karnes for the debt secured by his mortgage. The foreclosure decree recites that the defendants had been served with personal summons in the way, time and manner provided by law, but made default. The decree provided that, if the judgment was not paid in twenty days, the commissioner of the court be directed to sell said land for the satisfaction of the judgment, in the manner and under the terms provided in the decree.

J. W. Karnes especially appeared to file exceptions to the report of the commissioner of the sale of his land. The return of the sheriff in the foreclosure suit shows that J. W. Karnes and Mary Karnes were duly served with summons by delivering a copy of same and stating the substance thereof to the within named J. W. Karnes and Mary Karnes as commanded. The return was signed E. L. McShane, sheriff, by Jack Walker, D. S. According to the testimony of J. W. Karnes, no service of summons was had upon him. He admitted that his wife had told him that the sheriff had left a paper with her, but did not say that any was left for him, and that he never saw the paper. The record contained a stipulation that the papers and exhibits in the foreclosure suit

may be used as evidence in this case. According to the testimony of Mary Karnes, upon exceptions to the commissioner's report of sale in the foreclosure suit, deputy sheriff Walker served papers on herself and her daughter, Mrs. John Minick, in Berryville, Arkansas.

The chancellor found the issues in favor of the defendant, and it was decreed that the complaint of the plaintiffs be dismissed for want of equity. To reverse that decree the plaintiffs have duly prosecuted an appeal to this court.

Festus O. Butt, for appellant.

C. A. Fuller, for appellee.

HART, J., (after stating the facts). This court is committed to the doctrine that an officer's false return of service of process shall not preclude the defendant from showing the truth, in a proper proceeding, to be relieved from the burden of a judgment or decree based thereon. One who is aggrieved by a judgment rendered in his absence must show not only that he was not summoned, but also that he did not know of the proceeding in time to make a defense. *State* v. *Hill,* 50 Ark. 458, 8 S. W. 401; *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575; and *First National Bank of Manchester* v. *Turner,* 169 Ark. 393, 275 S. W. 703.

As will appear from our statement of facts, the mortgage foreclosure decree which is sought to be set aside in this case recites that the defendants were duly served with summons in the time and manner provided by law, but made default. This recital is *prima facie* evidence of the facts stated, but, under the principle of law decided in the cases above cited, the defendants may introduce testimony to contradict the recital of the decree; but the burden of proof is upon them. The return of the officer in the foreclosure suit shows that the defendants in that action, J. W. Karnes and Mary Karnes, who are the plaintiffs in the case at bar, were duly served with summons in the time and manner prescribed by law. This constituted the official oath of the officer as to the facts stated in his return.

We are of the opinion that the plaintiffs in this action have not satisfactorily met the burden laid upon them in contradicting the return of the officer as to the service of summons upon them. Mary Karnes, the wife of J. W. Karnes, admitted that she was served with process by the deputy sheriff at her residence in Berryville, Carroll County, Arkansas. J. W. Karnes admits that his wife told him that the sheriff had left a paper with her, but that she did not say that any was left for him, and that he never saw the paper.

Thus it will be seen that Mrs. Karnes admits in her testimony that service was had upon her, and J. W. Karnes admits that he was informed by his wife that a paper had been served upon her. If he had used reasonable diligence, this fact would have put him in possession of the fact that he had been made a defendant in the foreclosure suit. In any event, the evidence offered by the defendants is not sufficient to overcome the official return of the sheriff. At most, it only shows that, instead of serving the summons upon J. W. Karnes personally, it was served upon him by leaving a copy at his usual place of abode with some person who was a member of his family, over fifteen years of age, as provided in the 3rd subdivision of § 1144 of Crawford & Moses' Digest.

It follows that the plaintiffs did not show facts sufficient to overcome the return of the service of summons upon them in the foreclosure suit and the recital contained in the decree that they were duly served with summons; and they are therefore not entitled to set aside the foreclosure decree, regardless of the fact of whether or not they might have a meritorious defense to that action. It follows that the decree must be affirmed.

WILLIAMS v. COURTON.

Opinion delivered November 15, 1926.

1. DEEDS—DESIGNATION OF GRANTEE.—An instrument purporting to be a deed which left the grantee's name a blank does not become operative until the name of the grantee is inserted.
2. FRAUDS, STATUTE OF—CONVEYANCE OF LAND—SIGNATURE BY AGENT.—An agent to fill in the name of the grantee in a deed must have written authority from the principal.
3. HOMESTEAD—JOINDER OF WIFE IN CONVEYANCE.—A homestead cannot be conveyed by a husband without his wife joining in the deed.

Appeal from Benton Chancery Court; *Lee Seamster*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Clarence C. Courton and Izora B. Courton, his wife, brought this suit in equity against Clyde V. Seale and Leo Williams to cancel and set aside a deed purporting to have been executed by them to said Clyde V. Seale and a quitclaim deed to the same land executed by Clyde V. Seale to Leo Williams.

The material facts are as follows: Clarence C. Courton and Izora B. Courton were husband and wife, and they owned, as their homestead, the forty acres of land in controversy, in Benton County, Arkansas, the title to which was in the name of Clarence C. Courton. The latter also owned two farms in Oklahoma, containing ninety and sixty acres, respectively. In June, 1923, Courton and his wife temporarily moved from their home place in Benton County, Arkansas, to his Oklahoma farm, which was some sixteen miles away. The two Oklahoma farms were incumbered by mortgages.

On June 5, 1923, Courton and his wife went to the office of a lawyer in Oklahoma, in a town near where his farms were situated, and had him prepare three deeds, using Oklahoma forms. One deed was made in favor of Clarence C. Courton, purporting to convey to him the forty acres of land in controversy in Benton County, Arkansas. This deed was signed by Izora B. Courton, and neither the deed nor the certificate of acknowledg-

ment contained any reference to her homestead or dower in the land. Another deed purported to convey ninety acres of the Oklahoma land to Clarence C. Courton. This deed was also signed by Izora B. Courton. A third deed was executed by Clarence C. Courton to Izora B. Courton, conveying to her the remaining sixty acres of the Oklahoma land. Courton and wife took all three of these deeds home with them, and that night it was decided that all the lands referred to should be traded for land in Kansas, where the Courtons had formerly lived. To carry out this plan, it was decided to erase the name of the grantees as written in the deeds, and Clarence Courton was given verbal permission by his wife to insert the name of the grantee when he should trade for the Kansas land near their old home. Pursuant to this plan, all three deeds were turned over to Clarence C. Courton, and he carried them to Kansas with him, and stayed there about a month without trading for any land. In the meantime his wife remained on their farm in Oklahoma.

In the early part of July, 1923, Clarence Courton left Kansas in an automobile with L. E. Williams and J. R. Lloyd, and went to Flagler, Colorado. After they arrived at Flagler, Lloyd introduced Clarence C. Courton to Clyde V. Seale, and Courton agreed to trade his Benton County land for a tract of land in Colorado. In order to carry out the trade, Courton delivered to Seale the deed for the Benton County land, in which the name of the grantee had been left blank, and, signing the deed himself, authorized the notary who took his acknowledgment to insert the name of Clyde V. Seale as grantee in the deed. This was done. Lloyd and Williams were present, and knew about the trade between Seale and Courton for the Benton County land. On the next day, which was the 12th day of July, 1923, Williams purchased the Benton County land from Seale and received a quitclaim deed therefor.

Mrs. Izora B. Courton refused to give up possession of their homestead in Benton County to Williams, and

repudiated the transaction entirely. She joined with her husband in bringing this suit to cancel the two deeds to the Benton County land above referred to.

Other facts are shown in the record, but, inasmuch as they have no bearing on the issue raised by the appeal, they need not be stated.

The chancellor, among other things, found that the deed to the Benton County land, delivered by Clarence C. Courton to Clyde V. Seale, had no grantee named in it, and that it was delivered without the knowledge or consent of Izora B. Courton, and that said land was at the time the homestead of Clarence C. Courton and Izora B. Courton, his wife. The court held that the deed was void because it had the name of no grantee written in it at the time of its delivery. A decree was entered of record in accordance with the findings of the chancellor, and to reverse that decree L. E. Williams has duly prosecuted an appeal to this court.

Williams & Williams and *Tom Williams,* for appellant.

A. L. Smith, for appellee.

HART, J., (after stating the facts). The record shows that the forty-acre tract of land in controversy in Benton County, Arkansas, was the homestead of Clarence C. Courton and Izora B. Courton, his wife. Izora B. Courton first signed a deed conveying said land to her husband, and an Oklahoma form, which neither mentioned her homestead nor her dower, was used. Subsequently it was decided to erase the name of Clarence C. Courton as grantee in the deed and to leave the name of the grantee blank. When Clarence C. Courton made the trade with Clyde V. Seale and delivered the deed to him, the deed was blank as to the grantee. This court has held that an instrument purporting to be a deed, in which a blank has been left for the name of the grantee, is not operative, and that written authority to fill in the blank is necessary.

In *Adamson* v. *Hartman,* 40 Ark. 58, the court said: "An instrument of writing, purporting to be a convey-

ance, signed and acknowledged by the grantor, and otherwise in good form, does not become his deed until the name of the grantee and the amount of the consideration are inserted therein. And an agent cannot fill such blanks in the grantor's absence, unless his authority is in writing."

Numerous cases are cited in support of the decision, and, whatever may be the rule elsewhere, it is settled in this State that the instrument in question could not become the deed of the grantor unless the name of a grantee was inserted, and that that act could not be performed by an agent, in the absence of the principal, unless his authority was in writing. It is not claimed that Clarence C. Courton had any written authority to insert the name of Clyde V. Seale as grantee.

The chancellor found that the forty-acre tract of land in question was the homestead of Clarence C. Courton and his wife. His finding in this behalf is supported by the evidence in the record. Under our statute, Clarence C. Courton could not convey the homestead without his wife joining in the deed. *Pipkin* v. *Williams,* 57 Ark. 242, 21 S. W. 433; *Ferrell* v. *Wood,* 149 Ark. 376, 232 S. W. 577, 16 A. L. R. 1033; and *Miles* v. *Jerry,* 158 Ark. 314, 250 S. W. 34.

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

COLEMAN v. WEGMAN.

Opinion delivered November 15, 1926.

1. TRUSTS—AGREEMENT TO PURCHASE FOR ANOTHER.—The general rule is that a mere verbal agreement by which one of the parties thereto promises to buy in at judicial sale lands of the other and hold the same for his benefit does not create a resulting or implied trust, the agreement itself being within the statute of frauds, but such rule is subject to the exception that, where the purchaser buys land in which another is interested, under such a state

of facts as would make it a fraud to permit him to hold on to his bargain, a trust will be raised.

2. TRUSTS—SUFFICIENCY OF EVIDENCE.—To create a trust in favor of plaintiff in property purchased by defendant under oral agreement to take title and permit plaintiff to repurchase it, the evidence must be clear, satisfactory and convincing.

3. TRUSTS—SUFFICIENCY OF EVIDENCE.—Evidence *held* insufficient to establish a constructive trust.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; affirmed.

Cravens & Cravens, for appellant.

SMITH, J. Appellant filed a complaint against appellee, in which she alleged that, prior to the 19th day of September, 1924, she was the owner of a certain house and lot in the city of Fort Smith, upon which she had executed a mortgage to secure an indebtedness of $350 due by her to the Lyman Real Estate Company, hereinafter referred to as the company. This indebtedness matured, and was not paid, and the mortgagee had obtained a decree of foreclosure, pursuant to which the commissioner appointed by the court in the foreclosure proceeding sold the property on the date above named. The mortgagee was the purchaser at the commissioner's sale, and, after the sale had been confirmed and a commissioner's deed executed, conveyed the land to appellee, Mrs. Wegman. It was alleged that appellant had agreed with Mrs. Wegman that this should be done, and that the company had agreed that it would bid in the lot and, after obtaining the commissioner's deed, would convey to Mrs. Wegman, who would then convey to appellant, for the amount of the mortgage debt and interest and the costs of the foreclosure proceeding and sale, and that, pursuant to this agreement, the company conveyed to Mrs. Wegman. Thereafter appellant tendered to Mrs. Wegman the sum agreed upon, but Mrs. Wegman declined to accept the tender. There was a prayer that Mrs. Wegman be declared a trustee for the benefit of appellant, and that she be required to convey to appellant upon payment of the agreed amount of money. Appellant

offered testimony which supported the allegations of her complaint, and she was corroborated by Mr. Lyman, the president of the real estate company, who testified that it was agreed that, after purchasing the lot, the company would then convey the property to Mrs. Wegman and take a mortgage back from her to secure the purchase price, and that Mrs. Wegman would then convey to appellant.

In addition to this testimony, John Bennett, a witness for the appellant, testified that, before the sale, appellant came to him to have witness buy in the property for appellant, and he told her that he would do so if she could not procure some one else to buy it in. Witness did not have the money necessary to do so, but could have procured it, and would have done so, had appellant renewed her request.

Mrs. Wegman was given by the company what was called a payment book, in which payments were noted when made to the company. Mrs. Wegman turned this book over to appellant, who collected one or more month's rent on the property from the tenant who was in possession, and paid the same to the company.

Mrs. Wegman denied that she had told Lyman that she would buy the property for appellant, and testified that, on the morning of the foreclosure sale, she told appellant that she had better attend the sale and protect her interests. Witness did not attend the foreclosure sale, but, when she found that the mortgagee had purchased the property, she bought it for herself, because she thought it was worth more than she paid for it. She testified that she gave the payment book to appellant to collect the rent on the property. Appellant was a colored woman, and the property was located in a neighborhood occupied by colored people, and she paid appellant a commission to collect the rents and turn them over to the company, to be credited in the payment book as part payments on the purchase price secured by the mortgage.

Daisy Jones, a colored woman, testified that she was employed by Mrs. Wegman as a servant in her home, and

that, on the day the property was sold, she heard a conversation between appellant and Mrs. Wegman, in which Mrs. Wegman told appellant that she had better attend the sale and protect her interests, for the reason that she (Mrs. Wegman) was not going to buy the place for her, and if appellant did not buy it she would lose it forever.

The court below delivered a written opinion in the case, in which the testimony is reviewed, and a finding of fact was announced that Mrs. Wegman had bought the property from the company after the sale, "just as any other person would or could have done in her own right," and, upon this finding, the complaint was dismissed as being without equity.

For the reversal of this decree appellant relies upon the case of *Strasner* v. *Carroll,* 135 Ark. 34, 187 S. W. 1057, in which case it was said: "It is true the general rule is that a mere verbal agreement by which one of the parties thereto promises to buy in, at a judicial sale, lands of the other and hold the same for his benefit, does not create a resulting or implied trust, the agreement itself being within the statute of frauds. There are, however, several well recognized exceptions to the rule, and one of them is that where the purchaser of lands in which the other is interested becomes such under such a state of facts as would make it a fraud to permit him to hold on to his bargain. *Trapnall* v. *Brown,* 19 Ark. 39; *McNeil* v. *Gates,* 41 Ark. 264; *LaCotts* v. *LaCotts,* 109 Ark. 335, 159 S. W. 1111. In the first two mentioned cases the principle is announced that it would be a fraud in a purchaser, who obtained property at a price greatly below its value by means of a verbal agreement, to keep the property in violation of the agreement."

We have concluded, however, that, while appellant would be entitled to the relief prayed if the testimony was sufficiently certain to warrant it, the relief here prayed must be denied because the testimony does not measure up to the standard essential to grant such relief.

In the recent case of *Kavanaugh* v. *Morgan, ante* p. 11, it was said: "Appellant contends for the reversal of the decree because the evidence is not full, clear and convincing enough to have warranted the trial court in decreeing a trust *ex maleficio*. The requirements of the rule in such cases announced in *Tiller* v. *Henry,* 75 Ark. 446, and recently approved in *Eason* v. *Wheeler,* 167 Ark. 320, are as follows: 'Constructive trusts may be proved by parol, but parol evidence is received with great caution, and the courts uniformly require the evidence to establish such trusts to be clear and satisfactory.' Sometimes it is expressed that the 'evidence offered for this purpose must be of so positive a character as to leave no doubt of the fact,' and sometimes it is expressed as requiring the evidence to be 'full, clear and convincing,' and sometimes expressed as requiring it 'to be clearly established.' * * * Titles to real estate cannot be overturned by a bare preponderance of oral testimony seeking to establish a trust in opposition to written instruments. The conservatism of the courts has prevented the tenure of realty being based on such shifting sands."

It appears therefore that appellant would not be entitled to the relief prayed unless the showing had been made by testimony which was clear, satisfactory and convincing that Mrs. Wegman had agreed that she would take the title in her own name, with the understanding that appellant might repurchase the same, and that, because of this agreement and in reliance upon it, appellant did not make an arrangement which she otherwise would have made to protect her interests in the land. The court below found the facts against appellant's contention, and we are unable to say that appellant has sustained her contention by testimony which is clear, satisfactory and convincing, and for this reason the decree of the court below will be affirmed.

TRIMUE v. McCALEB.

Opinion delivered November 15, 1926.

1. APPEAL AND ERROR—REVIEW OF DIRECTION OF VERDICT.—In reviewing the correctness of a direction of verdict for plaintiff, the testimony will be viewed in the light most favorable to defendant.
2. BROKERS—FAILURE TO COMPLETE TRANSACTION.—Evidence *held* to sustain finding of the insolvency of the makers of purchase-money notes, payment of which was a condition of liability for a broker's commission.
3. BILLS AND NOTES—BONA FIDE PURCHASER.—One who acquired notes after maturity is not a holder in good faith under Crawford & Moses' Dig., § 7767.
4. BROKERS—RIGHTS TO COMMISSION.—Where a broker's commission was payable when the first purchase money should be paid, the fact that the purchasers became insolvent and deeded the land back to the vendor did not constitute such a payment as would render the vendor liable for the broker's commission, though the purchasers had made a cash payment exceeding the amount of the commission and also a small payment on the first purchase-money note.
5. BROKERS—RIGHT TO COMMISSION.—Indorsement of satisfaction of a vendor's lien on the margin of the record where the deed was recorded *held* not payment of such lien, so as to render payable a note given to a broker payable on payment of the first purchase-money note.
6. BROKERS—RIGHT TO COMMISSION.—The rule that the insolvency of a purchaser after the owner has accepted him will not deprive the broker of his commission for procuring a purchaser *held* inapplicable where payment of such commission was conditioned upon the purchaser paying his first purchase-money note, which was never paid.

Appeal from Craighead Circuit Court, Jonesboro District; *W. W. Bandy,* Judge; reversed.

Basil Baker, for appellant.

SMITH, J. Appellee recovered a judgment against appellant as the maker of a note for $250, dated January 1, 1920. The note was payable to the order of T. W. Altman, a real estate agent, and by him indorsed to appellee. At the conclusion of all the testimony the court directed the jury to return a verdict in appellee's favor, and we must therefore view the testimony in the light

most favorable to appellant, and, when thus viewed, the testimony may be summarized as follows:

Appellant owned a small farm, which he authorized Altman to sell at a price which would net appellant $3,500 in cash, and Altman procured Moskopp and Haas as purchasers, but they were able to pay only a thousand dollars of the purchase money in cash. A sale to Moskopp and Haas was negotiated at the price of $4,000, of which $1,000 was to be paid in cash. One thousand and nine hundred dollars of the purchase money was evidenced by three notes, two for $633 each, and a third for $634. The balance of $1,100 consisted in the assumption of the payment of a mortgage for that amount outstanding against the land at the time of the sale. The purchase price of $4,000 which Moskopp and Haas agreed to pay was $500 in excess of the price which appellant agreed to take, and this excess represented Altman's commission in the sale.

Appellant was unwilling to accept Moskopp and Haas unconditionally as purchasers of the land, so far, at least, as the payment of the commission was concerned, and, in payment of the $500 commission, he executed two notes to Altman's order, each for the sum of $250, the note here sued on being one of them, and the first one to fall due. The understanding between appellant and Altman was that the first note for the commission was to be paid when the first purchase money note was paid, and the second note for commission was to be paid when the second purchase money note was paid. As evidencing this agreement, the note here sued on has written in its face this condition: "This note is payable when Moskopp and Haas pay their first land note in favor of J. S. Trimue" (appellant).

At the time of the negotiations for the sale of the land it was understood and agreed by all the parties, including Altman, that, upon the maturity of the outstanding mortgage against the land, Altman would aid the purchasers, Moskopp and Haas, in procuring a new loan, and for a sum sufficient to pay the mortgage indebt-

edness and to discharge another lien against the land for $275 and the interest thereon.

Altman negotiated a new loan in the sum of $1,500 for Moskopp and Haas, and out of the net proceeds thereof paid the $1,100 mortgage and the accumulated interest and the $275 lien, which, with the interest thereon, amounted to $305. The small balance remaining was credited equally on each of the three purchase money notes.

The loan company agreed to make this loan only upon the condition that it be given a first lien, and, to accomplish this purpose, it was required, not only that the two outstanding liens above referred to be canceled and satisfied, but also that appellant cancel his vendor's lien to secure the unpaid purchase money due him, and this he did by indorsement of payment of the purchase money notes on the margin of the record where his deed to Moskopp and Haas was recorded. Thereafter appellant took from Moskopp and Haas a second mortgage on the land to secure the unpaid purchase money due him. Evidencing this indebtedness, three notes of Moskopp and Haas were taken, which gave a more extended time for payment than the original purchase money notes gave.

Altman was aware of and was a party to all these arrangements; indeed, it was he who negotiated and consummated the new arrangements, and this was done pursuant to an understanding had at the time of the original sale of the land.

Moskopp and Haas were unable to make any additional payments, either on the purchase money or on the mortgage which they had given to the loan company. Moskopp and Haas had both become insolvent. The court below found the fact so to be, and, if their insolvency is not shown by the undisputed evidence, it may at least be said that the testimony was sufficient to support that finding. Moskopp testified that both he and Haas were insolvent, that Haas realized his inability to pay anything on the land, and he abandoned it. Moskopp further testified that he, too, was insolvent, and he was

shortly thereafter adjudged a bankrupt, and at the time he gave his testimony at the trial below he had received his discharge in bankruptcy.

Haas abandoned the land, but joined with Moskopp in reconveying it to appellant in satisfaction of their notes for the purchase money, and a quitclaim deed was executed by them for that purpose, and appellant, with the knowledge and consent of Altman, accepted this deed in satisfaction of the debt due him from Moskopp and Haas, but he testified that this was done only because he knew that Moskopp and Haas were insolvent, and that a suit against them could result in nothing more favorable than a decree foreclosing the mortgage under which the land could be sold, and that he accepted the quitclaim deed to accomplish the only purpose which a foreclosure suit could accomplish and to avoid the expense of foreclosure. He thus recovered the land, but took it subject to the $1,500 mortgage which Moskopp and Haas had executed to the loan company.

The court below had the view that, when Moskopp and Haas deeded the land back to appellant and he surrendered to them their notes, this was, in law, a payment, and made the note here sued on due and payable, and, upon this theory, directed the jury to return a verdict in appellee's favor for the amount of the note, and this appeal is from the judgment pronounced on the verdict so returned.

There is no question in the case about appellee being the holder in good faith of a negotiable note, for value, before maturity. This is true for two reasons. First, according to the testimony on appellant's behalf, appellee did not acquire the note until after its maturity; and, second, the note was not an unconditional promise to pay money, either on demand or at a fixed or determinable future time. Section 7767, C. & M. Digest.

The question therefore is whether there was such a payment of the purchase money notes as matured and made payable the notes given for the broker's commission.

We think the court was in error in holding that the purchase money notes had been paid, under the circumstances herein recited, and, not having been paid, the agent's commission was never earned.

The doctrine announced in the case of *Boysen* v. *Frink,* 80 Ark. 254, 96 S. W. 1056, applies here. In that case the broker had negotiated a sale of a tract of land, under a contract with the owner which provided that the broker should have a commission of seventy-five cents per acre on the land sold, one-half of which was to be paid when one-third of the purchase price had been paid, and the other half of the commission was to be paid when one-half of the purchase price of the land had been paid the owner. The proposed purchaser was insolvent, and did not pay any of the purchase money notes. The agent recovered judgment for the full amount of the commissions.

In reversing this judgment it was said that it was the duty of the broker to furnish a customer able and willing to comply with the proposed sale before he is entitled to commission, when the commission is conditioned on payment of the purchase price. In that case the owner accepted from the proposed purchaser a thousand dollars as reimbursement for losses and expenditures caused by the breach of contract, and there was testimony on the part of the owner that he made diligent, but unsuccessful, effort to collect the purchase money notes. It was said that, if the thousand dollars was accepted in good faith as a reimbursement of losses for the proposed purchaser's breach of contract, and that the contract, to the extent of the agent's interest, could not be enforced, the agent had no case against the owner. The court also said that, if the thousand dollars was not accepted in good faith as a settlement of an otherwise uncollectable debt, but was accepted as a deal more advantageous to the owner than the enforcement of a valid sale, the owner would have to pay the agent before casting up his profits on the venture.

The court said: "If the purchaser was insolvent, no harm could be worked to Frink (the agent) by surrendering worthless notes; nor could any harm be worked him if the purchaser was irresponsible and yet paid Boysen (the owner) something (less than one-third the purchase price) for return of the notes, because Frink could not recover any commission until payment of one-third of the purchase price was made, nor all of his commission until payment of one-half the purchase price was made."

In this case, as in that, the owner had protected himself against the demand of the agent for a commission by stipulating when the commission should be paid, and the condition was never met in either case. The proposed purchaser in each case was insolvent, and, because of insolvency, the owner there, as here, was unable to enforce the contract of sale.

It is true Moskopp and Haas paid appellant a thousand dollars in cash, and that this sum exceeded the agent's commission; but it is also true that this payment was not the one which determined when the broker's commission should be paid. That was dependent upon the payment of the first and second purchase money notes, and the payment of these notes could not be enforced because of the insolvency of the makers, and it may therefore be said here, as was said in the Frink case, that no harm was done the broker by surrendering worthless notes.

If it be said that Moskopp and Haas made appellant a small payment on each of the three purchase money notes, it may be answered that the total sum credited on all three of these notes did not equal the first purchase money note, and it may be further said that the amount so paid was derived from the proceeds of the mortgage to the loan company, and appellant, in retaking the land, took it subject to this increased indebtedness.

We think the views here announced are not in conflict with the opinion in the case of *Pinkerton* v. *Hudson*, 87 Ark. 506, 113 S. W. 35. There a broker had negotiated

a sale under which his commissions were payable when certain parts of the purchase money were paid, and it was held that the fact that the real estate broker was postponed in his right to recover his commission until the purchase money was paid did not relieve the vendor of liability to pay such commission if, notwithstanding the purchaser was financially responsible, the vendor refused to collect the purchase money. But in that case the opinion recites the fact to be that the purchaser of the land was able to carry out the contract of purchase, and, this being true, the court held that it was the duty of the owner to sue the purchaser and compel payment, but that, having failed to discharge this duty, he must pay the broker his commission.

But just here is the distinction between that case, on the one hand, and the Frink case and the instant case, on the other. The purchasers here and in the Frink case were insolvent, and suit against them would have been fruitless, and the law does not require one to do a vain and useless thing. In the Pinkerton case the owner, by suing the proposed purchaser, could have enforced the contract or have collected damages for its breach, while here and in the Frink case suit against the proposed purchasers would have been unavailing, so far as collecting the purchase money is concerned.

The indorsement of satisfaction of the vendor's lien in appellant's favor on the margin of the record where his deed to Moskopp and Haas was recorded, was not a payment, and was not understood to be; indeed, the court did not so hold. The payment, in the opinion of the court below, consisted, not in the satisfaction of the vendor's lien, but in accepting a deed from Moskopp and Haas and the surrender to them of their purchase money notes; but, as we have shown, this was not a payment, because the notes were worthless, and the deed was accepted on that account, at least the jury might have found the fact so to be, and would have done so had they accepted appellant's version of the transaction, and, for this reason, the court was in error in directing a verdict in appellee's favor.

There are numerous cases in which it has been held that, if the owner accepts a proposed purchaser and enters into a binding contract with him, the existent or subsequent insolvency of the purchaser does not deprive the broker of his commission; but the rule is otherwise where the owner stipulates that the commission shall be payable under certain conditions, and those conditions are not complied with through no fault of the owner. *Harnwell* v. *Arnold,* 128 Ark. 10; *Moore* v. *Irwin,* 89 Ark. 289; *Coleman* v. *Edgar Lumber Co.,* 155 Ark. 275.

The judgment of the court below must therefore be reversed, and the cause remanded for a new trial, and it is so ordered.

HEAGLER & SONS *v.* BIGGS.

Opinion delivered November 15, 1926.

1. DRAINS—ALLOWANCE OF CLAIMS AGAINST DEFUNCT DISTRICT—BURDEN OF PROOF.—Where a drainage district had been dissolved under Sp. Acts 1921, No. 590, before the assessment of benefits had been completed, and the chancery court, pursuant thereto, found the amount due to the several claimants against the district, the burden was on landowners of the district to show that the allowances were inequitable or unjust.
2. DRAINS—ABANDONMENT—CLAIMS.—Where a drainage district was abandoned before the assessment of benefits was completed, the engineers and attorneys were entitled to recover compensation for their services only on a *quantum meruit* basis.
3. DRAINS—ABANDONMENT—REASONABLENESS OF ALLOWANCE.—In determining the reasonableness of an allowance to engineers made by the trial court upon a *quantum meruit* basis on abandonment of a drainage project, the fact that the engineers' contract with the district provided that, in case of abandonment, they should receive 10 per cent. above the amount actually expended by them, should be considered in determining whether such allowance was fair and just.
4. DRAINS—ABANDONMENT—ATTORNEYS' FEES.—In determining the value of attorneys' services on the abandonment of a drainage project, it is proper to take into account, not only the skill and learning of the attorneys, but also the net results achieved by them.

5. DRAINS—ABANDONMENT—ALLOWANCE OF CLAIMS.—Evidence *held* to sustain findings of the court fixing fees for attorneys at $1,500 and for engineers at $13,685.48 for services on a drainage district that was abandoned.

Appeal from Greene Chancery Court; *P. A. Lasley,* special Chancellor; affirmed.

Robert E. Fuhr, for appellant.

Block & Kirsch, for appellee.

SMITH, J. On February 18, 1915, by an order of the county court of Greene County, a small drainage district was established embracing lands on each side of what is known as Locust Creek ditch, including about ten sections of land. Huddleston, Fuhr & Futrell, attorneys, were appointed attorneys for the district. They prepared the papers necessary for the establishment of the district, and found there were three or four sections of land which were embraced in what was known as the St. Francis Drainage District of Greene and Clay counties, an improvement district created by a special act of the General Assembly, which act provided that no other improvement district should be created within its borders, and no further action was taken in the organization of the Locust Creek Drainage District.

In 1917, apparently for the purpose of curing this defect, the General Assembly passed act 357, creating a drainage district which embraced practically the same lands as were included in the order of the county court, with an additional section of land. Under this act the viewers of the original district were named as the commissioners for the new one, and the act creating the St. Francis Drainage District was amended so that the lands of that district might also be included in another drainage district. C. E. Waddell was appointed engineer for the new district, and the same firm of attorneys was named as attorneys for the new district.

A survey was made by Waddell, and a number of meetings were held by the commissioners, and the engi-

neer finally filed a report, in which he stated that the cost of the project would be too great to impose on an area so small, and he recommended that the district be enlarged to include other lands which would, in his opinion, be benefited by the proposed improvement.

For the purpose, evidently, of carrying the recommendations of the engineer into effect, the General Assembly, at its 1919 session, passed act 39, enlarging the district by adding thirty-four sections of land. New commissioners were named in the act of 1919, and, after they had qualified and organized, they employed the firm of W. R. Heagler & Sons as engineers, and the same firm of attorneys was employed as attorneys for the district.

The new engineers made a survey and prepared plans for the proposed improvement, which were filed with the commissioners, and an assessment of benefits was made, based upon these plans.

At this juncture the General Assembly, on the 24th day of February, 1920, passed act 224, enlarging the district so that its area embraced 61,000 acres of land, and included practically all the territory in Greene County between Crowley's Ridge and the St. Francis River. This act reappointed the three commissioners of the previous district, and added two more. After the commissioners qualified, the same firm of engineers continued to do the engineering work and the same firm of attorneys was re-employed to do the legal work.

In the district established under act 39, as amended by act 224, two plans for the reclamation of the lands in the district were submitted by the engineers. The engineers were admonished by the commissioners that previous plans had been found to be impractical, and they were enjoined to profit by the previous failures and to prepare the new plans with great care. A plan was finally adopted, and the commissioners proceeded to assess the betterments based upon the plan adopted, but, before the assessment was completed, the General Assembly, on March 28, 1921, passed act 590, repealing the prior acts creating the district.

The estimated cost of the improvement under the plans finally approved was $1,181,082.60, and the number of acres of land in the district was 61,081.

The engineering problems were shown to be quite difficult, and involved taking care of the run of water from the hills on the one hand and the flood water of the St. Francis River on the other.

The act dissolving the district provided that all claims against the district should be presented to the commissioners of the district within a time limited, and that the commissioners should pass upon and approve such claims as were found to be proper, and the commissioners were required to file with the circuit clerk a certificate showing the demands which had been approved and allowed, and the amounts thereof.

Pursuant to the provisions of the dissolution act, the attorneys presented a bill for $3,000, this bill to include all work necessary to be done in winding up the affairs of the district. The claim was allowed by the commissioners in the sum of $2,750.

The engineers presented a bill for $16,245.59, against which there was a credit of $6,000, leaving the balance claimed of $10,245.59. The commissioners allowed the engineers the sum claimed. In addition, the commissioners approved claims for their own services. Having thus ascertained the amounts for which, in their opinion, the district was liable, the commissioners filed a complaint in the chancery court, in which it was prayed, pursuant to the provisions of the dissolution act, that the sum found by them to be due by the district be declared a lien on the lands of the district, and that an assessment be made against the lands to discharge this indebtedness.

Certain owners of lands in the district intervened in this proceeding, and challenged the allowances made by the commissioners to the engineers and the attorneys and to the commissioners themselves as excessive. The chancery court heard testimony, and reduced the fee of the attorneys from the sum of $2,750 allowed by the

commissioners to the sum of $1,500. The claim of the engineers, with the interest thereon, as allowed by the commissioners, was for $17,761.35, and the court found that this was excessive, and the claim was reduced to $13,685.48. The court found that the claims of the commissioners for their *per diem* were just and equitable, and the intervention as to those items was dismissed, and a decree was entered in favor of the engineers and the attorneys for the amounts stated, and they have appealed.

It thus appears that the question presented is one of fact—whether the chancery court allowed the engineers and attorneys a fair and reasonable compensation for their services.

The case presented is not unlike that of *Gould* v. *Toland,* 149 Ark. 476, 232 S. W. 434, and the principles there announced are controlling here. In that case it was said that, "while much weight must be given to settlements made by the board under the act (of dissolution), they cannot be regarded as final. The effect of the ascertainment and settlement necessarily casts upon the landowners in the district the burden of showing that the allowances were inequitable and unjust." That case is authority also for holding that the engineers and the attorneys must be compensated upon a *quantum meruit* basis.

The engineers presented an itemized statement of their account, which embraced many items, all of which appear to have been allowed except an item which reads as follows: "Engineering services, rendered during period February, 1919, to August, 1921, as per detailed statement, page 12, $2,320."

It appears from the brief of appellees that, when this item is excluded and the interest is calculated on the remaining items, the court allowed all other expenses and charges claimed by the engineers.

It will be remembered that the appellant engineers are not the only engineers who made surveys relating to the proposed project, and it appears also that the above

item covers services rendered to August, 1921, a period of time extending five months after the dissolution of the district.

The contract between the engineers and the district contained a clause in which it was provided that, if it appeared, after completed plans of the proposed improvement had been made, the project should be abandoned on account of the excessive cost, the engineer should be compensated by "the payment to him of the amount of money actually expended in making said survey, plans, estimates and costs, drawings, etc., plus ten per cent. of this amount." It appears that the court, in fixing the sum to be allowed the engineers, took into account this provision of the contract, and allowed this additional ten per cent., but the property owners make no complaint of that action. We need not therefore determine whether this allowance should have been made in ascertaining the sum earned by the engineers in settling with them upon a *quantum meruit* basis in accordance with the rule announced in the case of *Gould* v. *Toland, supra,* but it is at least proper for us to consider this allowance in determining whether a fair and just settlement was made with the engineers.

This item of $2,320 is a comprehensive one, but, as we understand the testimony, numerous charges are included in the itemized statement filed by the engineers between February, 1919, and August, 1921, which would be covered by and included in the general designation of engineering services. We do not know whether this is a duplication or not. It may not be, at least not entirely so, but the court appears to have allowed the engineers all the charges which were itemized, and they were varied and extensive.

We do not review these items, as we think no useful purpose would be accomplished in doing so, but, after considering the testimony and assuming that the court below had in mind our decision in the case of *Gould* v. *Toland, supra,* that the burden was on the landowners of showing that allowances made by the commissioners

were inequitable and unjust, we are unable to say that the conclusion reached by the court below is contrary to the preponderance of the evidence.

As to the attorneys' fees, it may be said that, in determining their value, it is proper to take into account, not only the skill and learning of the attorneys, but also the net results achieved by them. *Vaughan* v. *Woodruff-Prairie Road Imp. Dist. No. 6,* 158 Ark. 236, 250 S. W. 870. It is not questioned that the attorneys have served the district faithfully and well, but it stands as an undisputed fact that the project was terminated by the repealing act of the General Assembly, so that no actual benefits have been received by the landowners. The project did not proceed to the point where an assessment of betterments was approved, and no part of the plans were ever executed. This fact is not controlling in determining what the compensation of the attorneys should be, but it is one which cannot be ignored.

The attorneys attended numerous meetings of the board of commissioners, and no doubt were called upon for opinions on many subjects, but they appear to have actually drawn only one contract, the one being the contract between the district and the engineers. It appears that the attorneys successfully resisted an attempt to eliminate certain lands from the district, but the trial of that question in the court below where it originated was conclusive of the question, as no appeal was prosecuted.

It appears that a suit is necessary against the landowners of the district to enforce the lien which was decreed against the lands of the district to discharge the allowances made pursuant to the act of dissolution, but it also appears that $500 of the $1,500 allowed was allowed for this purpose, and, as we understand it, a single proceeding for this purpose will suffice. It is not contemplated that annual suits will be brought, as occurs in going districts where there are annual delinquencies for the nonpayment of taxes.

It does appear that the fee allowed the attorneys here is a more modest one than has been allowed in other cases which have come before us for review, but each case must be considered on its own merits, and, after a careful consideration of all the testimony, weighed as we have weighed the testimony in regard to the engineers' claim, we are unable to say that the finding of the court below is contrary to the preponderance of the evidence, and we must therefore affirm the decree fixing the fee of the attorneys as well as that of the engineers. It is so ordered.

ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD COMPANY v. BALLARD.

Opinion delivered November 15, 1926.

1. EVIDENCE—OPINION AS TO LAND VALUES.—In an action for damages to strawberry land from a railroad fire, witnesses acquainted with the values of surrounding lands were competent to testify as to the value of land adapted to strawberry culture, of land set with strawberry plants, and of the comparative productive value of land set with one, two and three-year-old plants.
2. APPEAL AND ERROR—ESTOPPEL TO ALLEGE ERROR.—Where the railroad company, in an action for damages to strawberry lands from fire, contended in the trial court for a certain measure of damages, it cannot, on appeal, contend for another measure of damages.
3. RAILROADS—LIABILITY FOR FIRES—INSTRUCTION.—An instruction in effect that a railroad company is liable for negligently allowing hoboes to build fires on its right-of-way from which injury resulted to plaintiff's land *held* proper.
4. TRIAL—ARGUMENT OF COUNSEL.—Where counsel for defendant asked leading questions from its witness, it was not error to permit plaintiff's counsel to express the opinion that the manner of interrogating witnesses amounted to coaching or cautioning the witnesses.

Appeal from Clay Circuit Court, Eastern District; *W. W. Bandy,* Judge; affirmed.

Arthur Sneed, for appellant.

Ward & Ward, for appellee.

HUMPHREYS, J. This suit was instituted in the Eastern District of the Circuit Court of Clay County by appellee against appellant to recover damages in the sum of $714.80 for negligently permitting fire to escape from its railroad right-of-way, and from its engine in the operation of its train, destroying about ten acres of strawberries on land belonging to appellee adjoining said right-of-way.

The cause was submitted upon the pleadings, the testimony adduced by the respective parties, and the instructions of the court, which resulted in a judgment against appellant for $585, from which is this appeal.

The record reflects that, during the latter part of October or the first of November, 1923, nine acres of strawberry plants belonging to appellee, which adjoined the right-of-way near Piggott, were destroyed by fire starting near the track of said right-of-way, and that, soon thereafter, another acre of plants was destroyed in the same way. The testimony tended to show that the fire originated either from sparks thrown out from a passing engine or from some old ties that were burning on the right-of-way, or from a fire on the edge of the right-of-way built by a bunch of hoboes camping near the side of the track, who had been there for more than a week, making willow chairs for sale. The foreman of the section where the fire occurred and other railroad employees knew that these hoboes were camping near the track and had been building camp-fires for some time. The foreman saw two of the hoboes building a fire at the edge of the right-of-way on the morning of the day that the berry field was destroyed by fire. Several witnesses testified that it was a common thing for passing engines to set out fire at this point when the grass was dry, and that an engine, which was throwing out a blaze of sparks, passed just before the fire began to spread over the field. One of the witnesses testified that he had often put out fires near this point which had been set out by the passing engines. Appellee, his father, and Lee Knowles, W. C. English and A. B. Cargill each

testified that they were acquainted with land values in that community, and that the lands adapted to strawberry culture were worth $100 an acre, and, when set out in bearing strawberries, were worth $200 an acre. A number of the witnesses testified relative to the productive value of strawberries which had been set out upon the lands in that vicinity for one, two and three years. The strawberries which were destroyed by the fire in question had been planted for two years.

The first contention made by appellant for a reversal of the judgment is that the trial court erred in permitting E. H. Ballard to testify as follows:

"Q. Do you know what is the market value of naked land? A. One hundred dollars an acre. Q. If it is stocked with nursery stock or strawberries like on this, what would it be worth? A. Nursery stock is different to strawberries. Q. Say strawberries? A. One hundred dollars for the strawberries. Q. Making a total of two hundred dollars an acre? A. While we have got as high as seven hundred dollars out of strawberries."

And in permitting Lee Knowles to testify as follows:

"Q. What would it produce? A. It made around $100 per acre, to the best of my knowledge. Q. Did you know what they would produce, these adjoining lands? A. $100 per acre."

And erred in permitting E. H. Ballard to testify as follows:

"Q. You may answer. A. I made $1,100 off of ten acres across over there, and it was a year older than the patch that burned."

The argument is made that this testimony should have been excluded because appellee did not show that the lands about which they were testifying were similarly situated to the land in question, that the cultivation of the crops was not shown to be similar to the cultivation of the berries in question, and that the stand of the plants upon the various tracts of land was the same as upon the tract in question.

These witnesses resided in the community, and were testifying about the value of the lands in that vicinity. They testified that the lands in question had a good stand of berries, how long they had been planted, and the amount in value they had produced each year, which necessarily showed that the berries had been cultivated. The testimony was competent, and properly admitted under the theory advanced by appellant relative to the proper measure of damages upon which the case was tried.

The next contention made by appellant for a reversal of the judgment is that the latter part of instruction number 4 was erroneous. The latter part of instruction number 4 assailed by appellant is as follows:

"If you find from the proof in the case that there is no general market value for that kind of lands in the neighborhood and community, then it will be your duty to find from the proof in the case, as near as you can, what the value of the land was with the strawberries growing on it, and subtract from that the general market value of the land without the strawberries being considered, and your verdict would be the difference. In arriving at a conclusion as to what the value was with the berries on the land, you may take into consideration all of the facts and circumstances in proof."

The first part of the instruction announced the rule that the measure of damages should be the difference between the market value of the land set to bearing strawberries and the market value of the land without growing and bearing strawberries upon it. Evidence was introduced tending to show that land set to strawberries in that community had not been generally sold. The latter part of the instruction was given by the court as a measure for damages in case the jury should find that there was no general market value for lands set to strawberries in that community. Appellant's contention that, unless there was a general market value for such lands in the community, there could be no liability for destroying plants, is not sound. It is not necessary to decide in this

case what the correct rule of damages was, because appellant contended below and procured a trial upon the theory that the correct measure of damages was the difference in value of the land with strawberries growing on it and the value without the berries on it. He cannot be heard, on appeal, to change his theory as to the correct rule for the measure of damages. We think the second clause in the instruction which appellant assailed conforms to the rule for the measure of damages upon which the case was tried at the instance and request of appellant.

The next contention made by appellant for a reversal of the judgment is that instruction number 3, given by the court, in effect told the jury that, if the fire was set out by the hoboes, they should find for appellee. We do not think that appellant has correctly interpreted instruction number 3. It told the jury, in plain and unambiguous language, to find for the appellant unless the fire which destroyed the plants was set out by it or its employees in the operation of its engines, or that it spread from fires permitted to be on the right-of-way of appellant. Appellant was just as responsible for damages caused by the spread of fire from negligently allowing old ties to burn upon its right-of-way, or from fires it negligently allowed hoboes to build at their camp, as by fire that was set out by sparks and cinders thrown into the dry grass from its passing engines. The instruction correctly declared the law applicable to the various phases of testimony introduced in the case.

Appellant's last contention for a reversal of the judgment is that the court allowed O. T. Ward, counsel for appellee, to state in the presence of the jury that Elmer Harwood, one of the witnesses for appellant, had testified that two trains were run to Piggott the day of the fire, instead of one, before he was coached or cautioned. This witness had been asked leading questions by counsel for appellant relative to the number of trains which passed by the strawberry field on that day, for the purpose of refreshing his memory.

In his argument to the jury O. T. Ward expressed the opinion, from the character of questions which had been propounded to this witness, that the manner of interrogation amounted to cautioning or coaching him. Mr. Ward did not state, as a matter of fact, that the witness had been cautioned or coached before he was placed upon the witness stand. As stated above, he simply expressed the opinion that the manner of interrogating the witness amounted to cautioning or coaching the witness.

No error appearing, the judgment is affirmed.

SMITH v. STATE.

Opinion delivered November 15, 1926.

1. CRIMINAL LAW—RES GESTAE.—In a prosecution for assault with intent to kill, testimony as to what was done with a gun taken from the person assaulted while the fight was in progress *held* admissible as part of *res gestae.*
2. CRIMINAL LAW—IMPROPER QUESTION—HARMLESS ERROR.—In a prosecution for assault with intent to kill, to question a witness as to whether he knew of any trouble between defendant and his wife, who was sister of the person assaulted, was not prejudicial to defendant, where the answer was in the negative.
3. WITNESSES—REDIRECT EXAMINATION—EXPLANATION OF CROSS-EXAMINATION.—Where part of a conversation is brought out on cross-examination, the entire conversation may be elicited on redirect examination.
4. WITNESSES—IMPEACHMENT OF ACCUSED.—In a prosecution for assault with intent to kill defendant's wife's brother, defendant's testimony, on cross-examination, that he had slapped his wife on one occasion, in answer to the question whether he had beaten her, *held* proper as bearing on his credibility.
5. CRIMINAL LAW—EVIDENCE—ORDER OF INTRODUCTION.—It is within the trial court's discretion to admit in rebuttal evidence which should have been introduced as direct evidence.
6. CRIMINAL LAW—BURDEN OF SHOWING PREJUDICE.—A showing as to what the answer of a witness would have been must be made before advantage can be taken of the court's refusal to allow the question to be asked.

7. WITNESSES—IMPEACHMENT.—Where a State's witness was cross-examined as to collateral matters, defendant was bound by his answers, and could not contradict him by other witnesses.

8. CRIMINAL LAW—INSTRUCTIONS—APPLICABILITY.—In a prosecution for assault with intent to kill, evidence *held* to warrant instructions formulated on the theory that there was evidence of malice and premeditation.

9. HOMICIDE—INTENT—KIND OF INSTRUMENT USED.—In a prosecution for assault with intent to kill, the jury may consider the nature of the weapon used and the manner of using it, together with all other circumstances, in determining whether the assault was committed with intent to kill.

10. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE.—An instruction that, to justify an assault as in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person, and the defendant must act upon that influence, *held* neither abstract nor argumentative.

11. CRIMINAL LAW—ABSTRACT INSTRUCTION.—In a prosecution for assault with intent to kill, omission from an instruction of defendant's right to defend his father was proper where there was no evidence upon which to base such an instruction.

12. HOMICIDE—INSTRUCTION AS TO THREATS.—An instruction telling the jury that threats alone would not justify an assault with intent to kill *held* proper.

13. CRIMINAL LAW—INSTRUCTIONS—HARMLESS ERROR.—The giving of two instructions correctly embodying substantially the same principle of law *held* not prejudicial, though only one should have been given.

14. CRIMINAL LAW—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.—Failure to incorporate in a general instruction on self-defense defendant's right to act upon the danger as it appeared to him in good faith was not prejudicial where another instruction covered that point, and the jury were instructed to consider the instructions as a whole.

15. CRIMINAL LAW—INSTRUCTIONS AS TO THREATS.—Instructions as to the jury's right to determine, from threats of either party, as to which was the aggressor in a fight, *held* not conflicting, though one was broader than the other in allowing the jury to consider threats made by either, to ascertain the condition of defendant's mind at the time of the difficulty.

16. HOMICIDE—INSTRUCTIONS—HARMLESS ERROR.—One convicted of assault with intent to kill was not prejudiced by an instruction upon aggravated assault.

17. CRIMINAL LAW—INSTRUCTION AS TO DEFENDANT'S RIGHT TO TESTIFY. —Though it is within the discretion of the trial court to give an

instruction relative to defendant's right to testify in his own behalf, it is better practice not to refer to this right or to the rules governing his credibility, but to allow him to take his place along with other witnesses under a general charge.

Appeal from Little River Circuit Court; *B. E. Isbell,* Judge; affirmed.

Seth C. Reynolds, for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

HUMPHREYS, J. Appellant, Walker Smith, was indicted, tried and convicted in the circuit court of Little River County for an assault with intent to kill Pete Beavers, on the 6th day of July, 1926, and was adjudged to serve a term of one year in the State Pentientiary as a punishment therefor, from which is this appeal.

According to the testimony introduced by the State, Pete Beavers came to the home of appellant, on the Carr farm, near DeQueen, in order to protect his sister, appellant's wife, who had been having trouble with her husband. Beavers came to visit them at the request of his sister. He brought his pistol along, and carried it on the inside of his shirt almost continuously for the week he visited them. A revival was in progress near the farm, which was generally attended by the people in the community. It was conducted under a small arbor near the roadside. During Beavers' visit to the home of appellant, he inquired from some of the neighbors concerning the trouble existing between appellant and his wife. During the week there was no friction between appellant and Beavers until the evening on which the affray occurred. His sister had told Beavers of a discussion between herself and appellant, after he had beaten up their boy, at which time the boy had asked his mother to write to Beavers to come, whereupon appellant remarked, "Just let him darken the door." On Tuesday, before the difficulty on Wednesday night, Pete Beavers had gone with Judge Smith and his wife to Foreman for the purpose of sending a message, but he could not send it from Foreman, so went on to Winthrop, where he sent it. After leaving Foreman, he

got to Winthrop before the Smiths did, and returned alone, after night, to the Carr farm. During the trip to Foreman he informed the Smiths he was going to Oklahoma, but did not tell them he was going that day. Services were held at the arbor on Wednesday night, the 6th of July, which were attended by appellant and his immediate relatives and Pete Beavers, his sister, and a number of people in the community. During the services appellant, his father, R. E. Smith, and his brother, Judge Smith, stood outside of the arbor, most of the time, talking. R. E. Smith had what one of the witnesses described as a club, about four feet long and an inch and a-half thick, which he had cut in the woods, and had been using for about a week as a walking-stick. Pete Beavers had his pistol in his bosom, and his explanation for carrying same to church was that he was going to Oklahoma, and had not removed it from his person before going to church. He could make no explanation of why he had carried the pistol constantly after coming to the Carr farm. The preacher and his sister, Mrs. Babcock, who was assisting in the meeting, and her daughter, had accepted an invitation from appellant's wife to go home with her and spend the night. She remarked that her brother, Mr. Beavers, would walk home with them. Others had gathered around the preacher and were extending invitations to him to spend the night with them, when R. E. Smith came up and told appellant's wife that her boy had thrown sticks or rocks at his daughter Lee, when they started home. Her boy denied doing so, and, while the dispute was at its height, Pete Beavers stepped forward and asked his sister what the trouble was about. Before she could explain, appellant advanced hurriedly upon Pete Beavers with an open knife in his right hand, clutched him by the throat with his left, and cut him under the arm. At that time R. E. Smith, who was standing near, struck Beavers in the back with his club or walking-stick. Appellant and Beavers swung apart, and immediately came together again, falling to the ground. Appellant had the knife in his right hand and Beavers had

appellant's right hand in both of his. When they were falling, some one said, "Get that gun off of him." J. B. Tucker tried to pull appellant off of Beavers, but R. E. Smith interfered and demanded that he cease trying to separate them. Some one said to "get that gun," whereupon Judge Smith jerked Beavers' shirt open and got the gun, which was tied up in a handkerchief. Judge Smith took hold of the butt and swung the pistol into a shooting position and said, "Stand back." He then handed the gun to J. O. Tucker, but immediately requested Tucker to return it to him, which he did. The pistol was afterward turned over to an officer of the law, but just who got the knife and what was done with it was not developed. After the gun had been taken, Beavers remarked that "they had got him," whereupon appellant released him, when it was discovered that he had inflicted a deep and dangerous knife wound clear across Beavers' stomach.

The testimony introduced by appellant tended to show that the difficulty was instigated by Pete Beavers, he being the aggressor throughout, and that appellant was the only Smith who participated in the affray, and that the knife wounds were inflicted in necessary self-defense. A number of incidents leading up to and occurring during the affray have not been mentioned in stating the substance of the testimony adduced by appellant, and will not be referred to unless it becomes necessary to do so in the discussion of alleged errors committed by the trial court in the admission and exclusion of certain pieces of testimony.

The motion filed by appellant for a new trial contains forty-seven alleged errors, but all of them are not urged and argued as grounds for a reversal of the judgment. Those which are relied upon have been argued by learned counsel for appellant under the following heads:

First. That the court erred in admitting certain testimony.

Second. That the court erred in excluding certain testimony.

Third. That the court erred in giving certain instructions.

Fourth. That the court erred in refusing to give certain instructions.

I. The court allowed Mr. Tucker, over the objection of appellant, to state what Judge Smith did with the gun when he took it away from Pete Beavers. The statement objected to was to the effect that Judge Smith handed him the gun, then requested that he hand it back, which request was complied with. This occurred while the fight was in progress and immediately after Walker Smith let Beavers up. The testimony was admissible as a part of the *res gestae*.

J. D. Willis was allowed, over the objection of appellant, to answer whether he knew of any trouble between appellant and his wife, who was a sister of Pete Beavers. He answered in the negative, so appellant could not have been prejudiced on account of the question.

The prosecuting attorney was permitted, over the objection of appellant, to ask Pete Beavers, on redirect examination, to state the whole conversation between himself and Mr. Willis relative to the trouble between appellant and his wife. The question was a pertinent and a proper one, because counsel for appellant, on cross-examination of Beavers, had brought out a part of the conversation.

The prosecuting attorney was allowed to ask appellant, on cross-examination, over his objection, whether he had beaten his wife. He answered that he had slapped her on one occasion. The question was properly approved by the trial court as bearing upon the credibility of the witness. *Martin* v. *State*, 161 Ark. 177, 255 S. W. 1094.

The prosecuting attorney was allowed to introduce the testimony of several witnesses in rebuttal, over the objection of appellant, to the effect that they did not hear either Mrs. Walker Smith or Pete Beavers call R. E. Smith a liar when he said Mrs. Smith's boy had thrown rocks or sticks at his daughter, and other wit-

nesses to the effect that they did not see Pete Beavers run his hand in his shirt front as if to get the pistol, just before the fight began. The objection made to the testimony was that it should have been introduced as direct and not as rebuttal evidence. The objection was not tenable, for it was within the discretion of the trial court to admit it out of time. *Jordan* v. *State,* 165 Ark. 502, 265 S. W. 71.

II. The trial court refused to allow appellant to ask Pete Beavers, on cross-examination, whether he was a confederate of and peddled whiskey for John W. Owens, who was executed for killing a man by the name of Throckmorton. No showing was made by appellant that Beavers would have answered the question in the affirmative, had he been required to answer, and for this reason he is not in a position to take advantage of the court's refusal to allow and require an answer to the question. *Dixon* v. *State,* 162 Ark. 584, 258 S. W. 401.

Pete Beavers denied, on cross-examination by appellant, that he told Clydia Smith that he was going to Oklahoma and did not do it, and told Mr. Willis that he was supposed to be gone but was not; and that he was told by Judge Smith, on the way to Foreman, that he would get pinched for carrying a pistol if he did not watch out. The trial court refused to allow Clydia Smith, Mr. Willis and Judge Smith to contradict Beavers on these points, on the ground that they were collateral matters, the answers to which, on cross-examination, bound appellant. The testimony of these witnesses was properly excluded under the rule of evidence thus announced. *Crawford* v. *State,* 132 Ark. 518, 201 S. W. 784; *Lytle* v. *State,* 163 Ark. 129, 259 S. W. 394.

III. Instructions numbers 1, 2, 3, 4, 5 and 6, given at the instance of the State, over the several objections and exceptions of appellant, related to the law of assault with intent to kill, explaining fully the necessary essentials or ingredients of the crime. These instructions were formulated and given upon the theory that the testimony intro-

duced by the State tended to show malice or premeditation in the assault made by appellant upon Pete Beavers, with intent to kill him. Appellant contends that there is no testimony whatever in the record tending to show actual malice or premeditation upon his part to take the life of Pete Beavers, or facts and circumstances from which an inference of malice or premeditation might be drawn. We think otherwise. A short time before the difficulty, the Smiths were seen near the arbor in consultation. Immediately after the services closed, Walker Smith attacked Pete Beavers with an open knife and inflicted two wounds upon his body, one of which was a dangerously deep cut clear across the abdomen. One witness testified that, almost simultaneously with the assault, Walker Smith's father struck Pete Beavers on the back with a club four feet long and an inch and a-half thick. Other witnesses testified that, when Walker Smith was on top of Pete Beavers, cutting him, Judge Smith took Beavers' pistol out of his shirt bosom and swung it into a shooting position, saying to those crowding upon them to stand back. These facts warranted the jury in finding that appellant, his father and brother planned the attack, and, when coupled with the circumstance that a dangerous wound was inflicted with a knife clear across the abdomen of Beavers by Walker Smith, to find that the assault was committed with intent to kill and murder Beavers. The rule of law applicable is that "it is within the province of the jury to consider the nature of the weapon used, and the manner of using it, together with all the other circumstances in the case, in determining whether or not the assault was committed with intent to kill and murder a human being." *Chrisman* v. *State,* 54 Ark. 283, 15 S. W. 889; 13 R. C. L., page 800. We think the evidence amply sufficient to warrant the court in giving instructions numbers 1 to 6 inclusive, which were requested by the State.

Instruction number 7, given by the court at the request of the State, is as follows:

"The bare fear of those offenses to prevent which the assault is alleged to have been committed shall not be sufficient to justify an assault to kill. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the defendant really acted upon that influence, and not in a spirit of revenge."

The instruction is not abstract and argumentative, as contended. Furthermore, it is a correct rule of law. *Palmore* v. *State,* 29 Ark. 248.

Instructions numbers 8 and 9, given at the request of the State, are assailed as defective because they eliminated the right of appellant to defend his father, if it appeared to him, as a reasonable man, that his father was about to be attacked by Beavers, but we are unable to find anywhere in the record that Beavers was about to attack appellant's father. Had the instructions embodied the right of appellant to protect his father, they would have been abstract, and for that reason erroneous.

Our special attention is called to the objection made by appellant to instruction number 13, given by the court at the request of the State, to the effect that it told the jury that, if Beavers had threatened appellant, these threats would not have justified the cutting of Beavers. Appellant has misconstrued the purport of the instruction. It told the jury that such threats alone would not justify an assault.

Objection was made by appellant to instructions numbers 9 to 17, upon the ground that they did not embody the idea that appellant had a right to act upon a reasonable apprehension of danger, provided he did not use greater force than appeared reasonably necessary to him to repulse the assault of Beavers. Our interpretation of both instructions is that they recognized the right of appellant to act upon appearances, if honestly believed by him without fault or negligence on his part. These instructions embody the very idea which appellant contends is not embraced in them. They are correct declarations of law applicable to appellant's theory of the case. *Black* v. *State,* 84 Ark. 126, 104 S. W. 1104. They

are, in substance, the same, and only one of them should have been given, but we are unable to see any prejudice resulting to appellant on account of giving both of them.

Objection was made by appellant to instruction number 18, given at the request of the State, upon the ground that it ignored his right to act upon good faith appearances to him of danger in resisting the assault made by Beavers. The instruction was a correct general declaration of law relative to the right of self-defense, not embodying, however, this particular phase of the case; but other instructions were given covering the right of appellant to act upon appearances of danger, if believed in good faith by him. The court instructed the jury that they should consider all of the instructions together as a whole. In view of this instruction, we are unable to see that prejudice resulted to appellant on account of a failure to incorporate in the general instruction on self-defense the right of appellant to act upon good faith appearances.

Objection was made by appellant to instruction number 22, given at the request of the State, because of an alleged conflict between it and instruction number 14, given at his request. Both instructions related to the right of the jury to determine, from threats made by either party, as to which one was the probable aggressor. Appellant's instruction number 14 is broader than the State's instruction number 22, to the extent of allowing the jury to consider threats made by either for the purpose of ascertaining the condition of the appellant's mind at the time of the difficulty. The mere fact that one was broader than the other does not make them conflicting.

Objection was made to instructions numbers 2 and 3, given by the court, defining manslaughter and the resultant effect in case the jury should find that appellant had been guilty of manslaughter, had Pete Beavers died. The jury was told that, in such an event, appellant should be convicted of aggravated assault, instead of an assault with intent to kill. The court then defined an aggravated

assault, which is a lesser offense than an assault with intent to kill. Appellant was convicted of the higher offense, therefore he was in no position to complain of an instruction on a lower offense, which was necessarily favorable to him. *Jones* v. *State,* 161 Ark. 242, 255 S. W. 876.

IV. The trial court, over the objection of appellant, refused to give instructions numbered A, 2, 3, 6, 7, 8, 9, 10, 12, 16, 18, and 19. We have carefully read each request and reached the conclusion that the court was right in refusing to give any one of them.

Number A requested an instructed verdict for appellant. Our interpretation of the testimony introduced by the State was to the effect that the evidence is sufficient to support a verdict and judgment for an assault with intent to kill.

Number 2 related to the question of the credibility of witnesses, and was fully covered by instruction number 5, given by the court.

Number 3 related to the right of appellant to testify in his own behalf. It is within the discretion of the trial court to give an instruction relative to the right of a defendant to testify in his own behalf, but it is the better practice not to refer to this right or rules governing his credibility and the weight to be attached to his evidence, but to allow him to take his place along with all other witnesses under the general charge relative to the credibility and weight to be attached to their testimony. *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885; *Whitener* v. *State,* 120 Ark. 30, 178 S. W. 394; *Denton* v. *State,* 131 Ark. 1, 198 S. W. 111; *Davis* v. *State,* 150 Ark. 501, 234 S. W. 482.

Number 6, upon the question of reasonable doubt, was covered by number 1 given by the court.

Number 7 was abstract because there was no evidence tending to show that Pete Beavers was turbulent, quarrelsome or dangerous.

Number 8, upon the burden of proof, was covered by number 5, given at the request of appellant himself.

Numbers 10, 12 and 16 were abstract, as there was no testimony introduced tending to show that Beavers was making an attack upon appellant's father when he assaulted him.

Numbers 11, 13 and 15 were properly modified by the trial court so as to eliminate the right of appellant to defend his father. The testimony did not warrant the court in giving the instructions in the form asked.

No error appearing, the judgment is affirmed.

GREEN v. GREEN.

Opinion delivered November 23, 1926.

APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT.—Where no abstract of proceedings before the lower court is brought up on appeal, a decree refusing recovery on a supersedeas bond was affirmed, since the Supreme Court was not advised as to the grounds on which the ruling was made.

Appeal from Garland Chancery Court; *W. R. Duffie,* Chancellor; affirmed.

R. G. Davies, for appellant.

Murphy & Wood, for appellee.

McCULLOCH, C. J. This is an appeal from a decree of the chancery court of Garland County, refusing to summarily award recovery from appellee and his sureties on a supersedeas bond on appeal to the Supreme Court.

Appellant and appellee were formerly husband and wife, and on August 30, 1923, in a suit for divorce in which appellant was the plaintiff, the court rendered a decree in favor of appellant for the dissolution of the bonds of marriage, and for recovery of continuing alimony in the sum of $25 per month and for accrued alimony in the total sum of $1,325. It is contended by appellant that appellee appealed from that decree, giving the supersedeas bond involved in the present proceeding, and that the appeal was subsequently dismissed by this court. This is disputed by appellee. The court

ordered a sale of the property of appellee Green, and it was sold by the commissioner for the sum of $501. The court then made an order on the commissioner, after confirming the sale, to pay to appellant all the proceeds of the sale except the sum of $158.05, which sum the court ordered the commissioner to hold for further orders. Subsequently, on January 21, 1924, the court made another order directing the commissioner to pay over the balance of the proceeds of the sale to appellant, and that, "upon receipt of the same, the said cross-complainant discharge all judgments and allowances against the plaintiff, Frank J. Green, in her favor on account of alimony or otherwise, and for all future allowances, the payment of said sum being a full and complete settlement between them." Appellant prosecuted an appeal to this court, and the judgment was reversed on account of the error of the court below in discharging appellee Green from the balance of the judgment for alimony. Appellant then, after the mandate was filed, applied to the court for summary judgment against appellee and his sureties, which application the court denied.

The contention of appellant is, as before stated, that the supersedeas bond in question was executed on appellee's appeal from the first decree. This contention is set forth in the abstract and brief filed on behalf of appellant, but there is no abstract of the proceedings before the court, and we are not advised as to the grounds upon which the court's ruling was made. We are unable therefore to determine from appellant's abstract whether or not the ruling of the court was correct.

For this reason the judgment must be affirmed, and it is so ordered.

ÆTNA INSURANCE COMPANY OF HARTFORD, CONNECTICUT, v. SOLOMON.

Opinion delivered November 23, 1926.

1. TRIAL—REPETITION OF INSTRUCTIONS.—Refusal of requested instructions was not erroneous where appellant's theory of the case was fully submitted by instructions given.
2. INSURANCE—STORM POLICY—MODIFICATION OF INSTRUCTION.—Where, in an action on a storm policy, defendant asked an instruction that "an ordinary wind, no matter how long continued *or how strong*, is not covered by the policy unless it assumed the attitude of a storm," it was not error to strike out the words italicized, as the instruction as asked would have been contradictory.
3. INSURANCE—ALLOWANCE OF INTEREST.—In an action on insurance policies, interest was properly allowed on the amount found to be due, though it was ascertained from conflicting testimony.

Appeal from Phillips Circuit Court; *E. D. Robertson*, Judge; affirmed.

Cockrill & Armistead and *Bevens & Mundt*, for appellant.

Moore, Walker & Moore, for appellee.

McCULLOCH, C. J. This is an action instituted by appellees to recover on a policy of insurance issued by appellant indemnifying appellees against damage to certain buildings "by tornadoes, cyclones or windstorms." There are three separate policies involved in the litigation, and the aggregate sum of $4,188 is sought to be recovered on all of the policies. There was a trial of the issues before a jury, and a verdict in favor of appellees for $2,891, with interest from the date of maturity of the proofs of loss.

Each of the policies contained the following exception from liability:

"This company shall not be liable for any loss or damage occasioned directly or indirectly by or through any tidal wave, high water, overflow or cloudburst; nor for consequential loss or damage of any kind. This company shall not be liable for loss or damage caused by water or rain, whether driven by wind or not."

The defense of appellant was based upon the contention that the damage to the property in question was within the exception from liability.

Appellees were the owners of a large plantation in Phillips County, on which the insured houses—47 in number—were situated and used for occupancy by tenants on the plantation. According to the undisputed testimony, a severe windstorm occurred on April 10, 1922. There is a conflict in the testimony as to the extent of the storm, but the testimony introduced by appellees was to the effect that the houses were blown over, and that the wind was the sole cause of the damage. There was at that time an overflow of water from the Mississippi River, and the land was inundated to a considerable depth, in some places nearly up to the floors of the houses, and in other places above the floors of the houses. The testimony introduced by appellant was to the effect that the damage was caused by the overflow—that the wind was not sufficient to overturn the houses except for the depth of the water surrounding them. This issue was submitted to the jury upon conflicting testimony, and the evidence is legally sufficient to support the verdict.

There are numerous assignments of error in regard to the rulings of the court in refusing instructions requested by appellant, but the court gave six instructions at appellant's request (one of them slightly modified), which fully submitted appellant's theory of the case, and, we think, were sufficient without giving the refused instructions. The following instructions were given at appellant's request:

"No. 2. The jury is instructed that, if you find from the testimony that the windstorm was not sufficiently severe in and of itself to have caused the injuries to the buildings, your verdict will be for the defendant."

"No. 4. The jury is instructed that the plaintiffs are insured under the policies introduced in evidence, against loss or damage due directly to tornado, cyclone or windstorms. But the contract of insurance provides, and by its terms both parties are bound, that the defend-

ant shall not be liable for loss or damage occasioned directly or indirectly by high water or overflow. If therefore you find from the evidence that high water or overflow, even indirectly, was the cause of loss or damage, the plaintiffs cannot recover in this lawsuit."

"No. 9. You are instructed that the damages in this case are limited to such loss or damage to the buildings as was occasioned directly by the wind and would have been occasioned in the absence of and independent of the existence, presence or action of the water, overflow, or water driven by the wind."

"No. 12. You are instructed that, before you can find for the plaintiff, you must find from a preponderance of the testimony that there was a loss or damage occasioned by a tornado, windstorm or cyclone. Unless therefore you find that the damage done to the buildings included in the policies sued on was occasioned by a tornado, windstorm or cyclone, as hereinafter defined, you will find for the defendant. To constitute a windstorm within the meaning of the policies, there must not only have been a wind but also a storm. Therefore to constitute a windstorm there must have been a commotion of the elements involving violent force, vehement action, or turbulent commotion and disturbance of the elements."

"No. 13. You are instructed that, if you find from the evidence that, except for the existence of the flood at the time of the windstorm, there would have been no damage to any particular building claimed to have been damaged, you will find for the defendant as to that claim."

These instructions were quite as favorable to appellant as could have been given.

The following instruction No. 11 was given, with the italicized words stricken out:

"You are instructed that an ordinary wind, no matter how long continued, *or how strong,* is not covered by the policy, unless it assumed the attitude of a storm."

The modification did not, we think, impair the force of the instruction, and was not prejudicial. In fact, if

the words had not been stricken out, the instruction would have been contradictory in telling the jury that an ordinary wind, no matter how strong, did not bring the case within the terms of the policy "unless it assumed the attitude of a storm."

One of the refused instructions related to the burden of proof, but we think that instruction No. 12, quoted above, was sufficient to cover that subject. That instruction necessarily placed the burden of proof upon appellees, and it was unnecessary to repeat the instruction in another form.

One of the refused instructions was peremptory, and, as we have already seen that the evidence was sufficient to sustain the verdict in favor of appellees, this instruction was properly refused.

Appellees introduced the testimony of an architect who examined the buildings after the storm, and he testified in detail as to the extent of the damage and the cost of restoration. Each of the houses was dealt with in detail in the testimony, and the items of damage included labor and material for restoration. Among other things, the cost of new wooden blocks and porches and steps for the houses were included. It is contended by counsel that, according to the undisputed testimony, the loss of these portions of the houses was necessarily caused by the overflow and not by the force of the wind, and that the verdict was erroneous in including these items. The answer to this contention is that it does not affirmatively appear that these items were embraced in the verdict. The amount sued for was $4,188, and the recovery was for $2,891, leaving a difference of $1,297 between the amount claimed and the amount of the verdict. There was no objection made to the testimony concerning these items, nor was there any instruction asked excluding the consideration of them from the jury. We cannot say that the jury allowed for these items, therefore it does not appear that the verdict was excessive. So far as concerns the porches and steps, the loss may have occurred from the wind and not from the

water, hence it was proper for the jury to consider those particular items.

Finally, it is insisted that the court erred in its instruction to the jury allowing recovery for interest. The contention is that this is an unliquidated demand, and therefore does not bear interest. This is a suit on contract for the payment of money under certain conditions, and the claimants were entitled to interest on the amount found by the jury to be due, notwithstanding the fact that the amount was to be ascertained from conflicting testimony.

Judgment affirmed.

SHAMIS v. SEAMAN.

Opinion delivered November 23, 1926.

1. PLEADING—MOTION TREATED AS DEMURRER.—A motion to dismiss a complaint in replevin because the court lacked jurisdiction, the defendant holding the property as trustee in bankruptcy, *held* properly treated as a demurrer to the complaint.
2. REPLEVIN—JURISDICTION.—The circuit court in replevin has no jurisdiction of property held by defendant as trustee in bankruptcy, since it has already passed into the possession of the bankruptcy court.

Appeal from Phillips Circuit Court; *E. D. Robertson*, Judge; affirmed.

Sheffield & Coates, for appellant.

Moore, Walker & Moore, for appellee.

WOOD, J. This is an action begun by George Shamis, hereafter called appellant, against Fred Seaman, trustee in bankruptcy of G. I. Shamis, bankrupt, hereafter called the appellee. The appellant filed his complaint in the circuit court of Phillips County, Arkansas, on January 29, 1925, wherein he alleged that he was the owner and entitled to the possession of a Ford touring car, described by number, of the value of $450. He alleged that the property was in the possession of the appellee and wrong-

fully detained by him under the false claim that the same was the property of one G. I. Shamis, who was lately adjudged a bankrupt, and that the appellee was the trustee of his estate in bankruptcy. Such was the effect of the complaint and the affidavit in due form for replevin of the car.

The appellee moved to dismiss the complaint, alleging in his motion that he was an officer of the United States Court for the Eastern District of Arkansas, the appellee being duly elected, qualified and acting trustee in bankruptcy of the estate of G. I. Shamis, bankrupt, and as such had the car in controversy in his possession. Appellee therefore alleged that the circuit court of Phillips County had no jurisdiction of the action, and prayed that same be dismissed. No written answer was filed by the appellant to the motion to dismiss.

The cause was heard, without objection by appellant, upon the complaint and affidavit in replevin and on the motion to dismiss. The court sustained the motion to dismiss, and entered judgment in favor of the appellee dismissing the appellant's complaint for want of jurisdiction, and directing that the appellant be required to turn over the property to the appellee as trustee in bankruptcy, and, if such restitution were not made, that the appellee have judgment on appellee's delivery bond in the sum of $450, the alleged value of the car. From that judgment is this appeal.

No motion for a new trial was filed, and there is no bill of exceptions in the record. Therefore it is apparent that the trial court treated appellee's motion as a demurrer to the complaint. The court ruled correctly in so treating it. Since the appellant admits, for the sake of argument, that G. I. Shamis was duly adjudged a bankrupt, and that the appellee was duly elected trustee in bankruptcy of the estate of G. I. Shamis, and, as such, took into his possession the car in controversy, the only question is whether or not the circuit court had jurisdiction.

The admitted facts show that the property in controversy was in possession of the appellee as the trustee in bankruptcy. The property had already passed into the possession of the bankruptcy court when the appellant instituted this action. The circuit court therefore had no jurisdiction. The law applicable to the facts pleaded and admitted is correctly announced in syllabus to *Orinoco Iron Co.* v. *Metzel,* 230 Fed. 40, as follows: "As to property within the custody of the bankruptcy court, its exclusive jurisdiction over the general administration of the bankrupt's estate carries with it exclusive authority to determine, not only the claims of creditors, but also adverse claims, whether by way of ownership or paramount liens." Numerous authorities to support the doctrine thus announced are cited at page 44 of the opinion. In *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426, 68 Law. Ed. 425, at p. 434, the Supreme Court of the United States says: "Where the bankruptcy court had possession, it could, under the act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision (e) of § 67, under subdivision (b) of § 60, and under subdivision (e) of § 70. But in no case where it lacked possession could the bankruptcy court, under the law as originally enacted, nor can it now (without consent), adjudicate in summary proceeding the validity of a substantial adverse claim. In the absence of possession, there was, under the bankruptcy act of 1898, as originally passed, no jurisdiction, without consent, to adjudicate the controversy, even by a plenary suit." See cases cited in notes 17, 18 and 19.

If this were an action by the trustee in bankruptcy to determine the title and right to possession of George Shamis, the third party, to the property in controversy, the case would be different, and the authorities cited in brief of learned counsel for the appellant would be applicable. But such is not the case. The judgment of the Phillips Circuit Court is therefore correct, and it is affirmed.

ATWOOD v. BALLARD.

Opinion delivered November 23, 1926.

1. DEEDS—MENTAL CAPACITY.—If the maker of a deed has sufficient mental capacity to retain in his memory without prompting the extent and condition of his property and to comprehend how he is disposing of it and to whom and upon what consideration, he possesses sufficient mental capacity to execute the deed.
2. DEEDS—MENTAL CAPACITY—BURDEN OF PROOF.—Since the sanity and mental capacity of a grantor to make a deed is presumed, the burden is upon those who allege that he did not have sufficient mental capacity to make the deed.
3. DEEDS—FINDING OF MENTAL CAPACITY.—A finding that a grantor had sufficient mental capacity to make a deed *held* not against the preponderance of the evidence.

Appeal from Cleveland Chancery Court; *H. R. Lucas,* Chancellor; affirmed.

Toney & Smith, and *Owens & Ehrman,* for appellant.

R. W. Wilson, for appellee.

WOOD, J. This action was originally instituted by C. B. Atwood, guardian of Noble Atwood, against Ollie Ballard, Rosa Hardnett, Edward Atwood and Willie Atwood, hereafter called appellees. After the action was commenced, Noble Atwood died, and the cause was revived in the name of C. B. Atwood as administrator, and also in the name of the legal heirs of Noble Atwood, hereafter called appellants. It was alleged in the complaint that Noble Atwood was the owner of six hundred acres of land in Cleveland County, Arkansas, which lands are described in the complaint; that on July 25, 1923, he executed and delivered to the appellees a deed to the lands; that on that day, and long prior thereto, Noble Atwood was a person of unsound mind and incapable of executing a valid contract; that the deed was executed without consideration and was void; that the appellees were claiming to be the owners of the land and seeking to oust Noble Atwood from the possession thereof, and that the deed constituted a cloud upon the title of the appellants and the other heirs of Noble Atwood. The

prayer was that the deed be canceled and that the title of the appellants be quieted.

The appellees, in their answer, admitted that Noble Atwood was the owner of the lands in controversy and that he executed the deed thereto as alleged, but denied that he was insane before and at the time the deed was executed, and also denied that the deed was without consideration, and void.

John Sandine testified that he had known Noble Atwood for thirty years, and had had occasion to observe his conduct for the last three years past. He was not of sound mind in July, 1922; he acted curious like—he didn't have good sense—had been getting worse, and was now in the insane asylum. Atwood lived on his old home place in 1922 with colored people, who took care of him after he had a spell of sickness. It was after this spell that he became mentally unsound, and deeded the property to the appellees.

J. W. Greenlees testified that he is a justice of the peace; that he had known Noble Atwood for forty years, and had been immediately associated with him for the last ten years. Atwood is now in the asylum at Little Rock. Witness had an opportunity to observe Atwood's conduct during the years 1922 and 1923 and 1924. From his actions and conduct witness thought he was mentally unsound, and witness did not think he was capable of managing his business affairs in July, 1923.

H. O. Wilson testified that he was a practicing physician, and had been in the county of Cleveland for fifteen years. He was acquainted with Noble Atwood. He attended him as a physician in January, 1923. Since that time Noble Atwood's mental condition had been bad. Witness did not think that Noble Atwood was capable of managing his business affairs in July, 1923. Witness did not think Atwood was capable of making a deed and of knowing the effect of it. Witness was positive that Atwood did not know what he was doing during the month of July, 1923. Witness based his opinion upon his observations of Atwood's actions and conduct.

I. E. Moore testified that he had been sheriff of Cleveland County for six years, and also he had been a merchant in the county. As sheriff and merchant he had come in contact with Noble Atwood and had had an opportunity to observe his conduct during the last few years. From such observation he regarded Atwood as unbalanced during the years 1923 and 1924, and did not consider that he was capable of transacting and managing his business affairs. Witness considered Atwood totally incapable of looking after and managing his business from the first part of the year 1923.

H. D. Sadler testified that he was a practicing physician, and had lived and practiced medicine in Cleveland County for twenty-nine years. He had known Noble Atwood forty years. He was called as a physician to treat Atwood in the early part of 1923. After this illness witness did not see him, except when he would come to town. From observing him on the streets of Rison in 1923 and treating him as a physician, witness thought he was mentally unbalanced. There was a trial of some kind as to Atwood's mental condition, and witness testified at that time that Atwood was mentally unbalanced. Witness had never examined or treated Atwood except in his relation as physician and surgeon. Atwood was now in the asylum.

J. B. Searcy testified that he had business dealings with Atwood in 1920, and had observed him occasionally during 1923 and 1924, and he did not consider him capable of managing and controlling his own affairs.

Leali Atwood testified that he was a nephew of Noble Atwood; that his uncle had a spell of sickness in 1923, and at that time acted like a crazy man. He did not manage his farm in 1923, because he was mentally and physically incapable of doing so. After this illness in January, 1923, he would stand off by himself and have nothing to say to anybody, and acted so unnaturally that witness did not consider him mentally capable of managing his own affairs.

Another nephew of Noble Atwood testified that, after his uncle's illness in 1923, he was in very bad shape, and had very little to say.

Three witnesses testified to the effect that, during 1923 and 1924, a negro woman by the name of Eula Bonds, whose reputation for morality was not good, and other negro women, went to the house of Noble Atwood; that Atwood would send money to these women; that he gave Eula Bonds at one time as high as $50; that he would give orders on his merchants for the best grade of silk and shoes to these negroes. Before 1923 he had paid his bills and was conservative in his expenditures, but after that he was reckless in giving these orders, and merchants finally had to turn them down because they had become too large and Atwood had failed to pay his bills. One of the witnesses stated that one day Atwood told the witness that if the bank were on fire he could put it out with magic. This witness considered him mentally deranged for two years before his death.

H. G. Atwood, who was the assistant cashier of the Bank of New Edinburgh, testified that Noble Atwood carried an account with that bank, and that, prior to 1922, he was conservative with his funds. After that witness had to turn down a number of checks, which totaled several hundred dollars, on account of insufficient funds.

The above is substantially the testimony adduced on behalf of the appellants. George Brown testified, on behalf of the appellees, that he was an attorney at law; that he had been justice of the peace, deputy prosecuting attorney, Representative, and State Senator. He had known Noble Atwood for seventeen years. During the last half of that time he was well acquainted with him. He had been employed by Noble Atwood's half-breed children to defend them in a suit that had been filed against them. This action was previous to the present litigation. In order to prepare his defense, witness consulted with Noble Atwood. That was in February, 1924. Atwood told witness that he had an agreement with the appellees to deed them the land if they would support

and furnish him a home and medicine as long as he lived. Witness had several conversations with Atwood. Witness refused to accept employment until he had talked with Noble Atwood and ascertained whether or not he was sane. Witness talked with Atwood for an hour and a half with reference to the deed that he had made to the appellees. Witness discussed the action that had been brought against the appellees, and informed him that the plaintiffs in that action were seeking to set aside the deed because it was claimed he was insane when he executed it, and witness informed Atwood of the different grounds that had been urged as proof of his insanity. One was that he had issued a number of bad checks, and that was unusual for him. Another was that he had divested himself of almost all of his property, not retaining enough to support himself and pay his debts; and another, that he had deeded away his ancestral home to a gang of negroes. To this Atwood replied as follows: So far as the checks were concerned, he had Liberty bonds to the amount of $1,000 in the Bank of New Edinburgh. He was also a stockholder in the Bank of New Edinburgh. He had expected that the bank would pay the checks and treat them as liens on his Liberty bonds, and that they would also take his bank stock as security, as had been done before. Atwood said, "As to deeding away everything I have without retaining enough to support me and pay my debts, I had an agreement with Ball Atwood (one of the defendants in this suit) and the other children that we would all join in a deed and sell the timber and pay all my debts. Besides that, I have retained enough property in bank stock and Liberty bonds and real estate to support me as long as I am likely to live." He also said, "Besides all that, they agreed that, if I would deed them this land, they would support me and furnish me a home and medicine as long as I lived. As to the old home of my fathers being deeded away, I inherited one share of that and the other shares I bought from my brother and my sister." After that, witness had several conversations with Noble Atwood,

and, on one occasion, went with him to Pine Bluff and heard him make the same statements as above, and, in addition, on that occasion he heard Atwood say that he had inherited one share of the old home place from his father and had bought one share from his brother and sister, and he did not see why his children might not as well have the land from him as for him to have had it from his father. When he spoke of his children he had reference to his half-breed children by his negro paramour. Witness saw no difference in his condition in later years from that of former years, except that he had gown older and a little more feeble physically. Witness discovered no change in his mental condition, and stated that he had a clear conception of what property he had and what he intended to do with it and how to attend to it. In witness' opinion, Atwood had a clear conception of the effect of the deed. Witness was employed by the appellees to defend the action brought by the guardian and to set aside this same deed. The present attorney for the appellees later became associated with witness in the defense of that suit. Witness is in no way interested in the present case. When the present action was filed, the appellees sought to employ witness, but they could not agree on a fee, and witness was not employed. Noble Atwood had lived mostly among negroes until he apparently cared very little for white society.

Two merchants, Edgar McKinney and J. L. Reed, testified that they were in the mercantile business at Rison and did business with Noble Atwood during the year 1923. One of these witnesses testified that, during the first half of 1923, he did two or three hundred dollars' worth of business with Atwood. The goods were sold on his order, and these witnesses had filed a claim against Atwood's estate for indebtedness incurred by him during the year 1923. One of these witnesses stated that the orders were given to negroes. Atwood had always paid his accounts prior to the last one and witness had considered him financially good until he received

these bad checks. The other witness testified that he considered Atwood capable of transacting business; that, during the later years of Atwood's life, witness handled more of his checks than he ever had before, and the estate was indebted to witness in the amount of checks payment of which had been refused because of insufficient funds.

P. H. Harris testified that he operated a sawmill, and lived near Noble Atwood during the years 1923 and 1924. Witness saw him four or five times in 1923, and went over timber lands with him. Witness discussed with him farming and timber business, and was with him on one occasion three hours, looking over some timber. Atwood was showing witness some of the lines, and he pointed out to witness the corners of the land by the usual designations. Atwood showed witness between eight and twelve corners. They went six or seven miles all around the tract of land. Atwood had a good idea of what his timber was worth. He stated that he knew it was high, and he was not going to give it away. Some five or six weeks after this occasion witness entered into a conditional deal with Atwood for the sale of his timber. Witness wanted three years to cut the timber, and Atwood stated that he could give witness but two years. Finally the deal was not consummated. From witness' conversations with Atwood, at various times and places, witness was of the opinion that Atwood was capable of transacting business and managing his own affairs. "If," says the witness, "there was anybody in Rison that talked with good judgment, Atwood did." Another witness talked with him during the early part of 1923 in regard to the extension of oil leases which Atwood had previously signed. Atwood signed a contract of extension. He read the same over, and they talked about it. Atwood said it was "good for all of us getting a well drilled." He seemed to witness as much interested in that, after he read the contract and found out what they were after, and talked about it as much, as any man witness met on his rounds. Atwood thought it was a good thing, and talked with business

sense about it. Witness did not observe any difference in Atwood's conduct during that year from what it had been in former years. He had known Atwood some thirty-five years.

James F. Crump testified that he was a physician and surgeon, located at Pine Bluff. Prior to moving to Pine Bluff he had practiced medicine in Cleveland County, Arkansas. He had known Noble Atwood about forty years. Witness had not read any works especially on mental diseases, but had had lectures thereon. He had very little experience in the treatment of mental diseases. His practice had been that of the average practitioner. When witness lived at Rison he would see Atwood possibly once a month. During the spring and summer of 1924, witness saw Atwood in witness' office in Pine Bluff. Atwood stayed in witness' office on that occasion perhaps an hour, and witness examined him as to his mental condition, at the request of Mr. George Brown, attorney, at Rison (a brother-in-law of witness). Brown brought Atwood to witness' office, and asked witness to examine him and determine, if possible, his mental condition, stating that a guardian had been appointed for Atwood, and Brown desired to ascertain whether Atwood was capable of making a deed to his property which they were seeking to have set aside. Witness asked Atwood why he had deeded his estate to his illegitimate children, and Atwood stated that he did so because they had promised to take care of him in his old age, and he was getting physically unable to farm and make a living. Witness asked him if there was any parental feeling on his part towards them that induced him to make the deed, and whether or not he would have made the deed to any person who was not kin to him, under the same circumstances, and Atwood replied that he would not. Witness asked him in regard to some checks that he had overdrawn at the Bank of New Edinburgh, why he had issued these checks if he knew that the money was not in the bank, and he replied, "I didn't know how much money I had in there, but I did know that I had a Liberty bond

on deposit with them, that would have been sufficient to cover the checks I issued, if I didn't have sufficient money." In the course of the conversation witness asked about several other things, and Atwood's answers were such as to convince witness that Atwood knew what he was doing, and that his mental condition was perfectly sound. Witness did not observe any special difference on this occasion in Atwood's mental condition from what it had always been. In witness' opinion, Atwood knew and appreciated the effect of the transaction whereby, as grantor, he had conveyed to Ed Atwood and his other illegitimate children the tract of land in controversy, and was mentally capable of managing his business affairs in a reasonable and prudent manner. It is easier for one who is examining another for mental unsoundness to detect signs of insanity than it is when one is not looking for them. Witness had not seen Atwood, before the day he had examined him with special reference to insanity, for about ten years. In making the examination, witness observed the expression of his eyes, manner of talking, and his conduct generally, from every angle necessary to determine whether or not he was mentally unsound.

E. R. Mattox testified that he was a merchant and notary public, and was working for the Wonder State Oil Company most of the year 1923, and he prepared the deed in controversy. He took the acknowledgment. Noble Atwood gave him the tax receipts or deeds to get the description from. Atwood told witness that he had some lots in town that he didn't want to put in the deed. Witness was working for the oil company at the time the deed was executed, and visited Atwood for the purpose of getting an extension on an oil lease. Witness had taken Atwood's acknowledgment before to a lease executed to the Wonder State Oil Company. On the same day that Atwood executed and acknowledged the deed, he executed an extension of an oil lease to the Wonder State Oil Company. This was all done a few days before the first of August, 1923. Witness had known Noble

Atwood about eighteen years, and he noticed no difference in his conduct and conversation on the day that he executed the deed and extension of the oil lease as compared with his conduct in former years. Only he was physically a little more feeble because he was older. Noble Atwood read over the oil lease carefully, and went over different phases of it just like any one else would have done, only he was a little slower in his conversation than he had been. From his conduct and conversation in these transactions, witness was of the opinion that Atwood knew and appreciated the nature of the transaction when he executed the deed to these four parties.

J. M. Elrod testified that he was vice president and cashier of the Bank of Rison, and that Noble Atwood carried an account with the bank during the year 1923 and during previous years. He set forth many business transactions between Atwood and different merchants and individuals, all of which went through the Bank of Rison, which were paid, subsequent to July 25, 1923. As late as October 9, 1923, Atwood deposited with the Bank of Rison $10.61.

The testimony of J. E. Lybrand and Frank Poteet was to the effect that they had business transactions with Noble Atwood—one in October, 1923, in regard to buying some timber, and the other in December, 1923, and both these witnesses gave the substance of these negotiations with circumstantial detail, and, in their opinion, there was nothing in the conversation and conduct of Atwood to indicate that he was of unsound mind and incapable of transacting his business and managing his own affairs.

The mother of the appellees, a negress, testified that Noble Atwood was their father. She had lived in the house with Atwood nearly forty years. His attitude toward the appellees, his children, while they were growing up, was that of a father. He provided for them and looked after them in general.

We deem it unnecessary to set out the testimony of the appellees. Suffice it to say, their testimony was to

the effect that the relation between them and Noble Atwood was that of father and children. Their testimony details circumstances and facts which tended to prove that Atwood, before and at the time of the making of the deed in controversy, was of sound mind; that the consideration for the deed was that they were his children, and that they should take care of him until he died. The deed was filed for record on January 30, 1924.

The trial court found that "Noble Atwood was sane and fully capable of transacting business, and that, as to this particular transaction, he fully understood the contents and effect of said instrument; and that said deed of conveyance was supported by a good and valuable consideration, and is valid and binding as between the plaintiffs and the defendants herein, and vests title to said lands as against these plaintiffs, as the collateral heirs of Noble Atwood." The court thereupon rendered a decree dismissing the complaint for want of equity and vesting and quieting title to the lands in the appellees, from which decree is this appeal.

"The familiar principles of law applicable to cases of this kind have often been announced by this court. If the maker of a deed, will, or other instrument, has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument. Sufficient mental ability to exercise a reasonable judgment concerning these matters in protecting his own interest in dealing with another is all the law requires. If a person has such mental capacity, then, in the absence of fraud, duress, or undue influence, mental weakness, whether produced by old age or through physical infirmities, will not invalidate an instrument executed by him." *Pledger* v. *Birkhead,* 156 Ark. 443, 455, 246 S. W. 510, and cases there cited. See also *Beaty* v. *Swift,* 123 Ark. 166, 184 S. W. 442.

It will be observed that the only issue presented in the case is whether or not Noble Atwood had sufficient mental capacity to execute the deed in controversy. This was purely an issue of fact. Since the sanity and mental capacity of Noble Atwood to make the deed in controversy is presumed, the burden was upon the appellants to prove that he did not have sufficient mental capacity to make the deed. We have fully set forth the material testimony adduced by the appellants and the appellees upon this issue. It speaks for itself. It could serve no useful purpose to discuss it in detail. Applying the principles of law announced in *Pledger* v. *Birkhead, supra,* to the facts of this record which the testimony tends to prove, we are convinced that Noble Atwood, at the time he made the deed, had sufficient mental capacity to make the same, and the trial court ruled correctly in so holding. We are brought to this conclusion, not so much because of the greater number of witnesses who testified in behalf of the appellees that Noble Atwood did have sufficient mental capacity to make the deed in controversy, but because of the character of the testimony of these witnesses. It occurs to us that the testimony of the witnesses on behalf of the appellees is entitled to greater weight than the testimony of the witnesses on behalf of the appellant, for the reason that the testimony of many of the witnesses for the appellees shows that they had a better opportunity to know Atwood and to observe and understand his mental status than did the witnesses for the appellants. For instance, we are greatly impressed with the testimony of witness Brown and of Dr. Crump, who made a special examination of Atwood with a view of ascertaining whether he was of sound mind. While these witnesses were not experts on insanity, they did make a special examination of Atwood in the way of questioning him concerning the making of the deed in controversy, his motives for so doing, and his relationship and attitude toward the appellees. The testimony of these witnesses showed that they were entirely disinterested, and their professional

character and high standing, in the absence of any showing to the contrary, we believe entitles them to full faith and credit. Since they made a special examination of Noble Atwood to determine his mental capacity, their testimony is entitled to greater weight than the testimony of the physicians and other witnesses for the appellants, who did not make a particular examination of Atwood for the purpose of determining the precise issue as to whether or not he was mentally capable of making the deed in controversy. Likewise, the testimony of the notary public who wrote the deed and took the acknowledgment, of the vice president and cashier of the Bank of Rison, and of several other witnesses who had business transactions with Atwood, in which it became necessary for them to go over with him various matters of detail, is entitled to more weight than the testimony of witnesses who merely observed Atwood's conduct and had casual and occasional conversations with him. After giving careful consideration to the testimony of all the witnesses and making all due allowance for any bias or prejudice that might exist on account of relationship and interest, and all other matters brought in review by this record, we are thoroughly satisfied that the finding of the trial court, to say the least, is not clearly against a preponderance of the testimony. On the contrary, the court's finding of fact is in perfect accord with our own conclusion; and this finding, we believe, is supported by a decided preponderance of the evidence.

It is a well settled rule of this court not to disturb the findings of the chancellor unless the same are clearly against the preponderance of the evidence. *Jordan* v. *Bank of Morrilton,* 168 Ark. 117, 269 S. W. 53; *Leach* v. *Smith,* 130 Ark. 465, 470, 197 S. W. 1160, and cases there cited.

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

HARAHAN VIADUCT IMPROVEMENT DISTRICT *v.* MARTINEAU.

Opinion delivered November 23, 1926.

INJUNCTION—NECESSITY OF BOND.—Under Crawford & Moses' Dig., § 5801, providing that a "court or judge granting an injunction shall specify an amount for which the party obtaining it shall give security in a bond to the party enjoined, before the injunction shall become effectual," *held* that an order for a temporary injunction not providing for a bond is void, unless made under § 5796, *Id.*

Prohibition to Pulaski Chancery Court; *John E. Martineau,* Chancellor; writ granted.

M. B. Norfleet, Jr., for appellant.

Grover T. Owens, for appellee.

WOOD, J. L. S. McFadden, a property owner and taxpayer in Crittenden County, Arkansas, instituted an action in the chancery court of Pulaski County, for himself and other taxpayers in Crittenden County, against the State Highway Commission and the individual members constituting that commission and the Harahan Viaduct Improvement District and the county judge of Crittenden County, seeking to obtain a permanent injunction to restrain them from letting a contract on the 16th of November, 1926, for the construction of a viaduct in Crittenden County which is a part of a bridge over the Mississippi River, for which the Harahan Viaduct Improvement District was created by act 569 of the Acts of the General Assembly of the State of Arkansas of the year 1923. The plaintiff alleged various reasons or grounds in his complaint, which we deem it unnecessary to set forth, and concludes his complaint by a prayer for a temporary injunction restraining the defendants from letting a contract on November 16, 1926, and, on final hearing, that the injunction be made perpetual. On November 15, 1926, the plaintiff applied to Chancellor John E. Martineau of the Pulaski Chancery Court, in vacation, for a temporary restraining order. The judge issued the following order:

"On this day there is presented to the court the application of L. S. McFadden *et al.,* asking a restrain-

ing order against the above named defendants, enjoining them and their agents from letting a contract on November 16, 1926, for the construction of Harahan viaduct. And the court, being well and sufficiently advised in the premises, doth hereby order and adjudge: That the above-named defendants be and are hereby temporarily enjoined and restrained from proceeding with the letting of the contract as herefore advertised for the construction of the Harahan viaduct."

On the 16th of November, 1926, the Harahan Viaduct Improvement District, through its board of commissioners, applied to the judges of this court for a writ of prohibition directed against the Hon. John E. Martineau and the chancery court of Pulaski County, to prohibit the enforcement of the temporary restraining order. It is alleged in the petition for the writ of prohibition that the temporary restraining order above set forth was issued without notice to the Harahan Viaduct Improvement Commission, and that no bond had been specified in the order or filed, as required by law, before the temporary injunction should become effective. The petition for writ of prohibition was duly verified by the secretary of the Harahan Viaduct Improvement District Commission. At the hearing before four of the judges of this court, in chambers, the plaintiffs in the original action appearing in person and through their attorney, Grover Owens, and the defendants in the original action appearing in person and through their attorney, M. B. Norfleet, Jr., the cause was heard on the petition and exhibits and the affidavits of witnesses showing that no notice had been served on the chairman or secretary of the Harahan Viaduct Commission of the application for the temporary restraining order, and an affidavit of M. B. Norfleet, Jr., showing that he had applied to the chancellor to recall the temporary restraining order, which the chancellor had denied. It was conceded at the hearing that no bond had been filed with the clerk of the chancery court, and no order had been issued.

Our statute provides as follows: "In every case, the court or judge granting an injunction shall specify in the order therefor an amount for which the party obtaining it shall give security in a bond to the party enjoined, before the injunction shall become effectual, which amount shall be sufficient to cover all the probable damages and costs that may be occasioned by the injunction." Section 5801, C. & M. Digest. Under the above statute, before the injunction order by the court could be issued or become effectual, the court must specify that the party obtaining it shall give a bond to the party enjoined, naming an amount sufficient to cover all possible damages and costs that may be occasioned by the injunction. Compliance with the above statute on the part of the judge of the chancery court was absolutely essential to his jurisdiction to direct the clerk to issue the order and to have the order put into effect. Without compliance with the above statute, any order issued by the clerk would be absolutely void, and disobedience of the order on the part of the defendants could not be held a contempt of the court or of the judge issuing the order. In other words, a compliance with the above statute is essential to the jurisdiction of the chancery court, or judge in vacation, to have the order for a temporary injunction issued and made effectual.

Section 5796 of Crawford & Moses' Digest provides that the court or judge to whom an application for an injunction is made may direct a reasonable notice to be given to the party against whom the injunction is asked, to attend and show cause against it, at a specified time and place, and may, in the meantime, restrain such party. The chancery judge did not proceed under this section of the statute. The issuance of his order to enjoin the letting of the contract on the 16th of November, 1926, was tantamount to a permanent injunction, so far as the letting of the contract on that day is concerned, and therefore § 5801 *supra,* requiring the court's order to specify a bond, was jurisdictional. The chancery court or judge had no jurisdiction to order the issuance and

enforcement of a temporary injunction without complying with the above statute. The Supreme Court of Missouri, in *State* v. *McQuillin,* 260 Mo. 164, 168 S. W. 924, had under consideration the provisions of their Revised Statutes of 1909, § 2522, which is very similar to § 5801 *supra.* In that case the applicants for a writ of prohibition, directed to one of the judges of the circuit court, contended that the judge had no jurisdiction to award a temporary injunction without complying with the provisions of the Missouri statute. The court held as follows: "The right to grant a temporary or preliminary injunction (as one is called in equity jurisprudence which precedes a final decree) is forbidden by statute 'until' a sufficient bond is executed to the other party, 'except in suits instituted by the State in its own behalf';" citing the Missouri statute and other Missouri cases, and continuing: "If such an injunction is issued without bond, it is inoperative, and disobedience to its commands is not a contempt. *Ex parte Miller,* 129 Ala. 130, 30 So. 611, 87 Am. St. Rep. 49; *State ex rel.* v. *Greene,* 48 Neb. 327, 67 N. W. 162; 2 High on Injunctions, § 1429." Further on in this opinion the court said: "In the case in hand, the learned respondent did not issue a stay order to preserve the existing condition of affairs until he could hear the application for the temporary injunction, but he granted the temporary injunction in direct contravention of the terms of the statute making it his duty to require a bond before awarding that writ."

In *Ex parte Miller,* 129 Ala. 130, 30 So. 612, the Supreme Court of Alabama, passing upon a statute which required the giving of a bond before the writ of injunction became effectual, said: "Whatever might be the rule, in the absence of statutory regulations on the subject as to the time the writ becomes operative, we apprehend, under our statute, it can never be operative until the injunction bond has been executed. Such an order is conditional in its nature, and there can be no injunction, and consequently no contempt for its violation, until the bond has been given." Citing 2 High on Injunctions, § 1429;

1 Beach on Injunctions, § 269; *Winslow* v. *Nayson,* 113 Mass. 411.

If the judge of the chancery court had jurisdiction to order the temporary restraining order without the execution of a bond as required by statute, then, to be sure, such judge would have the power to punish the chancery clerk for failure to issue the order and to punish any one who acted in disobedience of such order. But, as we have seen from the above authorities, no one would be in contempt of court for disobedience of such orders. It therefore follows that the judge is without jurisdiction to have such an order issued and enforced, and that such order is absolutely void. The prayer of the petition for writ of prohibition is therefore granted, and the chancery court of Pulaski County and the judge of the chancery court are hereby prohibited from issuing and enforcing an order for a temporary injunction restraining the petitioners herein from letting the contract on this the 16th day of November, 1926.

BANK OF DERMOTT v. MEASEL.

Opinion delivered November 23, 1926.

1. CORPORATIONS—NOTE GIVEN FOR STOCK.—Under Const. 1874, art. 12, § 8, prohibiting the issuance of stock by private corporations except for money or property actually received, a note given to such a corporation for the purchase of stock in it is void.
2. CORPORATIONS—LOANS FOR PURCHASE OF STOCK.—Under Const. 1874, art. 12, § 8, prohibiting the issuance of stock by private corporations except for money or property actually received, *held* that a corporation cannot lend money to a subscriber to purchase its own capital stock.
3. CORPORATIONS—CONSIDERATION FOR ISSUANCE OF STOCK.—The substance, and not the form of a transaction, is controlling whether Const. 1874, art. 12, § 8, prohibiting the issuance of stock by a private corporation except for money or property actually received, has been violated.
4. CORPORATIONS—VOID NOTE—EFFECT OF RENEWAL.—A note given in renewal of a note for the purchase of stock in a private corpora-

tion which was void under Const. 1874, art. 12, § 8, is likewise void, the same defense being available to the maker in a suit on the renewal note as in a suit on the original note.

5. BILLS AND NOTES—RENEWAL NOTE.—A renewal note is not a payment of an original note, but merely an extension of the time of payment.

6. COSTS—DISCRETION OF CHANCELLOR.—The taxation of costs is within the discretion of the chancellor.

Appeal from Chicot Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

STATEMENT OF FACTS.

The Bank of Dermott sued C. M. Measel to recover $900 and the accrued interest alleged to be due upon a promissory note. The suit was defended on the ground that the note was void because it was given for stock in a private corporation, and was therefore void under § 8, art. 12, of the Constitution of the State of Arkansas.

The note sued on was introduced in evidence. It is for $900, and dated July 2, 1921. It is payable to the order of the Dermott Bank & Trust Company three months after date, and was duly transferred to the Bank of Dermott.

C. M. Measel was a witness for himself. According to his testimony, he made a contract with the Dermott Bank & Trust Company to purchase shares of its capital stock, and executed his note therefor in the sum of $750. When the note became due, it was renewed, and finally the witness executed his note for $900, which included the interest and principal upon the original note, and $78.38, which Measel owed the bank on another debt. At the time he executed the note in question, Measel also executed two other notes payable to the Dermott Bank & Trust Company. One of these was for $200 and the other was for $800. These notes were executed for the purpose of securing the money with which to purchase shares of stock in the Dermott Grocery Company. Both of these notes were subsequently paid.

C. A. Franklin was also a witness for the defendant. While his testimony is not so clear and positive as that

of the defendant himself, still it corroborates the defendant's testimony in every essential matter. According to the testimony of Franklin, he was cashier of the Dermott Bank & Trust Company at the time the transactions involved in this case were had. Measel gave two notes to the Dermott Bank & Trust Company to secure money with which to purchase stock in the Dermott Grocery Company, and subsequently paid these notes. He first gave a note to the bank for $750 for shares of stock in the bank. This note was renewed, and finally Measel gave his note to the bank for $900, which included the principal and interest of the original note, and the further sum of $78.38, which Measel owed the bank.

The Dermott Bank & Trust Company went into the hands of the Bank Commissioner, and the Bank of Dermott acquired all its assets and became its successor in business. In rebuttal, the plaintiff introduced in evidence the record from the Dermott Bank & Trust Company, made at the time the transactions involved in this case were had. The bank's record shows that Measel borrowed $1,750 from the bank. Seven hundred and fifty dollars of this money was used in purchasing shares of stock from the bank and the balance was used in purchasing shares of stock in the Dermott Grocery Company.

The chancellor found that the note sued on was executed by C. M. Measel in consideration of stock in the Dermott Bank & Trust Company sold him by said bank, and that all of said note ought to be canceled except $78.38, which Measel owed said bank on another debt. A decree was entered of record in accordance with the findings of the chancellor, and, to reverse that decree, the plaintiff has duly prosecuted an appeal to this court.

John Baxter, for appellant.

Martin A. Threet, for appellee.

HART, J., (after stating the facts). Section 8, article 12, of our Constitution provides that no private corporation shall issue stock or bonds except for money or property actually received, or labor done. It is con-

ceded that, in the construction of this clause of our Constitution, this court has held that a note given for the purchase price of corporate stock is neither money nor property actually received, within the meaning of the Constitution, and the note itself is void. *Bank of Commerce* v. *Goolsby,* 129 Ark. 416, 196 S. W. 803.

In that case the court said: "When notes are taken in exchange for stock, it is a palpable violation of the constitutional provision, because notes are merely evidences of indebtedness, and such a transaction shows upon its face that the stock has not been paid for. The design of the framers of the Constitution was that stock should not be issued and sold except for its value in money or property actually received, or labor done. A note is not property, in the sense of the Constitution, because it only indicates that the stock has not, in fact, been paid for, and, where the notes are worthless, the stock has been exchanged for nothing. Notes are not money and not bankable paper, but mere choses in action, and it in no sense meets the requirements of the above provision of the Constitution to accept a note in exchange for stock."

The language here used is too plain to be misunderstood, and this is conceded by counsel for the plaintiff. He earnestly insists, however, that the substance of this transaction is that Measel first borrowed some money from the bank and subsequently used it in the purchase of its capital stock. This contention, however, is contrary to the evidence. Both Measel and Franklin, who was cashier of the bank at the time, testified that the gist of the transaction was that Measel executed his note to the bank for shares of its capital stock. The purpose of the constitutional provision was to protect creditors of the corporation, as well as stockholders who had purchased stock in the corporation and had actually paid money or property therefor. The words, "actually received," mean the receipt of something tangible and which could be used in the payment of the debts of the corporation. If the bank could lend money and the same

money could be immediately used in payment of the stock of the bank, it is plain that the clause of the Constitution under consideration would serve no useful purpose. The substance, and not the form, of the transaction should be looked to. A preponderance of the evidence shows that the defendant never borrowed a dollar from the bank. The original note simply represents the amount of money which he agreed to pay the bank for stock which it had issued to him. To call it by another name could not in the least change the real character of the transaction. If the corporation could not take the note of a subscriber in payment of its own capital stock, it is plain that it could not lend money to a subscriber to its own capital stock in payment of it. This would be a palpable evasion of the Constitution. There is no more a payment of money where the corporation lends the money to the subscriber and then receives it back in payment of the stock than where it receives a note originally in payment of a stock subscription. *Watts* v. *Worcester Umbrella Co.,* 193 Mass. 138, 78 N. E. 886.

Again, it is insisted that the note sued on, being a renewal of the original note, takes the case out of the inhibition of the Constitution. We cannot agree with this contention. The same defense which the maker of the note might have made to an action by the holder of the note originally given by him may be made by him in this action on the note given in renewal of the original note. Both notes were given for the same illegal consideration. The renewal note is not a payment of the original note, but is merely an extension of the time of payment of such prior note. In *Hollan* v. *American Bank of Commerce & Trust Co.,* 159 Ark. 141, 252 S. W. 359, it was held that a contract is itself usurious which is issued in renewal of the usurious contract. Again, in *City National Bank* v. *DeBaum,* 166 Ark. 18, 265 S. W. 648, it was held that contracts made in violation of law are not rendered valid by renewal or by subsequent promises to pay them. If the law were otherwise, the constitutional

provision under consideration would have no practical use. A subscriber of capital stock of a corporation might execute a short-term note in payment of it, and, by executing a renewal contract when the original note became due, could validate the contract which had been declared illegal and void by the Constitution itself.

Finally, it is insisted that the court erred in taxing the cost in the case. The chancellor taxed two-thirds of the cost to the plaintiff and one-third to the defendant. It is well settled that the taxation of the costs is within the discretion of the chancellor. *Mt. Nebo Anthracite Coal Co.* v. *Martin,* 86 Ark. 608, 112 S. W. 882, and *Hayes* v. *Bankers' & Planters' Life Assn. of Ft. Smith,* 164 Ark. 202, 261 S. W. 296. In the case at bar, the principal sued on was $900, and the amount received by the plaintiff was only $78.38. It is evident that the plaintiff has no cause of complaint as to the taxation of costs.

The result of our views is that the decree of the chancery court was correct, and it will therefore be affirmed.

WHITLOCK v. BARHAM & DUNCAN.

Opinion delivered November 23, 1926.

1. EVIDENCE—CONSIDERATION OF DEED.—The only effect of the consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration, but for every other purpose it is open to explanation, and may be varied by parol proof.
2. DEEDS—CONSIDERATION—BURDEN OF PROOF.—Where a deed recited a consideration of $10, grantors seeking to prove a different consideration have the burden of proof.
3. DEEDS—CONSIDERATION—SUFFICIENCY OF EVIDENCE.—Grantors in a deed *held* not to have sustained the burden of proving a different consideration from that expressed in the deed.
4. BAILMENT—DAMAGES.—Where plaintiff permitted defendants to use a drilling outfit until the termination of a replevin suit, defendants, upon such termination, became liable for the market value of a drill stem which was lost by their negligence.

5. JUDGMENT—PARTIES BOUND.—Bailees of a drilling outfit involved in a replevin suit, not being parties to such suit, are not bound by the result.

6. BAILMENT—LIABILITY OF BAILEES.—Where plaintiffs permitted defendants to use a drilling outfit until termination of a pending replevin suit, without agreement on defendants' part to be liable for its usable value, *held* on judgment for such usable value being rendered against plaintiffs as sureties on a delivery bond in such suit, that defendants were not liable for such usable value.

7. JUDGMENT—CONCLUSIVENESS.—That the sureties on a delivery bond in replevin were *held* liable for the loss of a drill stem was not evidence that bailees of such drill stem were likewise liable, and the sureties could recover only by showing that the bailees were responsible for such loss.

8. INTEREST—UNLIQUIDATED DAMAGES.—Where the sureties on a delivery bond in replevin were compelled to pay the value of a lost drill stem, a suit by them against bailees of such drill stem for negligently causing its loss is one for unliquidated damages, though its value had previously been determined in the replevin suit, to which the bailees were not parties, and hence a decree against the bailees does not bear interest from the date of the judgment, but only from the date of rendition of the decree.

Appeal from Saline Chancery Court; *W. R. Duffie,* Chancellor; affirmed.

W. R. Donham, for appellant.

W. A. Utley and *J. T. Coston,* for appellee.

SMITH, J. Prior to July 6, 1921, J. Nick Thomas & Company had acquired oil leases covering about 12,000 acres of land in Mississippi County, Arkansas, and, on the date mentioned, entered into a contract with O. R. B. Pace to drill for oil on this land. By the terms of this contract Pace was to furnish, at his own expense, all machinery and necessary tools, and was to pay the labor. This contract required Pace to begin drilling for oil by a designated date, and to continue, without ceasing operations, for a period of more than sixty days until oil or gas was discovered, or a well of a certain depth had been drilled. In consideration of the performance of these obligations by Pace, 8,000 acres of the leases were to become his property, and the contract provided the manner in which the leases would be divided so that

Pace would have 8,000 acres and Thomas & Company would own 4,000 acres.

Pace leased a drilling rig and machinery from the Rose City Drilling Company, and began operations, but he soon became involved, and was unable to meet his obligations. The drilling company brought suit in replevin against Pace to recover possession of the drilling rig, machinery and tools, and Pace consulted and employed Barham & Duncan, a firm of attorneys residing in Blytheville, to represent him, and Barham & Duncan associated with themselves A. F. Barham and J. T. Coston, attorneys residing at Osceola. Pace was without means to employ attorneys, and could only compensate them by conveying an interest in his interest. After investigation, the prospects were sufficiently alluring to enlist the interest and aid of the attorneys, who will be hereinafter referred to as the plaintiffs, inasmuch as they brought this suit. It was first and immediately necessary to execute a delivery bond to retain possession of the drilling outfit, in order to preserve Pace's interest under his contract with Thomas & Company, and these attorneys personally executed the bond. It then developed that Pace owed a board bill of $162 at a Blytheville hotel, and had borrowed $750 from the Citizens' Bank of Osceola to pay labor. The attorneys indorsed a note to the hotel, and one to the bank, covering those items.

It was necessary for Pace to have more money to continue operations, and, with this object in view, he interviewed Gus Fulk, T. P. Murrey and J. F. Whitlock, of Little Rock, and his negotiations with these last-named gentlemen culminated in a contract, dated November 4, 1921, which recited that Pace had drilled a well to the approximate depth of 1,400 feet, but was unable to proceed with the drilling on account of lack of funds. Fulk and his associates will be hereinafter referred to as the defendants, as they are the parties sued in this cause. This contract provided that, in consideration of the sum of $250 paid Pace, he should convey to Fulk and his associates an undivided three-fourths interest in the con-

tract between Pace and Thomas & Company. The contract further recited that Fulk should furnish the expense money for the parties to go to Blytheville and endeavor to sell enough leases to finance the project.

It was further agreed between Fulk and his associates and Pace that Murrey should make Blytheville his headquarters, and should have charge of the sale of leases and of all collections and disbursements. Pace gave to Fulk and his associates an irrevocable power of attorney, conferring this authority. Whitlock, as the geologist, was to be present and supervise the drilling. Pace was to do the drilling. The contract also provided how the money received from the sale of the leases should be disbursed.

As a result of Pace's contract with the plaintiffs and his contract with the defendants, he had conveyed 125 per cent. of his interest in his contract with Thomas & Company and was still obligated to drill the well.

Defendants went to Mississippi County, where the well was located, and there discovered, to their surprise, that Pace had previously conveyed an undivided half interest in the leases to plaintiffs by an instrument which was duly of record.

Some very interesting testimony is given by these amateur oil men touching their dilemma. There were four on one side, and three on the other, with Pace between. According to defendants, they decided to charge their loss to their experience account and abandon the field, for the reason that their contract for three-fourths interest had been rendered ineffective through the previous conveyance by Pace of a half interest to the plaintiffs.

It was agreed that plaintiffs should reconvey three-fourths of their interest to Pace, and the consideration for this agreement is the controlling question of fact in the case. After some negotiations, the parties met in Memphis to execute a contract defining their respective rights and obligations. Of this contract more will be said

later. The parties separated without having evidenced their agreement by any writing signed by them. According to plaintiffs, an agreement was reached whereby they should convey three-fourths of their interest to defendants, the consideration therefor being the assumption by defendants of all liabilities existing or contingent against the plaintiffs, the liabilities assumed covering specifically the notes to the hotel and the bank and the liability of plaintiffs on the delivery bond in the replevin suit. A part of the consideration was that Pace, through the delivery bond, should retain and continue to use the drilling rig, tools, etc., involved in the replevin suit.

According to defendants, they were induced by plaintiffs to proceed with the execution of their contract with Pace in consideration of the conveyance to them from plaintiffs of a three-fourths interest in the half interest which Pace had conveyed to plaintiffs, thus giving defendants a three-fourths interest in all of Pace's interest, as was provided in their original contract with Pace.

A few days after the meeting in Memphis, Coston met a man named Laird, in Jonesboro, who advised him that he had purchased from Pace a half interest in the contract Pace had with Thomas & Company, and, because of this information, plaintiffs executed a deed to defendants, instead of Pace. This deed recites that it was executed "for and in consideration of the sum of $10 to us paid" by defendant.

After the execution and delivery of this deed, the drilling of the well was resumed. Murrey continued in the endeavor to sell leases, but met with only indifferent success. Fulk made advances for promotion purposes, pursuant to his agreement so to do, to the extent of $2,250, and Whitlock supervised the drilling.

Defendants were disappointed in their expectations in regard to the sale of leases, and Fulk declined to advance more money for operating expenses, and drilling operations ceased for the lack of funds with which to continue.

The replevin suit came on for trial, and Pace failed to attend, and a judgment was rendered against him and plaintiffs as sureties on the delivery bond for the usable value of the rig and for $1,550, the value of the drill stem, which had become fastened and stuck in the well.

Plaintiffs were compelled to pay about $3,000 in satisfaction of this judgment, and they thereupon brought this suit to recover the amount thereof, together with the amount of the two notes which they had indorsed for Pace. Defendants answered, and denied any liability, and specifically pleaded the statute of frauds.

The court found that the plaintiffs had permitted defendants to have the use of the drilling rig to carry on the operations commenced by Pace, and that defendants, as bailees of the rig and machinery, negligently permitted the drill stem to become fastened in the well, and, upon this finding, rendered judgment against defendants for the value of the drill stem, which was found to be $1,550. The court declined, however, to render judgment against the defendants for the amount of the judgment against plaintiffs for the usable value of the drilling outfit, and also declined to render judgment against defendants for the amount of the two notes which plaintiffs had indorsed for Pace, for the reason that any agreement on the part of defendants to answer for the debt, default or miscarriage of Pace was within the statute of frauds, and, not being evidenced by any writing signed by the parties sought to be charged, could not be enforced. The court also declined to allow interest on the value of the drill stem. From this decree the defendants have appealed, and the plaintiffs have prosecuted a cross-appeal.

We will not attempt to set out the testimony in detail, as we think no useful purpose would be accomplished by doing so. It is apparent, from what has already been said, that the situations of the parties afforded numerous opportunities for misunderstandings, which were accentuated by the fact that, in the beginning, the

plaintiffs and the defendants dealt with each other on terms of amity and confidence. The venture was one in which all parties would have profited largely, had oil or gas been discovered, and in which all would lose if the venture failed.

Defendants say that the attempt of plaintiffs to hold them responsible for the debts of Pace and for the liability incurred by plaintiffs as sureties on the delivery bond is, in effect, an attempt to reform the deed to them from plaintiffs, and that this relief can be granted only upon testimony that is clear and decisive. Plaintiffs reply by saying that they are not seeking to reform this deed, but are seeking only to show that the consideration expressed, which was $10 paid plaintiffs, was not the real consideration for this instrument, but that the consideration was in fact the assumption by defendants of all obligations or liabilities which plaintiffs had incurred through their relations with Pace.

Plaintiffs are correct in their contention concerning the law governing this question. In the case of *J. H. McGill Lumber Co.* v. *Lane-White Lumber Co.,* 90 Ark. 246, 119 S. W. 822, it was said: "This court, in *Vaugine* v. *Taylor* (18 Ark. 65) quoted with approval the following statement of the law on the subject found in the opinion of Cowen, J., in *McCrea* v. *Purmort,* 16 Wend. 400: 'It seems, according to the American cases, that the only effect of a consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration, and that, for every other purpose, it is open to explanation, and may be varied by parol proof.' "

The burden is, however, upon the plaintiffs to show that the consideration expressed in the deed to defendants was not the true consideration. It is clear that plaintiffs were under the apprehension that defendants were relieving them of all the obligations they had assumed; but it is not so clear that defendants had so agreed.

It will be remembered that the conveyance from plaintiffs to defendants did not divest plaintiffs of their entire interest in the project. On the contrary, they retained and did not convey a one-eighth interest in the leases which would have been assigned Pace had the venture proved successful. It was to the interest of all parties that Pace should continue operations, otherwise all would lose. When the parties met in Memphis to reduce their agreements to writing, Coston, for the plaintiffs, prepared certain memoranda, and Fulk performed a similar service for the defendants, but the contract was never reduced to writing satisfactory to all parties, and no contract was ever signed. The memoranda prepared by Coston concerning the contract which the parties were to make sustain the contention of plaintiff, but those prepared by Fulk sustain the contentions of the defendants.

Plaintiffs say that, if the testimony is in equal poise between themselves and the defendants, the scales tip in their favor through the testimony of the cashier of the bank holding the note of Pace which plaintiffs had indorsed. This officer testified that he spoke to Murrey more than once about payment of this note, and that Murrey asked indulgence of time, and promised to pay the note. Murrey admits having more than one conversation with the bank cashier about payment of the note, but, according to his testimony—and it is sustained by the Fulk memoranda—the Pace obligations were to be paid out of the proceeds of the sales of leases belonging to Pace, but there were not enough sales to finance the drilling operations, and there was never money on hand to pay the bank. The money realized from the sales of leases, with the exception of a few items of expense, all went into drilling operations. Under the memoranda prepared by Fulk it was agreed that, from the sales of leases, Murrey, as the financial agent of defendants, should discharge the outstanding obligations of Pace to the extent of $1,500 before anything should be paid Fulk to reimburse him for his advances, but, as we have

said, the funds out of which this was to be done were never provided.

We conclude therefore that plaintiffs have not met the burden of proof which the law imposes upon them, of showing that the consideration of their deed to defendants was the assumption of payment by defendants of the existing liabilities of plaintiffs through their relations with Pace.

It does not follow, however, because we so hold, that defendants should not be held liable for the value of the drill stem. The testimony shows that one of the agreements reached by the parties was that defendants should be allowed to use the drilling outfit until the termination of the replevin suit, and that they did so use it, and, while using it, permitted the drill stem to become stuck in the well and to so remain until it "froze" there, as the witnesses expressed it, meaning thereby that it became set in a way that it could not, after freezing, be removed. Defendants were bailees of the drilling outfit, and the testimony on the part of the plaintiffs sustains the finding made by the court below, that the drill stem was allowed to freeze through the negligence of the defendants. The testimony shows that, when Fulk ceased to make advances, and Murrey failed to sell enough leases to provide funds to continue operations, defendants abandoned the enterprise, and left the drilling outfit unprotected.

Pace was not sufficiently concerned about the replevin suit to attend the trial. The plaintiffs were therefore without a witness or a defense in that suit, and judgment was rendered against them as sureties on the delivery bond for the usable value of the drilling rig and machinery and the market value of the drill stem which was left stuck in the well.

Defendants were not parties to the replevin suit, and are therefore not bound by its result. They are not liable for the discharge of the judgment against plaintiffs for the usable value of the rig, because the testimony does not establish an agreement on their part to assume

it; and, for the same reason, they are not liable for the payment of the notes to the bank and the hotel, indorsed by plaintiffs; but they are liable for the drill stem, because, while it was in their possession, they negligently permitted its loss.

The court below held defendants were liable for the loss of the drill stem, but refused to charge them with the interest on the value thereof which plaintiffs had paid. Plaintiffs say they should have judgment for interest on the sum they were required to pay as the value of the drill stem from the date of the judgment against them in the replevin suit.

As we have said, defendants were not parties to the replevin suit, and are not bound by the adjudications there made. It was necessary therefore, for the plaintiffs to recover in the present suit, to show that defendants were answerable to them for the return of the drill rig stem and had failed to discharge this duty, and it was essential also for plaintiffs to show the value of any part thereof which had been negligently lost or destroyed. The value of the drill stem, as found by the jury in the replevin suit, was not conclusive of that question in the court below. It was necessary for the court below to find this value, and, while the court found the same valuation, the demand was nevertheless based upon one for unliquidated damages.

The fact that plaintiffs had been held liable for the loss of the drill stem was not even evidence that defendants were also liable, and plaintiffs could recover only by showing that defendants were responsible for this loss. The liability was one which plaintiffs were required to establish, and the amount of the liability could be determined only after a trial. *Coburn* v. *Muskegon Booming Co.*, 72 Mich. 134, 40 N. W. 198.

In volume 17 C. J., chapter "Damages," page 822, it is said that "an award of interest, or, more accurately, of damages for the detention of compensation, is not, according to the weight of authority, a matter of right

in actions of tort for unliquidated damages, but is discretionary with the jury or with the court, where the trial is to the court, except in certain well-defined classes of cases, wherein the recovery is measured by the value or difference in value of the property destroyed or injured, and plaintiff is regarded as entitled, as a matter of law, to interest upon the amount found, if entitled to a recovery." And at § 146 of the same chapter, page 824, it is said: "In other jurisdictions, in cases of wrongs resulting in depreciation or destruction of personalty, an allowance of interest as such is a matter of discretion, and, according to the weight of authority, is, where the amount of the loss is definitely ascertainable, allowable as of right, and by that name." Among other cases cited in support of the text last quoted are the cases of *Hooten* v. *State,* 119 Ark. 334, 178 S. W. 310, and *St. Louis, I. M. & So. Ry. Co.* v. *State,* 119 Ark. 334, 178 S. W. 310, and *St. Louis, I. M. & So. R. Co.* v. *Biggs,* 50 Ark. 169, 6 S. W. 724.

The instant case is unlike that of *Rogers* v. *Atkinson,* 152 Ark. 168, 237 S. W. 679, where the jury had failed to compute and include interest in the verdict, and, upon appeal, we modified the judgment of the court below by computing and adding the interest. That was a suit on a note, and it was an undisputed fact that, if the plaintiff was entitled to a verdict, he was entitled to interest as in the case of a liquidated demand, and we held therefore that the plaintiff was entitled to have the judgment modified so as to include interest.

The instant case is more like that of *McDonough* v. *Williams,* 86 Ark. 600, 112 S. W. 164, which was an action for deceit in the sale of corporate stock, in which case it was held that the plaintiff should have judgment only for the amount assessed by the jury, which did not include interest.

We decline therefore to modify the decree of the court below by adding interest to the value of the drill stem from the date of the judgment against plaintiffs in

the replevin suit, as plaintiff insist we should do. However, the decree here appealed from will and does bear interest from the date of its rendition.

Upon a consideration of the whole case we find no error in the decree of the court below, and it is therefore affirmed both upon the direct appeal and the cross-appeal.

FRAZER v. PETTIT-GALLOWAY COMPANY.

Opinion delivered November 23, 1926.

1. EVIDENCE—ADMISSIBILITY OF COPY OF WRITING.—A copy of a writing is inadmissible in evidence until it has been shown that the original is lost or destroyed, or that it is in the possession of the opposite party, who has failed to produce it as evidence after being notified to do so.
2. INTEREST—OPEN ACCOUNT.—An open account for goods sold bears interest after maturity.
3. SALES—WAIVER OF BREACH OF WARRANTY.—Where the seller of a gas plant warranted it free from defects for one year, the buyer will be held to have waived a breach of such warranty by selling the plant.
4. SALES—REMEDIES OF SELLER.—Though the seller of a gas plant could, under reservation of title, retake the property after the buyer had resold it, it was not required to do so, and could treat the title as having passed to the buyer's vendee and sue for the balance of the purchase price.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann*, Judge; affirmed.

A. J. DeMers and *T. N. Robertson*, for appellant.

Carmichael & Hendricks, for appellee.

SMITH, J. In February, 1923, appellant, Frazer, and his wife purchased from appellee certain household appliances, including a gas plant and accessories. These articles were bought on open account, and title was reserved by appellee until the purchase money was paid. The gas plant and accessories were installed in the suburban home of appellants, near the town of Levy, Arkansas. The sale was evidenced by a written contract, which contained the following guaranty: "Guaranty—All

apparatus listed above is guaranteed to be free from defects in workmanship and material for a period of one year, and any parts proving defective within this period will be replaced without charge. On apparatus having guaranty card attached, the card must be properly filled out on date of installation and returned to us or to the manufacturer."

Frazer was slow in making payments, and was asked for a note, which appellee thought it could use by discounting it at the bank, and a note was given, which evidenced the balance then due. There was correspondence between the parties in regard to the payment of the note. Appellee had notified the attorneys for appellants in writing that it desired the originals of certain specified letters for the benefit of the record. These letters were not produced by appellants, and the court permitted appellee to introduce copies thereof. When appellants put on their case, they offered to introduce copies of certain letters, which were excluded when objection to their introduction was made. No notice, however, had been given to appellee to produce the originals of the letters copies of which appellants sought to introduce. These rulings are assigned as error.

In the case of *Hartford Fire Ins. Co.* v. *Enoch*, 72 Ark. 47, 77 S. W. 899, a syllabus reads as follows: "A copy of a writing is inadmissible in evidence until it has been shown that the original is lost or destroyed, or that it is in the possession of the opposite party, who has failed to produce it as evidence, after being notified to do so." There was therefore no error in the ruling made.

At the conclusion of all the testimony, the court instructed the jury as follows: "Gentlemen of the jury, in this case, as the court sees it, there is nothing for the jury to decide. The proof shows that this gas plant was sold, together with other articles, all of which amount had been put in a note for $1,200; the proof shows further, without contradiction, and it is admitted, that that note, or account, either, was paid down below the cost of the gas plant, and when any amount was paid on the

purchase price of the gas plant it was a ratification of the gas plant. Now, the defendant claims that the gas plant did not perform the service it was intended for, but the law required him, when he found that out, to act by complaining, so, if he paid with knowledge of its condition, then the law imposed on him absolute ratification under his contract. That is one reason. Another reason is, the property has been sold, for a consideration, to a purchaser, and for that reason the plaintiff cannot get its property. So you will return a verdict for the plaintiff by direction of the court."

Thereupon the jury, under the above direction of the court, rendered a verdict in favor of the plaintiff for the sum of $750, and judgment was rendered accordingly, and the defendants have appealed.

Appellee had sold appellants other goods, which, upon complaint concerning their quality, had been taken back, and these goods are not involved in this litigation.

There was testimony, which does not appear to be denied, that certain payments were made, which were credited on the note, and, in response to appellee's demand that the balance be paid, appellants offered to pay the note if no interest was charged thereon, this contention being based on the theory that the account itself bore no interest, and that the note had been given merely to accommodate appellee in raising money by using the note. Of course the account, as well as the note, after maturity, would bear interest.

It appears that, without appellee's knowledge or consent, appellants sold the house in which the plant had been installed, but appellants say this is unimportant, for the reason that, having reserved title to the heating plant, appellee had the right to retake it, and should do so, inasmuch as appellants contend it did not meet the specifications of the guaranty under which it was sold concerning its heating qualities. It will be observed, however, that the guaranty was in writing, and contained no reference to the heating qualities of the plant.

Appellants did not return the property, or offer to do so, nor did they wait until they were sued and plead partial failure of consideration. On the contrary, they sold the plant, and have the proceeds.

We think therefore that the court was correct in holding, as a matter of law, that appellants had ratified the contract of sale, even though there had been a breach of the guaranty, by selling the plant. It is true, appellee, under its reservation of title, might have retaken the property, but it was not required to do so. It has elected to treat the title as having passed to appellant's vendees, and, under this election, it had the right to sue for the balance of unpaid purchase money.

The judgment of the court below is correct, and is therefore affirmed.

INTERSTATE JOBBING COMPANY v. VELVIN.

Opinion delivered November 23, 1926.

1. CORPORATIONS—LIABILITY OF OFFICERS—FAILURE TO MAKE REPORTS.—In an action to enforce the personal liability of the president of a private corporation for debts incurred during a year for which no financial report of the corporation had been filed, as required by Crawford & Moses' Dig., § 1715, a defense in the nature of a plea of payment of a portion of the account for which defendant would otherwise be liable *held* unavailable where there was no plea of payment.
2. PAYMENT—PLEADING.—Where there is no plea of payment, proof thereof is inadmissible.
3. CORPORATIONS—LIABILITY OF OFFICER—EVIDENCE.—In an action to enforce the personal liability of the president of a private corporation for debts incurred during a year for which no financial report of the corporation had been filed, where plaintiff, entitled to a reversal, asked that judgment be rendered in the Supreme Court for what in any event would be the minimum amount for which it is entitled to judgment, *held* that plaintiff in any event would be entitled to the difference between purchases and payments made during such year.

Appeal from Hempstead Circuit Court; *James H. McCollum,* Judge; reversed.

E. F. McFaddin, for appellant.

SMITH, J. This is the second appeal in this case, and, in the opinion reported on the former appeal, which appears in 165 Ark. 263, will be found a statement of the facts out of which the litigation arose. The suit was brought by the Interstate Jobbing Company to enforce against appellee, as president of the Farmers' Mercantile Company, a domestic corporation, the liability prescribed by § 1715, C. & M. Digest, for failure to file the annual corporate report required by that section.

Defendant Velvin became president of the corporation on January 1, 1921, and was president thereof during the remainder of that year. The corporation was indebted to appellant, the plaintiff below, on January 1, 1921, in the sum of $367.10, and, during that year, bought more goods amounting to $471.75, and made payments on account during that year amounting to $350.

At the first trial plaintiff asked an instruction which, after defining the duty of certain corporate officers to file reports, directed the jury, if this duty had not been performed, to return a verdict for it "for whatever amount of accounts, if any, you find were contracted by the Farmers' Mercantile Company with the plaintiff herein, after the failure to file the report required by law." The court modified this instruction by adding "less whatever sum, if any, you may find, from a preponderance of the evidence, the Farmers' Mercantile Company paid to the plaintiff during the year 1921."

The instruction was modified on the theory that payments made in 1921 should be credited on the items purchased during that year, although there had been no application by the debtor of these payments to the items purchased during that year. We held this modification was erroneous, for the reason that, the debtor having failed to direct the application of the payments, the creditor had the right to apply the payments to the older items of the account, as had been done in the account sued on.

The cause was remanded for a new trial, but there was no amendment of the pleadings; and the answer upon which the case went to trial contained only a general denial of the allegations of the complaint. After the jury had been impaneled to try the case and the plaintiff had made a statement of the case, counsel for defendant, in stating his defense, said that an agreement had been made between the secretary of the Farmers' Mercantile Company and the plaintiff whereby any payments made in 1921 should be applied to any purchases made during that year. Thereupon counsel for plaintiff objected to the statement, for the reason that the answer had set up no such defense, and, when this objection was overruled, a continuance was then asked upon the ground of surprise, which motion was also overruled, to which action plaintiff duly excepted. Thereafter, by appropriate objections, both to the admission of testimony and to the giving of instructions, plaintiff preserved its exceptions to the submission of this special plea to the jury.

It appears therefore that, at the first trial, the defendant sought to have the payments made by the corporation in 1921 credited to the 1921 purchases, as a matter of law, without alleging or attempting to prove any agreement or direction to that effect; while at the second trial defendant asked that this be done because of an agreement to that effect.

It will be remembered that, although the suit was commenced in 1922 and had been pending in court for several years, the answer contained no reference to this agreement, and we are therefore of the opinion that the court should have denied defendant the right to present this special plea under the circumstances, or, having granted this right, should, by continuing the case, upon such terms as were thought proper, have afforded plaintiff an opportunity to meet the plea.

This new defense was in the nature of a plea of payment of a portion of the account, for which defendant would otherwise be liable, and it is a rule of pleading well settled by the decisions of this court that, where

there is no plea of payment, proof thereof is inadmissible. *Robinson* v. *Woodson,* 33 Ark. 307. In the case of *Jarvis* v. *Andrews,* 80 Ark. 277, 96 S. W. 1064, it was held that evidence tending to prove payment of the note in suit was properly excluded in the absence of a plea of payment. See also *Hays* v. *Dickey,* 67 Ark. 169, 172, 53 S. W. 887. Cases cited in the notes to 30 Cyc. 1253 and 21 R. C. L., pages 115 and 117, show that this rule is one of general application.

The case must therefore be reversed, and would be remanded except that appellant asks that judgment be rendered here for what, in any event, would be the minimum amount for which it is entitled to judgment.

It appears from the undisputed evidence that payments and purchases were made in 1921 as follows:

Jan. 11, payment	$ 75.00	
Jan. 31, purchase		$21.25
Feb. 11, payment	100.00	
Mar. 7, purchase		38.00
Mar. 15, payment	50.00	
June 15, payment	50.00	
Aug. 16, payment	50.00	
Sept. 21, purchase		128.25
Sept. 21, purchase		230.25
Sept. 28, payment	25.00	
Total payments	$350.00	
Total purchases		$417.75

It thus appears that purchases exceeded payments by $67.75, and plaintiff is entitled to judgment for this amount in any event, as it is an undisputed fact that defendant had made default in complying with § 1715, C. & M. Digest.

Appellant argues that, as there were payments made in 1921 which exceeded the purchases that had been made during that year up to the time of payments, the excess of those payments should, automatically and immediately, be credited to the older items of the account. And so they would be if there were no agreement to the contrary.

But we cannot say that the undisputed testimony authorizes that action, so that plaintiff is entitled only, under the undisputed evidence, to a judgment for the difference between purchases and payments made in 1921.

The judgment of the court below will therefore be reversed, and the cause remanded for a new trial, unless appellant elects to have judgment rendered here in its favor for $67.75.

HUDDLESTON v. BURNETT.

Opinion delivered November 23, 1926.

1. AUTOMOBILES—FILLING STATION NOT NUISANCE PER SE.—Construction and operation of a filling station and public garage is a lawful business and not a nuisance *per se*.
2. NUISANCE—NATURE OF INJURY.—A lawful business may not be conducted in the neighborhood of a dwelling house if the noise therefrom would render its enjoyment materially uncomfortable.
3. AUTOMOBILES—OPERATION OF FILLING STATION—INJUNCTION.—Operation of a filling station and public garage in a residential district, which would result in creating incessant noise in the neighborhood, was properly enjoined.

Appeal from Pope Chancery Court; *W. E. Atkinson*, Chancellor; affirmed.

J. H. A. Baker and *J. A. Worsham*, for appellant.

E. A. Williams, for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Pope County enjoining appellants from building and operating a filling station and public garage on a strip of land 85 east and west by 246 feet north and south, fronting on the Little Rock & Fort Smith highway, in the residence section of the town of Atkins. The lot in question adjoins appellee's home on the east and Mrs. T. J. Robinson's home on the west. The plan was to erect the station and garage nearer the north line of the highway than the other residences situated on the north side, and, when erected, would be located within 100 or 125 feet of appellee's house. Hundreds of automobiles and trucks passed along the highway daily,

and, in the tourist season of the year, passed both day and night. The homes of appellee and his neighbors were built in this locality with a view to getting out of the business district of the town. It was distinctively a residence section, located some five or six blocks away from the business district. Appellant, J. W. Huddleston, owned and operated a filling station in the business district of the town, and, in partnership with E. W. Lawson, purchased the strip of land in question upon which to build a filling station, garage and residence, to be occupied by appellant, E. W. Lawson, who was to operate said station. The strip of land in question was purchased after appellee and his neighbors had built their homes in that locality.

It was alleged in the complaint that the operation of a filling station and public garage would become a nuisance by creating such noise, through the honking of horns, racing, and testing of motors, thereby destroying the peace, quiet and comfort of appellee's home.

Appellants filed an answer, admitting that they intended to construct a filling station and garage upon the strip of land in question, but denying that the operation thereof would constitute a nuisance.

The testimony introduced was directed to the sole issue presented by the pleadings, of whether the operation of a filling station and garage in that particular locality would constitute a nuisance that would result in irreparable damage to appellee. The trial court found that it would, and permanently enjoined the construction thereof, so the correctness of the finding and decree is before us for trial *de novo*.

The construction and operation of a filling station and public garage is a lawful business and not a nuisance *per se*, but one cannot prosecute a lawful business in the neighborhood of a dwelling-house if the noise therefrom would render the enjoyment of it materially uncomfortable. In *Junction City Lumber Co.* v. *Sharp*, 92 Ark. 538, 123 S. W. 370, this court quoted with approval from *Ross* v. *Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654, the following paragraph:

"The law, then, must be regarded as settled that, when the prosecution of a business, of itself lawful, in a neighborhood of a dwelling house, renders the enjoyment of it materially uncomfortable, by the smoke and cinders and noise, or offensive odors, produced by such business, although not in any degree injurious to health, the carrying on such business there is a nuisance. *Durfey* v. *Thalheimer,* 85 Ark. 544, 109 S. W. 519; *Terrell* v. *Wright,* 87 Ark. 213, 112 S. W. 211, 19 L. R. A. N. S. 174."

The record reflects that appellee purchased a lot and built a home five or six blocks from the business section of Atkins, for the purpose of living in a quiet neighborhood, on account of the nervous condition of his wife and extreme old age of his mother, who was eighty-four years old, before appellants bought the adjoining lot upon which to build the proposed filling station and public garage; that the locality chosen by him was and still is a distinctively residential district.

A decided preponderance of the testimony adduced in the case was to the effect that the operation of a filling station and public garage upon the lot purchased by appellants for that purpose would produce a disturbing noise in the neighborhood, and particularly interrupt the peace and quietude of appellee's home. The witnesses testified that a great many people on the much-traveled highway would stop and honk their horns for gas and create much noise in stopping and starting their automobiles, testing their motors, etc. It strikes us that the creation of incessant noises of this character, in a strictly residential section, would constitute an intolerable nuisance in the neighborhood.

No attempt was made by appellants to show any public necessity for establishing a filling station and public garage at this particular point. Appellant Huddleston owned and was operating a filling station within five or six blocks of this neighborhood.

After a careful consideration of the evidence, we are unable to say that the finding of the court was contrary to a clear preponderance of the testimony.

No error appearing, the decree is affirmed.

BYRD v. GALBRAITH.

Opinion delivered November 23, 1926.

1. AUTOMOBILES—CARE TO AVOID INJURING STREET LABORERS.—Persons driving motor cars must exercise reasonable care to see and avoid injuring persons at work in the streets, as well as pedestrians.
2. AUTOMOBILES—EXERCISE OF CAUTION BY STREET LABORER.—A person at work in the street need not neglect his occupation to avoid injury from an automobile driver's want of ordinary care, but he cannot recover if actually guilty of contributory negligence.
3. NEGLIGENCE—INSTRUCTIONS AS TO CONTRIBUTORY NEGLIGENCE.—In an action for injury to plaintiff while at work in the street, an instruction that if the nature of his work precluded him from keeping a constant lookout for approaching automobiles and he was so engaged in his duties as not to see the approach of the automobile which struck him, he was not guilty of contributory negligence, *held* not error, in view of other instructions submitting such defense.
4. TRIAL—REPETITION OF INSTRUCTIONS.—Where the court, at defendant's request, charged that, before the plaintiff could recover, the jury must find that he was free from any negligence that contributed to his injuries, it was not error to refuse a further instruction setting up the same defense.
5. AUTOMOBILES—STREET LABORER—REASONABLE CARE.—One working in the street is responsible only for failure to exercise such care as reasonably prudent persons should exercise under similar circumstances to avoid injury by automobiles.
6. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.—A verdict for $3,500 in favor of a father for injuries to his minor son was not excessive where he had spent $3,200 for medical attention and would have to spend more.
7. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.—In view of his suffering and permanent injuries, a recovery of $14,000 by plaintiff *held* not excessive.

Appeal from Jefferson Circuit Court; *T. G. Parham,* Judge; affirmed.

Maurice Reinberger and *Coleman & Gantt,* for appellant.

Harry T. Wooldridge, for appellee.

HUMPHREYS, J. Appellee, Oliver Galbraith, father of appellee, Fred Galbraith, instituted suit in his own right, and as next friend for his said minor son, against appellant, in the circuit court of Jefferson County, to recover

damages for injuries inflicted upon his son through the alleged negligence of appellant in running over him with an automobile, at the intersection of Fifth Avenue and Main Street, in Pine Bluff, while engaged in painting a "No Left Turn" sign on the surface of the street, as an employee of the city.

Appellant filed an answer, denying the allegations of the complaint and, by way of affirmative defense, pleading contributory negligence on the part of appellee's son.

The cause was submitted upon the pleadings, the testimony adduced by the respective parties and the instructions of the court, which resulted in verdicts and consequent judgments in favor of Oliver Galbraith for $3,500 and Oliver Galbraith, as next friend for Fred Galbraith, for $14,000, from which is this appeal.

The substance of the evidence, reflected by the undisputed testimony, is about as follows: The injury occurred between 8 and 9 o'clock P. M. on September 16, 1924, at the intersection of Fifth Avenue and Main Street, in said city. Fifth Avenue runs north and south and Main Street east and west. The street car company operates a double track along Main Street. At this particular point Main Street is 55 feet wide, and the distance from the west car rail of the west car track to the curb line on the west side of Main Street is 20 feet. It maintains a safety zone on the north side of the intersection and on the west side of the double tracks for passengers to get off and on the street cars running south on Main Street. Traffic going south on Main Street was required to keep on the west side, and traffic north to keep on the east side of the center of Main Street. The street intersection is in the business part of the city, where the traffic is heavy, the Hotel Pines being on the northwest corner of the intersection, McEwen's Dry Goods Store on the southwest corner, Franey Brothers' Store on the southeast corner, and the Y. M. C. A. building on the northeast corner. The intersection of the streets at this point was perhaps the best lighted intersection of streets in the city.

Fred Galbraith was an intelligent young man, having graduated from the high school when he was sixteen years of age. He was eighteen years of age at the time of the injury, and had been working in the city engineer's office for over a year, as inspector of streets and sewers. He was familiar with the streets and conditions of traffic in all parts of the city. He and two assistants had been directed to repaint the traffic signs on the surface of the streets, and were permitted to select their own time for doing the work. Fred Galbraith was told by the city engineer, on the afternoon of the night that the injury occurred, to go that night and paint the "No Left Turn" sign at the intersection of Fifth Avenue and Main Street. On the occasion of the injury, Fred Galbraith was dressed in khaki pants and light brown shirt, and was working about five or six feet west of the west car rail on the west car track, leaving a space of about fifteen feet between the west curb line of Main Street and himself, for automobiles to travel going south on said street. At the time he was struck by appellant he was facing south, in a stooping or kneeling posture, down on the street, painting on the surface thereof, in large letters, "No Left Turn", and was devoting strict attention to the performance of his duties, not moving around or about on the street, and had been in the same position for fifteen or twenty minutes. While thus engaged, an automobile, owned and operated by appellant, traveling south on Main Street, struck him in the rear and knocked him over on the pavement. His foot was caught in the axle of the car, and he was dragged a distance of 68 feet before appellant brought his car to a stop and Galbraith was extricated. He did not know that he had run over Galbraith until Galbraith's co-worker jumped on the running-board of the car and told him what had happened. Galbraith did not see appellant's car before it struck him. Appellant was not looking in the direction of Galbraith at the time he ran over him, his attention having been attracted to some girls across the street, who had called to him. At the time of the injury Galbraith

was not working under the protection of lanterns or other guards. There is nothing in the record, however, to show that it was customary, when this character of work was being done at night, to put out lanterns or other signs.

Fred Galbraith was immediately removed to a hospital and examined by a physician. It was found that the skin had been peeled almost entirely off his back, a hole punched in his side, and that he had sustained minor cuts and bruises practically over his entire body. He recovered from these injuries, but suffered intense and excruciating pain from them for a period of about six weeks. In addition to these temporary injuries, he received a permanent injury to his left arm, from which he was still suffering at the time of the trial. A hole was punched in his left elbow which required two operations by home surgeons, and later a major operation by Dr. Willis C. Campbell, of Memphis, an eminent bone specialist. He remained in Dr. Campbell's clinic from December 27, 1924, until March 1, 1925, under the care of Dr. Campbell and his assistants. The operation performed by Dr. Campbell consisted in the removal of an extensive area of diseased bone. The wound had not healed at the time of the trial. Dr. Campbell and other physicians testified that the injury was a permanent one, rendering his left arm twenty-five per cent. deficient. At the time of the trial his father had expended about $3,200 for hospital, nursing and medical services, and was then bearing the expense of having the wound dressed daily.

The only disputed questions of fact arising out of the testimony consisted in a contrariety of opinions as to whether it was better to paint the traffic signs in the daytime or at night, and whether the work could have been performed in such a manner as to allow or permit Fred Galbraith to have kept a lookout for automobiles and in that way avoid the injury. Bearing upon that point, Jim Whittle testified that a man painting letters already outlined could stand on any side of them and do the work, which would enable him to keep a lookout while repainting them, whereas appellee, Fred Galbraith, testified that

he kept no lookout whatever while painting the sign, because he could not and paint the sign.

Appellant contends for a reversal of the judgment upon three alleged grounds:

First: In giving instruction number 3 on behalf of appellees, over the objection and exception of appellant.

Second: In refusing to give instructions numbers 5 and 9, requested by appellant, over his objection and exception.

Third: Because the verdict was excessive.

The general law applicable to cases of this character is well stated in the case of *Burger* v. *Taxicab Co.*, 66 Wash. 676, 120 Pac. 519, as follows:

"The true rule as to the reciprocal rights and duties of persons driving vehicles and laborers on the highway is as follows: 'Persons riding or driving are bound to exercise reasonable care to see and avoid injuring persons who are at work in the streets, as well as pedestrians. And the laborer is not bound to neglect his occupation in order to avoid injury from the want of ordinary care on the part of drivers of vehicles. But he cannot recover if actually guilty of contributory negligence.' "

The same doctrine was announced in a Michigan case, styled *O'Donnell* v. *Lange*, 162 Mich. 654, 127 N. W. 691 (quoting from the syllabus): "One employed as a street cleaner must, while at work, use ordinary care to avoid injury from passing vehicles, but he need not neglect his work to escape collision with those not using reasonable care."

With this rule in mind, we will proceed to a consideration of the alleged errors of the trial court in giving instruction number 3, requested by appellees, and in refusing to give instructions numbers 5 and 9, requested by appellant.

1. Instruction number 3, given by the court over appellant's objection, is as follows:

"If you believe from a preponderance of the evidence in this case that the plaintiff, at the time of the

injury, was an employee of the city of Pine Bluff and, under the directions of the city engineer, was engaged in painting a 'No Left Turn' sign upon the street, and that the nature of his work precluded him from keeping a constant lookout for approaching automobiles; that, at the time he was struck and just before such time, he was not moving about or around upon the streets, and that he was so engaged in his duties as not to see the approach of the automobile which struck him, then the court tells you that he was not guilty of contributory negligence."

Appellant assails the instruction upon the alleged ground that it, in effect, relieved appellee entirely of the duty of keeping any lookout whatever, or taking any precaution for his own safety, regardless of whether he might have done so in the proper performance of his duties in the exercise of ordinary care for his own safety. Or, expressing it differently, that the instruction eliminated the defense of contributory negligence entirely from the case. We do not think the instruction susceptible of the construction placed upon it by appellant. It is apparent that the trial court did not intend to exclude appellant's defense of contributory negligence, else he would not have given instruction number 1, which is as follows:

"If you believe from a preponderance of the evidence in this case that, at the time he was injured, the plaintiff, Fred Galbraith, was engaged in performing his duties as an employee of the city of Pine Bluff in painting a 'No Left Turn' sign at the intersection of Main Street and Fifth Avenue, and that, while so doing, he was devoting strict attention to his duties and was in the exercise of that degree of care reasonably consistent with the practical performance of his work, and that, while so engaged, an automobile driven by the defendant, traveling south on Main Street, approached the intersection of Fifth Avenue and Main Street, and that the defendant negligently failed to keep such a lookout for plaintiff or others who might be lawfully upon said street as a reasonably prudent person, in the exercise of

ordinary care under the same or similar circumstances, would have done, and that, by reason thereof, Fred Galbraith was struck by said automobile, thereby causing the injuries of which he complains, then you are instructed that your verdict should be for the plaintiff; provided, that you further find that the plaintiff himself was not guilty of contributory negligence as defined in these instructions."

Certainly, if it had been the intention of the court to exclude contributory negligence on the part of appellee, Fred Galbraith, as an affirmative defense in the case, he would not have given instruction number 4, requested by appellant, which is as follows:

"Before you can find for the plaintiff, Fred Galbraith, you must find that he himself was free from any negligence that contributed to his injuries."

We think instruction number 3, correctly interpreted, meant that Fred Galbraith was not required to spend all of his time in keeping a lookout for approaching automobiles, and that it would not be negligence as a matter of law on his part to fail to look and listen for approaching vehicles while he had his mind and eyes on his work. Under this interpretation, the instruction correctly stated the law, for a workman in a street could not possibly keep a constant lookout for approaching vehicles and perform duties which required him to think and see. *Reagan* v. *Los Angeles Ice & Cold Storage Co.*, 46 Cal. App. 513. We think, when instruction number 3 is read, as it should be, in connection with instruction number 1, given by the court at appellees' request, they cover the whole law declared in the cases above referred to.

2. Appellant is in no position to complain at the court's refusal to give his requested instruction numbers 5 and 9, after having prevailed upon the court to give instruction number 4. Both 5 and 9, in effect, preclude a recovery by appellees if Fred Galbraith failed to exercise such care for his safety as an ordinarily careful and prudent man would have done under the same or similar

circumstances. Instruction number 4, set out above, was broader and more favorable to appellant than either one or both instructions numbers 5 and 9. It prevented the recovery by appellees if Fred Galbraith, by commission or omission, contributed to his injury by the slightest negligence, whereas the law renders him responsible only for the failure to exercise such care as a reasonably or ordinarily prudent person would or should exercise under the same or similar circumstances. In other words, the instruction holds him to the very highest degree of care, when the law requires him only to exercise ordinary care.

3. Relative to the claim that the verdict is excessive, it is only necessary to call attention to the fact that the father, Oliver Galbraith, showed that he had expended on his son almost as much as the amount awarded him, and that he will have to expend other amounts before the wound heals. This verdict in his favor, as we understand the record, does not take into account any amount for the loss of the services of his son.

When the extent and nature of the injury is considered in connection with the excruciating pain suffered by Fred Galbraith, as a result of the injury, it cannot be said that $14,000 was an excessive allowance to him.

No error appearing, the judgment is affirmed.

INGRAM v. WOOD.

Opinion delivered November 23, 1926.

1. JUDGMENT—AMENDMENT AFTER LAPSE OF TERM.—Where the original decree in a partition suit determined the interests of all the parties involved, as provided by Crawford & Moses' Dig., § 8100, it became final with the lapse of the term, and a supplemental decree, rendered at a subsequent term, changing the interests of the parties but not embracing any of the grounds for vacating or modifying the prior decree set out in § 6290, and alleging no claim that the original decree was procured by fraud, *held* void.
2. EQUITY—OPENING OR VACATING DECREE.—A court of equity can set aside a void decree at any time.

Appeal from Union Chancery Court, First Division; *John E. Harris,* special Chancellor; affirmed.

Bailey & Bailey, for appellant.

HUMPHREYS, J. This is an appeal from a decree rendered on May 5, 1925, in the first division of the chancery court of Union County, annulling an amended and supplemental decree made and entered on January 27, 1925, in a suit wherein J. W. Raiford *et al.* were plaintiffs and Ben R. McClanahan *et al.* were defendants. Both appellants and appellees herein were parties to that suit, which was a partition suit of certain lands in said county. The original decree in that suit was rendered on the 30th day of June, 1924. It was adjudged in the original decree that appellees herein, Mrs. Lizzie Wood and Mrs. Fannie McMullen, owned an undivided one-sixth interest each, and appellants herein, who were children of their deceased sister, an undivided one-thirtieth interest each in the lands involved in the suit. The term of court at which the original decree was rendered adjourned until court in course on the first Monday in September, 1924. On the 27th day of January, 1925, at a subsequent term of court, the amended and supplemental decree was rendered, on the motion of the attorneys who represented appellants and appellees herein in the original partition suit, so as to change their several adjudged interests in said lands to equal shares therein, conformable to the said attorneys' construction of a written instrument of date May 3, 1923, evidencing a purported family settlement between appellants and appellees on the one side, and R. H. Ingram and Mattie J. Ingram on the other.

It will be observed that the effect of the amended and supplemental decree was to materially reduce the interests of appellees herein, Mrs. Lizzie Wood and Mrs. Fannie McMullen, adjudged to them in the original decree. On account of this reduction, they attacked the validity of the supplemental decree aforesaid, by motion, at a subsequent term of the court, upon the ground that the court was without authority in law to

change or modify the original decree after the expiration of the term at which same was rendered.

The following recitals appear in the decree of May 5, 1925, from which this appeal was taken:

"Said matter is presented to the court upon the verified petition of Mrs. Lizzie Wood and Mrs. Fannie McMullen aforesaid, and upon the response filed thereto by Polk Ingram, Pauline Ingram Ward, formerly Pauline Ingram, Emma Ingram Quires, formerly Emma Ingram, Ruby Ingram McMullen and Charles (Charlie) Ingram, *feme sole,* aforesaid, and upon all of the original pleadings, depositions and records heretofore filed or entered in this cause, said depositions, pleadings and records being more fully set out in the original decree entered in this cause, and submitted also upon the original decree in September, 1924, and upon the motion to correct and modify the original decree which was filed on January 21, 1925, and upon the supplemental decree entered in said cause on January 27, 1925, and upon the oral testimony of Mrs. Fannie McMullen, Mrs. Lizzie Wood, Arthur McMullen, and Neill C. Marsh."

Appellants herein contend for a reversal of the decree of date May 5, 1925, because they say the ascertainment of the several interests of the parties in the lands was not an issue in the suit at the time the original decree, of date June 30, 1924, was rendered. The supplemental decree of date January 27, 1925, reflects by recitals therein that the rights and interests of all the parties to the suit, including the rights and interests of appellants and appellees herein, were ascertained and determined, but, in ascertaining and determining same, the court made a mistake as to the correct interest to which each was entitled. According to the recitals of the decree of date May 5, 1925, quoted above, the original pleadings in the partition suit and the testimony therein were before the court, which formed a basis for the finding in said decree that the several interests of all the parties in the lands involved were correctly ascer-

tained and determined in the original decree of date June 30, 1924.

We have searched the transcript for the pleadings and testimony upon which the original decree was based, but are unable to find that same were incorporated therein. The transcript contains the proceedings beginning with and including the supplemental decree rendered on January 27, 1925. The omission from the transcript of the original pleadings and testimony makes it impossible for us to determine what the issues were in the original suit, except as reflected by the recitals in the supplemental decree of date January 27, 1925, and the decree of date May 5, 1925. These recitals, as stated above, show that the original suit was one in partition, and that the interests of all the parties to the lands involved were ascertained and determined. It is the statutory duty of courts in partition suits to ascertain and determine the interests of all parties in the lands and tenements sought to be divided and to decree a partition in accordance with the rights of each thus ascertained. Section 8100, C. & M. Digest.

It follows from what has been said that the original decree, which fixed the interests of the several parties in the lands involved, became final and binding upon appellants and appellees herein with the lapse of the term of court on the first Monday in September, 1924. The only method by which the decree could have been modified or set aside, after the lapse of the term at which same was rendered, except for fraud in the procurement of same, is the method provided in § 6290 of Crawford & Moses' Digest. The motion filed to modify the decree did not embrace any of the grounds contained in said section for modifying and vacating judgments. The supplemental decree therefore of date January 27, 1925, changing the several interests of appellants and appellees in said lands as ascertained and determined in the original decree of date June 30, 1924, was rendered without authority in law, and void. *Brady* v. *Hamlett*, 33 Ark. 105; *Kersh* v.

Lincoln County, 36 Ark. 589; *Robinson* v. *Citizens' Bank,* 135 Ark. 308, 204 S. W. 615.

The supplemental decree, of date January 27, 1925, was void, so it was within the continuing and inherent power of the court, after the lapse of the term at which rendered, to set it aside as a nullity. A court has the right to say at any time that a void decree is no decree at all. *Bobo* v. *State,* 40 Ark. 224; *Jackson* v. *Becktold Printing & Book Manufacturing Co.,* 86 Ark. 591, 112 S. W. 161, 20 L. R. A., N. S., 415; *State* v. *West,* 160 Ark. 413, 254 S. W. 828.

No error appearing, the decree is affirmed.

FRETWELL v. NIX.

Opinion delivered November 29, 1926.

1. MORTGAGES—EFFECT OF DEED SUBJECT TO MORTGAGE LIEN.—Where a deed recited that it was "subject to a mortgage lien," but not an assumption of the mortgage debt by the grantees, the acceptance of the deed did not impose liability on the grantees for the payment of such debt.
2. DEEDS—MERGER OF PREVIOUS CONTRACT.—The original contract for the exchange of properties is deemed merged in the deed consummating the trade; the execution and acceptance of the deed being presumed to represent the final agreement of the parties.
3. EVIDENCE—SUFFICIENCY TO OVERCOME RECITALS IN DEED.—Proof to overcome recitals in a deed as to the consideration thereof must be more than a mere preponderance of the evidence.

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

John E. Miller and *Culbert L. Pearce,* for appellant.

Brundidge & Neelly, for appellee.

McCULLOCH, C. J. Appellants, J. A. Fretwell and his wife, Sallie Fretwell, were the owners of certain farm lands in White County, Arkansas, and appellees, J. P. Nix and J. W. McCuen, were the owners of certain real estate in Sebastian County, and on September 1, 1923, these parties entered into a written contract for exchange

of said properties. The contract recited that appellants agreed to sell to appellees the farm property in White County for the following consideration:

"Thirty thousand dollars, sixteen thousand to be paid as follows: $12,500 mortgage to the Oklahoma Farm Mortgage Company and $750 interest on the east half of section 11, and all of section 2, except 97 acres in the northwest quarter, and a mortgage of $2,500, together with $250 interest, on the balance of the above-mentioned land. And $14,000 to be paid by a warranty deed to lot 21 in block 22, Main Addition, subject to $1,500 loan, and lot 2, block 538, Reserve Addition, subject to $1,700 loan, and lots 56 and 57 in Randolph Place, subject to $1,100 loan, and lot 16 in block C, Sulphur Springs Addition, all in city of Fort Smith, Arkansas; and lot 13 in block 5 in South Fort Smith Addition to South Fort Smith, Arkansas; and lots 8 and 9 in block 1, Weaver's Addition to Huntington, Arkansas; and one concrete stuccoed double office building in Hartford, Arkansas, known as the A. M. Dobbs property, subject to a $500 mortgage in favor of W. L. Roberts."

It appears from the pleadings and proof in this case that the mortgage debt of $2,500 and the $250 interest referred to in the contract was to the Arkansas Bank & Trust Company, a banking institution at Newport, Arkansas. Abstracts of title were submitted by the respective parties, and there was considerable correspondence and personal negotiation concerning the consummation of the trade, and, after a time, appellees refused to comply with the contract. Appellants executed and tendered a deed conveying the property which they had undertaken in the contract to convey, except four acres of the land, which was expressly reserved from the operation of the conveyance. The deed did not recite an assumption of the mortgage debts by appellees, but contained a recital of consideration of "the sum of $5,000 and exchange of other property," and also a recital that the conveyance was "subject to a mortgage lien in favor of the Oklahoma Farm Mortgage Company for $12,500,

and $750 accumulated interest," and "subject to a mortgage lien in favor of Arkansas Bank & Trust Company of Newport, Arkansas, for $2,500, and $250 accumulated interest." The mortgage to the Arkansas Bank & Trust Company covered only a portion of the lands conveyed.

Appellants instituted an action against appellees in the Sebastian Chancery Court to compel specific performance of the contract, and, during the pendency of that action, appellees accepted the deed tendered by appellants and executed to appellants a deed conveying the Sebastian County property specified in the original contract. That ended the litigation in the Sebastian Chancery Court. Appellees failed to pay the mortgage debt to the Arkansas Bank & Trust Company, and appellants instituted this action in the chancery court of White County against appellees and against the Arkansas Bank & Trust Company to compel the latter to foreclose the mortgage on the lands conveyed therein and also to recover from appellee any deficiency in the amount of the debt after crediting the proceeds of the foreclosure sale. The Arkansas Bank & Trust Company appeared and filed a cross-complaint praying for a foreclosure of the mortgage, and a decree was rendered in its favor, with personal judgment against appellants, and a sale by commissioner was ordered by the court. In the decree thus rendered the court reserved for further consideration the claim against appellees for the deficiency. The sale was made by the commissioner, and Arkansas Bank & Trust Company purchased the property for the price of $1,500, which was credited on the personal judgment against appellants. The sale was duly confirmed and deed made, and subsequently there was a trial of the cause on the question of personal liability of appellees for the deficiency. It was alleged in the complaint that appellees assumed liability for all of the mortgage debts referred to in the original contract and in the deed. Appellees answered, denying that they had agreed to assume and pay the debts, and alleged that they had purchased appellants' equity in the property, subject to the

mortgage debts. The court rendered a final decree dismissing the complaint of the appellants, Fretwell and wife, and the cross-complaint of appellant Arkansas Bank & Trust Company, and an appeal has been duly prosecuted to this court.

It is the contention of appellants that they are entitled to recover against appellees under the terms of the original contract. The argument is that the recital in the contract of the several items of mortgage indebtedness as a part of the consideration for the exchange of properties renders appellees personally liable for those debts. It is clear that, under the terms of the deed, there was no assumption of the mortgage debts, the conveyance being merely subject to those debts, and that the acceptance of the deed did not impose liability on appellees for the payment of the debts. *Patton* v. *Adkins,* 42 Ark. 197; *Felker* v. *Rice,* 110 Ark. 70, 161 S. W. 162. It is, however, the further contention of appellants that, under the doctrine announced by the court in the case of *J. H. Magill Lumber Co.* v. *Lane-White Lumber Co.,* 90 Ark. 426, 119 S. W. 822, and other cases, they are entitled to recover upon proof of any additional consideration not expressly recited in the deed. The answer to this contention is that the original contract became merged into the deed consummating the trade, and the execution and acceptance of the deed is presumed to represent the final agreement of the parties. Conceding that appellees should be permitted to prove an additional consideration, *i. e.,* an agreement to assume and pay the mortgage debt, the proof is not sufficient to overcome the presumption arising from the recital of the consideration in the deed. The proof is in conflict with the recitals in the deed, and must, in order to prevail, be more than a mere preponderance of the evidence. *Vaugine* v. *Taylor,* 18 Ark. 65; *J. H. Magill Lumber Co.* v. *Lane-White Lbr. Co. supra.* The language of the deed was selected by the grantors, and it is fair to assume that they adopted the language which expressed the contract in accordance with their

conception of its terms. There was a controversy between the parties as to the performance of the contract, and it was only after litigation had begun that appellees agreed to accept the conveyance which was executed by appellants on September 22, 1923, but not delivered to appellees until December 24, 1923, and the delivery and acceptance of the deed was in settlement of the pending litigation in the Sebastian Chancery Court. There is no proof in the record of an agreement at that time that there should be any other consideration except that expressed in the deed itself, and appellants rely entirely upon the original contract as proof of that agreement. But, as we have already stated, the original contract was merged in the deed, which is presumed, until the contrary appears, to completely recite the agreement of the parties in consummating the trade. Moreover, there is testimony in the record, adduced by appellees, tending to show that there was no intention, at the time of the consummation of the trade, to perform the original contract, for the reason that the four acres of land omitted from the deed contained the house and barn on it, and that another tract of seventeen acres was under two mortgages, and that this constituted the reasons that appellees had for refusing to comply with the original contract.

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

GAVIN v. SCOTT.

Opinion delivered November 29, 1926.

1. FRAUDULENT CONVEYANCES—PRESUMPTION IN CASE OF INSOLVENCY.—The rule that a voluntary conveyance by an embarrassed debtor to members of his family is *prima facie* fraudulent, and that when the debtor's embarrassment proceeds to financial wreck the presumption is conclusive as to existing creditors, does not apply in the case of subsequent or secured creditors.
2. FRAUDULENT CONVEYANCES—SECURED CREDITORS.—A secured creditor of an embarrassed debtor is in the same category, in regard

to voluntary conveyances by the debtor to his family, as subsequent creditors, since it will be presumed that secured debts will be fully paid by resort to the security, and any deficiency on foreclosure will be treated as a subsequent debt.

3. FRAUDULENT CONVEYANCES—EXISTING UNSECURED CREDITORS.—A conveyance by a debtor to his wife and children which left him insolvent is conclusively fraudulent as to unsecured creditors existing at the time of the conveyance.

Appeal from Yell Chancery Court, Dardanelle District; *W. E. Atkinson,* Chancellor; reversed.

John M. Parker, for appellant.

Herbert C. Scott and *Sam Rorex,* for appellee.

WOOD, J. On January 5, 1918, Gleason Brothers executed a note to John Gavin in the sum of $418.40, with interest thereon at the rate of ten per cent. per annum until paid. John Gavin died, and W. L. Gavin was appointed administrator of his estate. On the 13th of September, 1923, the administrator recovered judgment against J. H. and W. J. Gleason, members of the firm of Gleason Brothers, in the sum of $657.30. Long prior to this time, to-wit, on the 6th of April, 1921, J. H. Gleason executed to Nancy C. Gleason, his wife, Jerry G., Luther H., Floy, and George G. Gleason, his children, a deed to 455.74 acres of land in Yell County, Arkansas, and also a part of a block in the town of Dardanelle, Yell County, Arkansas. The deed recites that it was executed for a consideration of $1 and love and affection.

On the 13th of November, 1923, this action was instituted by W. L. Gavin, administrator of the estate of John Gavin, deceased, against the estate of J. H. Gleason and the widow and children of J. H. Gleason, to set aside the above deed and also a deed of Nanny C. Gleason, dated January 31, 1922, to Jerry G. Gleason. H. C. Scott was appointed administrator *ad litem* for the estate of J. H. Gleason and guardian *ad litem* for the minor children. It was alleged in the complaint that these deeds were voluntary conveyances, and that they were fraudulent and void as against the judgment in favor of the estate of John Gavin. An amendment was later filed to the complaint in

which it is alleged that an execution had been issued on the above judgment and placed in the hands of Joseph Gault, sheriff of Yell County, and that the sheriff had failed to levy such execution prior to the death of J. H. Gleason, and, after such death, that the sheriff declined to levy on the lands described in the original complaint. The plaintiff prayed that the sheriff be made a party and that an order be issued commanding him to levy on the lands described in the complaint. An answer was filed by the administrator *ad litem* of the Gleason estate and as guardian *ad litem* for the minor heirs of J. H. Gleason. The execution of the deed in controversy was admitted, but the defendant denied that it was fraudulent and void as to the plaintiff. The defendant Gault answered and alleged that he did not levy the execution on the lands put in his hands by the attorney for the plaintiff for the reason that, upon investigation, he ascertained that these lands had been deeded to other persons, and that the record showed that the lands were not the property of the defendant in the execution, and for the further reason that the defendant in execution had died after the execution came into his hands.

The plaintiff introduced a certified copy of the judgment mentioned in the complaint and the deed in controversy. Gault testified that he was the sheriff of Yell County, and that he made the return on the execution placed in his hands by the plaintiff's attorney, "that no property clear of mortgage was found in the name of J. H. Gleason upon which to levy the same." As far as he was able to find from the records, J. H. Gleason, at that time, was insolvent. Gleason lived two or three days after he received the execution. He had been sick for two years before that time. We deem it unnecessary to set out all the testimony bearing upon the issue as to whether or not J. H. Gleason was insolvent at the time the deed in controversy was executed. It suffices to say that the uncontroverted proof shows that, at the time this deed was executed, the firm of which Joseph H. Gleason was a member had contracted debts, and, among

them, the debt to John Gavin, the foundation of this action, which had not been paid. An action had been instituted to foreclose a mortgage on one of their debts in the sum of more than $9,000, and there were also other debts, unsecured, outstanding at that time. Efforts, at that time, had been made and were being made to collect the debt to John Gavin, but without success. J. H. Gleason offered to pay one-half of the note if he could be released from liability for the other half. Thus the note, at the time of the execution of the deed in controversy, remained unpaid.

While there was testimony on the part of the defendants tending to show that, at the time the deed in controversy was executed, J. H. Gleason had sufficient assets to pay all of his indebtedness, nevertheless the debt in controversy was not paid; and the execution of this deed left J. H. Gleason without sufficient property to pay the debt to John Gavin. His own son testified that there was no unincumbered land belonging to the estate of J. H. Gleason; that there was no unincumbered personal property belonging to the estate, and no personal property belonging to the firm of Gleason Brothers, and none belonging to the firm of J. H. Gleason & Son. "He (J. H. Gleason) didn't have any estate at the time of his death," says the witness. It thus appears that J. H. Gleason, at the time of the execution of the deed in controversy, was an embarrassed debtor. The debt his firm owed to John Gavin was at that time an existing indebtedness. The debt had been contracted by the firm of Gleason Brothers in 1918. By the execution of this deed, as is shown by the undisputed testimony, J. H. Gleason rendered himself wholly insolvent.

In *Wilks* v. *Vaughan,* 73 Ark. 179, 83 S. W. 915, we said: "It is thoroughly settled in equity jurisprudence that conveyances made to members of the household and near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care, and when they are voluntary they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial

wreck they are presumed conclusively to be fraudulent as to existing creditors." Other cases announcing the doctrine are *McConnell* v. *Hopkins,* 86 Ark. 225, 110 S. W. 1039; *Brady* v. *Irby,* 101 Ark. 573, 142 S. W. 1124, Ann. Cas. 1913E, 1054; *Papan* v. *Nahay,* 106 Ark. 230, 152 S. W. 107; *Simon* v. *Reynolds-Davis Gro. Co.,* 108 Ark. 164, 156 S. W. 1015; *Burke* v. *New England National Bank,* 132 Ark. 268, 200 S. W. 1018; *Farmers' State Bank* v. *Foshee,* 170 Ark. 445, 280 S. W. 380.

The above rule does not apply in favor of subsequent creditors, nor creditors whose debts, at the time of the conveyance, are secured. The latter are in the same category as subsequent creditors, for the reason that it will be presumed, and must be assumed, that creditors whose debts are secured will be fully paid when their security is resorted to, and, if there be a deficit, this is treated as in the same attitude as a subsequent debt. *Home Life & Accident Ins. Co.* v. *Schichtl, ante* p. 31.

Gavin's debt was unsecured, and he was an existing creditor at the time of the conveyance in controversy, and the undisputed testimony shows that Gleason, at the time of the conveyance, even if not insolvent, was an embarrassed debtor, and the conveyance rendered him thereafter wholly insolvent. Therefore the court erred in not holding that the conveyance in controversy was conclusively fraudulent as to Gavin. The decree is reversed, and the cause is remanded with directions to the trial court to enter a decree setting aside the conveyance, in so far as it affects the rights of Gavin, and to subject the property conveyed to the payment of his judgment, and for such other and further proceedings as may be necessary, according to law and not inconsistent with this opinion.

HART, J., (dissenting). It seems to me that much confusion will result from the application of the rule in the *Wilks* v. *Vaughan* case to the facts in the case at bar, and that of the *Home Life & Accident Co.* v. *Schichtl.*

As I understand the rule in the Wilks-Vaughan case, there is a conclusive presumption of fraud as to existing creditors if the grantor, at the time, is greatly embarrassed or so largely indebted that his conveyance necessarily has the effect to hinder and delay creditors. This seems to be the interpretation placed upon it in the present case, but the application seems to be wholly at variance with that in the Schichtl case.

In the present case, the voluntary conveyance was made more than two years prior to the rendition of the judgment sought to be enforced against the debtor. The conveyance was held to be fraudulent because it necessarily had the effect to hinder and defraud existing creditors. In the Schichtl case, the conveyance was made only seven days before the rendition of the judgment against the debtor, and his embarrassment proceeded to financial wreck just as soon as his property could be sold under the foreclosure decree. The court in that case seems to have proceeded upon the theory that, in addition to showing that the conveyance was a voluntary one and that the party seeking to impeach it was at the time a creditor of the grantor, the additional fact of insolvency at the time must be shown. In other words, that the conveyance necessarily had the effect to hinder and defraud existing creditors in the collection of their debts was not sufficient. But it is insisted that, because the creditor in the Schichtl case had a mortgage on certain lands of the grantor, who made the voluntary conveyance, this placed him in the attitude of a subsequent creditor.

As it appears from our dissent in the Schichtl case, this holding is directly opposed to the rule announced in the Mallory case, and there has been no express overruling of the latter case. There might be some reason in holding that a mortgagee whose mortgage is not due should be considered in the nature of a subsequent creditor where the debt is shown to be fully secured by the mortgage, for then the debtor might be in the same condition legally as if he were free from debt. To my mind,

the case it quite different where the mortgagee is seeking to foreclose his mortgage and thereby collect his mortgage debt. In such a case the mortgagee is trying by every means available to him to collect a past-due indebtedness, and should be considered an existing creditor. If I am correct in my reasoning in the matter, a contrary or different application has been made of a settled principle of equity in these two cases which calls for a dissent on my part in this case because the application is different from that made by the majority in the Schichtl case.

HIGHT v. STATE.

Opinion delivered November 29, 1926.

1. ROBBERY—SUFFICIENCY OF EVIDENCE.—In a prosecution for robbery, evidence *held* sufficient to authorize a conviction of assault with intent to rob.
2. ROBBERY—CONVICTION OF ASSAULT.—Under Crawford & Moses' Dig., § 3211, one indicted for robbery may be convicted of an assault with intent to rob.
3. CRIMINAL LAW—CAUTIONARY INSTRUCTIONS.—While the courts have a large discretion in advising a jury, which reports that they are unable to agree upon a verdict, of the importance of rendering a verdict, the court must be careful not to express an opinion upon the facts nor to attempt to coerce the jury.
4. CRIMINAL LAW—CAUTIONARY INSTRUCTION.—In a criminal prosecution, a cautionary instruction advising the jury that the litigation was expensive to the State and the defendants, was not error as tending to cause the jury to return a verdict against the defendants.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

John B. Hiner and *John D. Arbuckle,* for appellant.

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant, for appellee.

HART, J. Harry Hight and John Holstein prosecute this appeal to reverse a judgment of conviction against them for the crime of assault with intent to rob.

The first assignment of error is that the evidence is not legally sufficient to warrant the verdict.

Alfred Eaton was the principal witness for the State. According to his testimony, he lived in Memphis, Tennessee, and was nineteen years of age when he went to work in the harvest fields in the West. On his way home he traveled by freight train, and met John Holstein and Leonard Marts in Kansas, and, when they got to Oklahoma, they met Harry Hight. When the witness left Kansas, he had $14.72. When he reached Greenwood Junction, Oklahoma, he had $5 in his pocket. He had been shoveling coal, and the fireman told him to get out of the engine and go back where the rest of the boys were. When he got back there, Marts told him to get off, and kicked him twice. Then John Holstein, Harry Hight and Leonard Marts seized him, and two of them held him while the other one searched him and got the five-dollar bill. He does not know which one of them took the money from his purse. Another witness testified that Greenwood Junction is at the State line between Arkansas and Oklahoma, and that the train upon which the boys were riding was going into Crawford County, Arkansas.

Leonard Marts, John Holstein and Harry Hight were all witnesses in the case. They denied that they robbed Eaton or that they assaulted him with intent to rob him. Evidence was also adduced by the defendants tending to show that they were of good character.

The jury was the judge of the credibility of the witnesses, and, if they believed the testimony of Eaton to be true, they could have found the defendants guilty of robbery. This is conceded by counsel for the defendants, but they contend that, under the evidence, the jury must have found the defendants guilty of robbery or nothing. We do not agree with this contention. According to the testimony of the defendants and of Marts, Eaton did not have any money, and they had been buying him something to eat while on the train. The jury might have given credence to this much of their testimony, and

still might have rejected that part of it in which they testified that they did not attempt to rob Eaton, and might have believed the testimony of Eaton to this extent.

Again, it does not follow that the action of the jury in finding the defendants guilty of assault with intent to rob instead of robbery was prejudicial to them. As the jury found the defendants guilty of the lesser offense, they cannot complain. The defendants were indicted for robbery, and, under § 3211 of Crawford & Moses' Digest, an offense includes an attempt to commit the offense. In the construction of this statute it has been held that, under an indictment for murder, the accused may be convicted of an assault with intent to kill, provided the indictment contains all the substantive allegations necessary to let in proof of the inferior crime. *Davis* v. *State,* 45 Ark. 464. It has also been held that an indictment for rape of a female under the age of sixteen years will sustain a conviction of carnal abuse. *Henson* v. *State,* 76 Ark. 267, 88 S. W. 965. In *State* v. *O'Keefe,* 23 Nev. 127, 43 P. 918, 62 A. S. R. 768, it was held that, under a statute providing that the jury may find the accused guilty of any offense necessarily included in that with which he is charged, or an attempt to commit the offense, one charged with robbery may be found guilty of an attempt to rob. In *Harris* v. *State,* 170 Ark. 1073, 282 S. W. 680, it was held that, where the State's evidence in a prosecution for murder in first degree tended to prove that defendant killed an officer while attempting to arrest defendant engaged in perpetrating larceny, and defendant's evidence was to the effect that he was not engaged in perpetrating larceny, but shot deceased in self-defense, it was not error to submit to the jury the lower degrees of homicide.

In the application of this rule to the case at bar, if it should be conceded that the evidence showed the defendants to be guilty of robbery or nothing, still no prejudice would result to them from submitting to the jury an instruction with regard to assault with intent to rob. *Rogers* v. *State,* 136 Ark. 161, 206 S. W. 152.

The next assignment of error is that the court erred in giving a cautionary instruction to the jury. We do not agree with counsel in this contention. We have frequently held that trial courts have a large discretion in advising a jury, which reports that they are unable to agree upon a verdict, of the importance to the State and to the defendant of reaching an agreement where they can do so by a fair interchange of arguments. Of course, the court must be careful not to express an opinion upon the facts or to attempt in any wise to coerce the jury. We shall not set out the cautionary instruction in this case, on account of its length, and we again advise trial courts of the care they should exercise in giving such instructions, lest, by inadvertence, they say something to the jury which would be likely to coerce them or be taken as an expression of opinion upon the facts by the court. *Stepp* v. *State,* 170 Ark. 1061, 282 S. W. 684; *Nelon* v. *Nelon,* 171 Ark. 505, 284 S. W. 743.

It is claimed, however, by counsel for the defendants, that the cautionary instruction in this case is erroneous because the court told the jury that the litigation was expensive to the State and to the defendants, and, for that reason, it was important for the jury to reach a verdict. In 11 Enc. of Pl. & Pr., p. 305, it is said, among other things, that the trial court may urge, as a reason for agreeing on a verdict, the time and expense involved in the trial and the time and expense which a new trial would entail. Several cases from courts of last resort are cited in support of the text. In most of these cases it has been insisted that the language of the court was calculated to impress upon the jury the necessity of agreeing, to save costs to the State, and, on this account, was prejudicial to the defendant. It has been generally held that the language is only an expression of opinion by the court that it was for the best interest of the parties and would save cost to the loser if a verdict should be reached. It has generally been said that the element of expense is not thereby injected into the case as a proper matter to influence the jury to agree upon a verdict, but is

intended merely to impress upon the jury the advisability of a new effort to decide the case according to the law and evidence.

It is next insisted by the counsel for the defendants that advising the jury that the litigation was expensive to the defendants might cause it to return a verdict against them. We do not think the language could have this effect. It might, if it had any effect, be as effective in inducing the jury to acquit the defendants as to convict them. Hence we hold this assignment of error is not well taken.

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

TATUM v. STATE.

Opinion delivered November 29, 1926.

1. HOMICIDE—MURDER—SPECIFIC INTENT TO KILL.—In a prosecution for murder a specific intent to take life is necessary to a conviction of murder, and in determining the existence of that intent the jury should consider the manner of the assault, the nature of the weapon used, the manner in which it was used, the statement of the defendant, and all the facts and circumstances tending to show his state of mind.
2. HOMICIDE—SPECIFIC INTENT.—The specific intent to kill, necessary in commission of murder, need not have existed for any appreciable length of time.
3. HOMICIDE—MALICE.—In a prosecution for murder, malice may be inferred from the fact that a murderous assault was committed with a knife, in connection with other circumstances.
4. HOMICIDE—ABUSIVE OR INSULTING WORDS.—Mere words, however abusive or insulting, cannot reduce a homicide from murder to manslaughter.
5. HOMICIDE—CONDITION OF MIND.—The only way to determine the condition of mind of another at the time of a killing by him is to judge from the attending circumstances.
6. HOMICIDE—MALICE QUESTION FOR JURY.—The question of the presence or absence of malice at the time of a killing is for the jury, when there is any evidence to support their finding.

7. CRIMINAL LAW—WEIGHT OF EVIDENCE.—The jury are the judges of the weight of the evidence.
8. CRIMINAL LAW—SUFFICIENCY OF EVIDENCE.—In reviewing a verdict the sufficiency of the evidence must be viewed in the light most favorable to the State.
9. CRIMINAL LAW—CREDIBILITY OF WITNESSES.—The jury are the judges of the credibility of witnesses, and may accept a part of a witness' testimony and reject a part believed to be false.
10. HOMICIDE—INSTRUCTION AS TO THREATS.—An instruction in a murder case not to consider threats if deceased was making no attempt to kill or do great bodily harm to defendant "as viewed from the standpoint of the defendant at the time acting without fault or carelessness on his part" *held* correct, in view of other instructions which submitted the question of the appearance of danger to the defendant.

Appeal from Lafayette Circuit Court; *James H. McCollum*, Judge; affirmed.

STATEMENT OF FACTS.

Lee Tatum was indicted for murder in the first degree, charged to have been committed by stabbing A. Brittenberg with a knife.

It appears from the record that Lee Tatum and A. Brittenberg had a lawsuit about a tract of land, and came to Stamps, Lafayette County, Arkansas, for the purpose of taking depositions in the case. They met on the streets, and Tatum stabbed Brittenberg with a knife which resulted in his death in fifteen or twenty minutes. Thus far the facts are undisputed.

According to the testimony of C. W. Hamm, he saw Lee Tatum and Newt Aldridge sitting on an iron step about a foot high which extended out in front of a drug-store in the town of Stamps. The witness saw Brittenberg walking towards them. He then turned away, and his attention was attracted by hearing somebody scuffling. He looked around, and noticed Brittenberg advancing towards Tatum with his hands up (he was advancing towards Tatum as the latter came out from behind the offset made by the iron step extending out in front of the store). He saw the defendant make a stab at Brittenberg, and the latter threw up his hands and hol-

lowed "Oh!" He then put his hands to his side and leaned over. When he took his hands away from his side, the blood gushed to the sidewalk. Within fifteen or twenty minutes he died.

Two other witnesses testified to practically the same state of facts. They said that Brittenberg was pushing the defendant when the latter stabbed him. One of them said that the blood poured out of Brittenberg's body when he was stabbed.

Charlie McGill was also a witness for the State. According to his testimony, he saw the difficulty, and was not more than twenty feet from the scene of the difficulty when it occurred. He was asked to tell the jury what he saw, and answered as follows: "Well, I first noticed just a scuffle, and I didn't think it was much of a fight. They were just ruffling hands, and Brittenberg kindo' pushed Tatum back, and, as he did, why, Tatum took another step back, pushed against the drugstore door, and at the same time he was reaching for his right-hand back pocket for a knife, and just one step was made off that step of the drugstore, and, when he did, there was one strike, and Brittenberg tried to defend that."

On cross-examination he was asked if Brittenberg did not have his hands doubled up just before he tried to throw his hands up, and replied that he did not see them doubled up. He further stated that he did not see Brittenberg hit Tatum, but did see him push him. Brittenberg was seventy-three years of age at the time he was killed.

According to the testimony of Newt Aldridge, Brittenberg passed by the drugstore where the witness and the defendant were sitting, and shook hands with the witness. Brittenberg then turned to Tatum and said: "Mr. Tatum, I am not your friend. I won't shake hands with you." Mr. Tatum turned to Brittenberg and said: "I don't want no friendship from no such son-of-a-bitch as you are." Brittenberg then said: "I won't take that, Tatum, at all." Tatum began getting up, and Brittenberg hit him and knocked him up against the

screen door of the drugstore. Tatum caught on his hands as he was knocked against the door, and, when he got up, he took his knife out of his pocket. The witness told Brittenberg not to advance on Tatum, that he would cut him. Brittenberg made a step, and a short step, towards Tatum. He stooped a little bit and had his hands in the motion of boxing. Tatum then struck him with his knife. Brittenberg weighed somewhere between 175 and 200 pounds. He was a well-preserved man and skilled in boxing. The witness saw him knock out two boys with whom he was boxing.

The defendant was a witness for himself, and, according to his testimony, he stabbed the deceased with his knife in order to prevent him from doing him great bodily harm. Brittenberg had knocked him down one time and was advancing upon him in a threatening position when he stabbed him. The defendant admitted that he had sharpened his knife on the day before the killing, but said he did so because he had dulled it in cleaning some fish a few days before.

The jury returned a verdict of guilty of murder in the second degree, and fixed the punishment at ten years in the penitentiary. From the judgment and sentence of conviction the defendant has duly prosecuted an appeal to this court.

Steve Carrigan and *McKay & Smith,* for appellant.

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant, for appellee.

HART, J., (after stating the facts). It is earnestly insisted by counsel for the defendant that the evidence is not legally sufficient to support the verdict. This court has held that, in a prosecution for assault with the intent to kill, it is necessary to show a specific intent to take life under such circumstances that, if death ensues, the accused would be guilty of murder in the first or second degree. It was also held that, in determining whether or not such intent existed, the jury should take into consideration the manner of assault, the nature of the weapon used, the manner in which it was used, the state-

ment of the defendant, and all facts and circumstances tending to show his state of mind. *Clardy* v. *State,* 96 Ark. 52, 131 S. W. 46, and *Davis* v. *State,* 115 Ark. 566, and cases cited.

While there must have been a specific intent to take life, it need not have existed for any appreciable length of time, and malice could have been inferred from the fact that a murderous assault was committed with a knife in connection with the other attendant circumstances. *Green* v. *State,* 51 Ark. 189; *Ferguson* v. *State,* 92 Ark. 145.

In *Keirsey* v. *State,* 131 Ark. 487, 199 S. W. 532, it was held that mere words, however abusive or insulting, cannot reduce the degree of homicide from murder to manslaughter.

In *Stepp* v. *State,* 170 Ark. 1061, 282 S. W. 684, the court said that, inasmuch as no one can look into the mind of another, the only way to decide upon its condition at the time of the killing is to judge from the attending circumstances, and that the question of the presence or absence of malice at the time of the killing is for the jury, when there is any evidence to support its finding, because the jury is the judge of the weight to be given to the evidence, in deciding its legal sufficiency to support a verdict, it must be viewed in he light most favorable to the State.

We have set out the substance of the evidence, and need not repeat it here. In arriving at its verdict, the jury was not required to accept or reject the whole of the testimony of any witness. The undisputed evidence shows that bad blood existed between the defendant and the deceased on account of a lawsuit between them about some land. They had come to Stamps, where the killing occurred, for the purpose of taking depositions in the case. The deceased passed a drugstore where the defendant and Newt Aldridge were sitting on an iron step in front of it. He shook hands with Aldridge, and refused to shake hands with the defendant, saying, in substance, that he was not his friend. The defendant

replied by applying a vile epithet to the deceased. It is true that, according to the witnesses for the State, the deceased first pushed the defendant back; but the jury might have inferred that the defendant called the deceased a vile name for the purpose of causing a row, and had the intention of stabbing him with a knife and killing him if the deceased tried to fight him with his fist. He knew that the deceased had some skill in boxing, and that he was seventy-three years of age. While the deceased was a large man, the defendant might have thought that, on account of his advanced age, he might not be able to harm him, but, on account of his skill in boxing, he might claim that he cut deceased in order to keep from receiving great bodily harm at his hands. At least these were legal inferences which the jury might have drawn from the testimony.

The jury was the judge of the credibility of the witnesses, and might accept such portion of the testimony of any particular witness which it believed to be true and reject that part which it believed to be false. When the testimony is viewed in the light most favorable to the State, the jury might have inferred that Tatum was angered at the deceased and intended to raise a quarrel with him and to stab him and kill him if he should advance upon him. In reaching this conclusion, the jury might take into consideration the character of the wound, the fact that it caused death in fifteen or twenty minutes, and the further fact that the defendant sharpened his knife on the day before, at a time when he knew that he would meet the deceased in Stamps, where they were to take depositions in a pending lawsuit. It is true that the deceased first addressed the defendant by saying that he would not shake hands with him because he was not his friend. In the first place, there was nothing in the language used which was insulting; but, even if it should be so construed, as we have already seen, words, however insulting, are not sufficient to reduce a homicide from murder to manslaughter. It follows that we are

of the opinion that the evidence is legally sufficient to warrant the verdict.

It is next insisted that the court erred in giving instruction No. 15, at the request of the State. The instruction reads as follows: "You are instructed that the only purpose for which proof of threats is admissible is to throw light on the state of mind of the defendant at the time he struck the fatal blow, and to show who was the probable aggressor, and if you believe, from the evidence as explained in these instructions, that the deceased was not making any attempt to kill the defendant or do him great bodily harm, as viewed from the standpoint of the defendant, acting as a reasonable man, you will not consider threats, even if proved, for any purpose; and in this connection you are told that threats alone, however violent, would not justify an assault or afford provocation for a homicide.

Counsel for the defendant specifically objected to that part of the instruction which makes the defendant view the facts as a reasonable man and because of reading "as viewed from the standpoint of the defendant acting as a reasonable man," instead of "as viewed from the standpoint of the defendant at the time, acting without fault or carelessness on his part." We do not think the objection of counsel to the instruction is well taken. There is nothing in the testimony itself to show that the defendant was not a reasonable man or a man of ordinary intelligence. The question was narrowed down to whether, under the circumstances of the case, the attitude of the deceased, as described by the witnesses, was of itself sufficient to create in the mind of the defendant, as a reasonable man or a man of ordinary intelligence, a *bona fide* belief that the danger to him was imminent, and that the action which he took was necessary for the purpose of protecting himself from loss of life or the infliction of great bodily injury. If a man of ordinary intelligence, or a reasonable man under the same circumstances, would not have believed the danger to have been real, then the defendant cannot be said to have been justified

in his action. In several other instructions given to the jury the court submitted the appearance of danger to the defendant, in accordance with the rules of law laid down in our previous decisions. When the instructions are considered and read as a whole, we cannot see how the jury could have been misled by the instruction in question or could have thought that it referred to any other time than the time of the killing. *Branscum* v. *State,* 134 Ark. 66, 203 S. W. 12, and *Sullivan* v. *State,* 17 Ark. 768.

It is next insisted that the court erred in refusing to give instruction No. 12, requested by the defendant, which reads as follows: "You are instructed that, if you believe from the evidence that the deceased had made threats of physical violence against the defendant, and that these threats had been previously communicated to the defendant, and that the deceased came up to where the defendant was sitting in the door of the store at Stamps, and struck the defendant, and that the acts and conduct of the deceased at the time were such as to lead the defendant to believe that the deceased was about to put his threats into execution, and that it honestly appeared to the defendant, acting on the facts and circumstances as they appeared to him from his standpoint at the time, without fault or carelessness on his part, that it was necessary to stab and kill the deceased to prevent him from taking his life or doing him serious bodily injury, then you are instructed that the defendant would be justified in so acting, and you should return a verdict of not guilty for the defendant."

The evidence on the part of the defendant showed that the deceased had made previous threats against the defendant and that the persons to whom the threats had been made communicated them to the defendant. The court, in other instructions, however, instructed the jury that it might consider such threats in determining who was the aggressor at the time the killing occurred. The court was not required to multiply instructions upon the same phase of the case. The respective theories of

the State and of the defendant were fully and fairly submitted to the jury in the instructions given by the court. We have examined these instructions carefully, and find no reversible error in them.

It follows that the judgment must be affirmed.

H. ROUW COMPANY v. KANSAS CITY SOUTHERN RAILWAY COMPANY.

Opinion delivered November 29, 1926.

1. CARRIERS—DELAY IN SHIPMENT—JUSTIFICATION.—A carrier is not justified in delaying a shipment under a diversion order because a through rate could not be obtained where the order for diversion was not made conditional on obtaining such rate.
2. CARRIERS—DELAY IN SHIPMENT—DAMAGES.—The damage for unreasonable delay in shipment of goods is the difference between the market value of the goods at the time and place when and where they should have been delivered and the value when they were delivered, with interest.

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

STATEMENT BY THE COURT.

The H. Rouw Company sued the Kansas City Southern Railway Company to recover damages for alleged negligent delay in an interstate shipment of apples.

According to the testimony of J. L. Cannon, who was the agent for the plaintiff in the transaction, he shipped a car of apples from Gentry, Arkansas, to Dallas, Texas. The car of apples was consigned to the plaintiff with directions to notify the Texas Produce Company at Dallas, Texas. On the arrival of the apples at Dallas, Texas, they were examined by the Texas Produce Company, which refused to accept them at the price offered, but offered to take them at a reduced price. The plaintiff refused to accept the reduced price, and, on September 7, 1923, returned the original bill of lading to the agent

of the defendant at Gravette, Arkansas, and wrote across it the following diversion order: "Divert to the H. Rouw Company, Austin, Texas, via M., K. & T. Railroad Company. Signed J. L. Cannon." He delivered the bill of lading with the diversion order just before the train left Gravette for Gentry. He heard no more of the matter until the morning of the 10th inst., which was the fourth day after the diversion order was given. On that day the agent at Gravette called the witness and told him that through rates did not apply from Dallas to Austin over the M., K. & T., and asked him if he still wanted the car of apples diverted. Witness told the agent that the car should have been in Austin a day or two before, and that his diversion order was not a conditional order; that there was nothing on it about the rate, and that he had simply asked that the car be diverted. The car was later diverted to Austin, Texas, and it was refused by the brokerage company to which it was consigned. The reason was that apples had been received from the State of Washington which were claimed to be of a superior quality to the apples shipped and which could be purchased at a less price. The shipment of apples from the State of Washington to Austin caused the price of apples to fall, and the plaintiff had to sell them for a less price than it could have obtained for them at Dallas.

According to the evidence for the defendant, delay in the shipment of the apples from Dallas to Austin, Texas, was caused by its efforts to divert the car of apples on a through rate from the point of shipment to the final point of destination. The diversion order was in the hands of the defendant, and was not produced at the trial. Delay in diverting the car of apples was due to the fact that the defendant could not secure a through rate via the M., K. & T. Railroad.

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

Roy Gean, for appellant.

James B. McDonough and *Joseph R. Brown*, for appellee.

HART, J., (after stating the facts). Over the objection of the plaintiff, the court instructed the jury that, if J. L. Cannon, the agent for the plaintiff, requested the defendant's agent to divert the shipment of apples from Dallas, Texas, to Austin, Texas, saving the through rate if possible, the delay in Dallas was justified. It is earnestly insisted by counsel for the plaintiff that this instruction was abstract and necessarily prejudicial to the rights of the plaintiff, because there is no testimony in the record tending to show that the plaintiff asked the defendant to save the through rate in making the diversion order. In this contention we think counsel for the plaintiff is correct.

The diversion order was in possession of the defendant, and was not produced at the trial. J. L. Cannon, who was the agent for the plaintiff, and who acted for it throughout in the transaction, gave in his testimony what purported to be a copy of the diversion order. There is nothing in it about saving the through rate. According to the testimony of Cannon, the diversion order was not upon any condition whatever. There is nothing in the record whatever from which it might be inferred that the diversion order was subject to the condition that the railway company was to secure a through rate if possible. It is true that the order was diverted via M., K. & T. Railroad, and that the evidence on the part of the defendant shows that a through rate could not be obtained over this route. This, however, was not sufficient evidence upon which to base the instruction. The plaintiff may have known that it was necessary to get the car of apples to Austin as quickly as possible and may have chosen this route on that account. Be that as it may, the fact that the car of apples was directed to be diverted over the M., K. & T. Railroad is not sufficient evidence that a through rate over that line was requested. There is no other testimony whatever in the record upon which to predicate such an instruction. It follows that the court erred in giving the instruction complained of.

Inasmuch as the judgment must be reversed, we call attention to the established rule of this court as to the measure of damages. The general rule of damages for unreasonable delay in the transportation of goods is the difference between the market value of the goods at the time and place when and where they should have been delivered and their value when they were delivered, with interest. *St. L. I. M. & S. R. Co.* v. *Coolidge*, 73 Ark. 112, 83 S. W. 333; *K. C. Sou. Ry. Co.* v. *Mabry*, 112 Ark. 110, 165 S. W. 279; *K. C. & Memphis Ry. Co.* v. *Oakley*, 115 Ark. 20, 170 S. W. 565; and *St. L. I. M. & S. Ry. Co.* v. *Tilby*, 117 Ark. 163, 174 S. W. 1167.

For the error in giving the instruction complained of as indicated in the opinion the judgment will be reversed, and the cause remanded for a new trial.

WEBB v. COBB.

Opinion delivered November 29, 1926.

1. CONTRACTS—MERGER OF WRITTEN IN ORAL CONTRACT.—A written contract may be superseded by a subsequent oral contract.
2. EVIDENCE—MODIFICATION OF WRITTEN BY ORAL CONTRACT.—The rule that parol evidence is not admissible to contradict, vary or alter the terms of a written instrument does not exclude the introduction of evidence to show that a written contract has been modified, altered or in fact entirely rescinded by a subsequent oral agreement.
3. EVIDENCE—BEST AND SECONDARY.—In a suit by a contractor for extra work under a contract for construction of a building, permitting him to testify as to the plans of the building to show what was extra work without introducing the written plans was not error where defendant had the original plans, and the contractor's evidence clearly distinguished between the work contracted for and the extra work.
4. TRIAL—INSTRUCTION ASSUMING FACTS.—Where a contractor claimed that a written contract for construction of a building had been abandoned and an oral contract substituted on account of defects in steel framework completed at time of the contract, and was suing for extra work, an instruction that, if defendant agreed to pay plaintiff for additional work on account of defects

in steel construction, plaintiff could recover for such extra work, was not erroneous as assuming that there were defects in the steel construction, in view of another instruction making it necessary for the jury to find whether there were defects in the steel construction.

Appeal from Garland Circuit Court; *Earl Witt,* Judge; affirmed.

W. G. Bouic and *Murphy & Wood,* for appellant.

A. B. Belding and *Gibson Witt,* for appellee.

SMITH, J. Appellant was the general contractor for the construction of a four-story steel and brick building and an additional story on an old building for the Woodmen of Union, a negro fraternal organization in the city of Hot Springs. Appellant and appellee entered into the following written agreement:

"Hot Spring National Park, Ark.,
"April 29, 1924.

"I, J. C. Cobb and Company, do hereby agree to build complete all brick work, terra cotta, and tile for the outside walls of the proposed W. O. U. bank and office building and the fourth story of the present building, corner Gulpha and Malvern Streets, city, in keeping with the plans and specifications furnished by W. T. Bailey, architect, for the sum of $8,250, to be paid as follows:

"For the first story $1,000; during and completing the second story $1,500; during and completing the third story $1,700. And for the completion of the fourth floor and parapet walls complete, $4,000. All of which is to be done in a workmanlike manner and subject to the usual conditions.

"John L. Webb, Principal.
"J. C. Cobb, Contractor."

After the execution of this contract, appellee commenced work, but, after a few weeks, discovered, according to his contention, that the spacing and openings in the steel work were irregular and not uniform, and that the uprights were out of plumb, and the brick and terra cotta would not fit and fill the openings without extra chipping, cutting and reshaping, and changing the levels

of many of the horizontal pieces of steel. When this condition was discovered, according to appellee's contention, it was seen that it was impracticable and impossible to follow the plans and specifications in building the walls with the materials furnished by appellant, and it was therefore agreed to abandon the written contract, and a new oral contract was made. This oral contract provided that appellee should furnish the labor for building the outside walls, without plans or specifications but under the directions of a superintendent employed and furnished by appellant, for the same price stipulated in the written contract, towit, $8,250, and appellant was to pay an additional charge for chipping, cutting and finishing the brick and terra cotta to fit the openings or spaces in the structural frame steel work of said building, and for all extra brick work done in and about the building.

Appellant's contention is that the steel framework and the terra cotta blocks were properly constructed, and that all trouble encountered by appellee was due to his own fault in improperly building his brick and terra cotta walls so that they were not plumb and in disregarding the terra cotta plans and the numbers on the terra cotta blocks which were intended to show where each of the blocks was to be placed in the structure, and that the written contract was not changed. Appellant also contends that appellee did no extra work except the construction of a smokestack at an agreed price of $900. Appellant alleged in his answer that appellee had abandoned the work without cause after having been paid more than he had earned under the contract, and appellant was required to employ another contractor to complete the job, thereby increasing the cost of the work to a sum largely in excess of the contract price, and a judgment for this excess was prayed in a cross-complaint filed by appellant.

The cause was submitted to the jury under instructions covering the two theories of the case, and there was a verdict and judgment for appellee in the sum of $2,500,

from which is this appeal. Appellant has abandoned the allegations of his cross-complaint.

The steel framework of the new building and the concrete foundations for this work were in place when appellee began operations.

Appellee testified that the steel was out of plumb, and gave as his reason for saying it was not plumb that his brick ran into the steel flanges at the second story, and at every other story. He testified that his brickwork was plumb, and, if the steel had been plumb, he would not have run into it with his brickwork, but he admitted that he never dropped a plumb line to get his starting point. He also testified that he properly placed the terra cotta blocks, and they did not fit. A number of witnesses corroborated appellee in these statements.

The testimony on appellant's behalf is in conflict with this testimony, but the verdict of the jury is decisive of the conflicts in the testimony as to the cause of the trouble.

When appellee was called as a witness in his own behalf, he offered in evidence the written contract set out above, and objection was made to its introduction unless and until the plans and specifications there referred to were also introduced in evidence. Appellant, while denying that there was a second or oral contract, insists that, if there were, it was still necessary to introduce the plans and specifications to determine what work done by appellee was called for in the contract; in other words, it could not be definitely known what part of the work was extra without knowing what work was contemplated in the plans and specifications with reference to which the written contract was made. By numerous objections to testimony and the instructions which were given, and by exceptions to the refusal to give other instructions, appellant preserved this point throughout the trial.

Appellee insists that he is not suing on the written contract, but on a subsequent oral contract; and he also insists that the testimony shows the work which the

plans and specifications required him to do, and also the extra work called for by the plans.

Appellee makes two answers to appellant's insistence that appellee should have offered in evidence the plans and specifications. The first is, as stated, that the suit was not based thereon, and the second is that the testimony does not show that appellee was in possession of a copy of the plans and specifications, but does show that appellant was in the possession of the original of the plans and specifications and might have introduced them, and we are unable to say that the testimony does not support appellee in both these contentions.

We think the court was correct in holding that appellee's right to recover was not dependent on the written contract, for, according to his contention, it had been superseded by a subsequent oral contract, and he had the right therefore to sue upon the oral contact.

One of the principal items for extra work involved in this appeal is for the construction of the pilasters. Appellee admits that the pilasters were shown on the original plans, but, when the plans were submitted to him, appellant stated that he did not want the pilasters, and for appellee to take no account of them in making his bid, yet, according to appellee, appellant changed his mind as the work progressed, and decided that he did want the pilasters, and directed appellee to build them, but this direction was not given until after the abrogation of the written contract. Appellant objected to this testimony, and insists that it is a contradiction of the written agreement by oral testimony.

We do not think this objection is well taken. The contract which was signed by the parties stipulated that the work should be "in keeping with the plans and specifications," which meant, of course, the plans as they then stood. Appellee does not contend that he was not to erect the building in keeping with these plans; on the contrary, he admits their binding effect. His contention is that the plans and specifications with reference to which he contracted did not call for the building of the

pilasters at the time the contract was signed. The plans and specifications were not incorporated in the contract except by reference to them, and the contract as signed did not undertake to define what these plans were. It was permissible therefore for appellee to show what the plans and specifications were with reference to which the parties had contracted.

In 9, Encyclopedia of Evidence, page 356, it is said: "The rule that parol evidence is not admissible to contradict, vary or alter the terms of a written instrument does not exclude the introduction of evidence to show that a written contract has been modified, altered, or in fact entirely rescinded by a subsequent oral agreement, the evidence not being for the purpose of varying the terms of the written instrument, but to show that it has become inoperative, either in whole or in part, by reason of a subsequent and independent agreement. It is immaterial how soon after the execution of the written instrument the new agreement was made."

Appellant insists that the question concerning the pilasters demonstrates the necessity for the introduction of the plans and specifications, as otherwise the court and jury could not know what work was extra, and, as appellant says, this is the principal error complained of. Appellant also insists that the cause was not and could not have been properly submitted under the instructions given, in the absence of the plans and specifications, as the jury could not tell what part of the work done was covered by the written agreement and what was not included in the written agreement.

We think, however, that appellee answers these assignments of error when it is shown that it does not clearly appear that appellee was in possession of the plans, whereas it is not questioned that appellant had the original plans and might himself have introduced them in evidence, and further, according to appellee, the testimony offered in his behalf distinguishes between the work contracted for and the extra work.

It is finally insisted that the court erred in giving an instruction numbered 9, which reads as follows: "If you believe from a fair preponderance of the evidence that, after the work was begun by the plaintiff under the written contract in evidence, the plaintiff and the defendant entered into a verbal agreement, whereby the defendant placed a superintendent in charge of the work to be done by the plaintiff and agreed to pay the plaintiff the usual or customary price for such additional work as would be necessary in completing defendant's contract on account of defects in the terra cotta or steel construction, and that, in said verbal agreement, the plaintiff agreed to perform additional work not contemplated in the written contract, then you should find for the plaintiff for any balance due him for such additional labor as was required on account of any defect in the terra cotta or steel construction, and for the usual or customary value of the work, if any, performed by the plaintiff not contemplated in the original contract."

The specific objection made to this instruction is that it assumes there were defects in the terra cotta or in the steel construction. This instruction must, however, be read in connection with another instruction which told the jury that appellee's insistence was that, on account of defects in the terra cotta and steel construction, it became necessary to abrogate the original contract, and, unless the facts were so found, to find for appellant, except as to certain additional work about which there was no dispute. This instruction required the jury to find that there were defects, and that, on account of these defects, a new contract was made, and we think therefore, when the two instructions are read together, the instruction quoted is not open to the objection made.

Upon a consideration of the whole case we find no error, so the judgment of the court below is affirmed.

BEEBLE v. ARKANSAS LIGHT & POWER COMPANY.

Opinion delivered November 8, 1926.

1. APPEAL AND ERROR—JURY QUESTION.—To determine whether a cause should have been submitted to the jury, the Supreme Court will view the testimony in the light most favorable to the party against whom the verdict was instructed.
2. DAMAGES—NOTICE OF SPECIAL DAMAGES.—Evidence *held* sufficient for the jury on the issues whether plaintiff gave defendant sufficient notice that they would be entitled to special damages for defendant's failure to furnish an adequate motor to irrigate plaintiff's rice fields and whether defendant showed that plaintiffs had failed to do all in their power to minimize the damages.

Appeal from Arkansas Circuit Court, Southern District; *George W. Clark,* Judge; reversed.

John W. Moncrief, for appellant.

John L. Ingram, for appellee.

HUMPHREYS, J. Appellants instituted this suit against appellee, in the circuit court of Arkansas County, to recover damages in the sum of $8,795.80 to a rice crop of 119.8 acres grown in the year 1924, for failure to comply with a contract to furnish a 15-horse-power motor capable of producing power sufficient to pump 1,500 or 1,800 gallons of water per minute to irrigate the rice. The complaint alleged a breach of contract to furnish power as well as a motor, but the undisputed proof disclosed that the power lines were completed within the time specified in the contract, so only the allegations relative to the contract of the motor and the failure to furnish same will be mentioned in setting out the substance of the complaint.

The complaint, in substance, alleged that appellee entered into an oral contract with appellants to furnish and rent them a 15-horse-power electric motor, capable of furnishing water for said rice, and to install same; that appellee, with full knowledge of the purpose for which said motor was desired, advised appellants that a 15 horse-power motor was capable of furnishing power sufficient to pump the necessary water to irrigate said 120-acre tract of growing rice; that appellee was advised

of the purpose for which appellants wanted said electric motor, and with this knowledge, and while knowing the consequences of a failure on its part to furnish and install a capable motor in ample time to irrigate said field, entered into a contract with appellants, for a valuable consideration, to furnish an electric motor in time to irrigate the rice, but, in violation of its contract, failed to furnish a motor that would supply the necessary water; that it furnished a motor with which appellants were unable to water the rice, thereby causing the greater part of the crop to burn and die.

Appellee filed an answer, denying the material allegations of the complaint.

The cause was submitted upon the pleadings and evidence, and, at the conclusion of the testimony, the court instructed a verdict in favor of appellee, over appellant's objection and exception, from which is this appeal.

The court peremptorily instructed a verdict upon the theory that appellants failed to give appellee sufficient notice that they would be entitled to special damages upon its failure to furnish the electric motor; and because appellants made no effort to minimize their damages when appellee breached the contract.

Appellee contends for an affirmance of the judgment upon the theory that the testimony brings the case within the general rule announced in *Barry-Wehmiller Machinery Co.* v. *Thompson,* 83 Ark. 283, to the effect that "the measure of the damages for breach by a vendor of a contract of sale of a chattel is the difference between the article agreed to be furnished and the one furnished, or, if the one furnished was not fit for practical use, the cost of procuring an article of the kind agreed to be furnished;" and the rule announced in the cases of *Beekman Lumber Co.* v. *Kittrell,* 80 Ark. 228, 96 S. W. 988, and *Young* v. *Berman,* 96 Ark. 78, 131 S. W. 62, to the effect that "a party injured by a breach of contract must make reasonable effort to prevent or reduce the damages; and where he can, by reasonable exertion or

expense, arrest the loss caused by such breach, the measure of damages is the amount of such expense."

Appellants contend for a reversal of the judgment upon the theory that the testimony brings the case within the general rule announced in *Miles* v. *American Railway Express Company,* 150 Ark. 114, 233 S. W. 930, to the effect that "where two parties make a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered either as arising naturally from the breach of the contract or as having been in contemplation of both parties at the time they made the contract, as the probable result of a breach of it. In determining what damages were contemplated by the parties to a contract, it is proper to consider the nature and purpose of the contract and the attending circumstances known to the parties at the time the contract was executed, and the damages should be awarded which might reasonably have been expected to follow from a breach of the contract;" and within the rule announced in 4 Enc. of Evidence, page 10, to the effect that "it is for the alleged wrongdoer to show any facts and circumstances in mitigation of damages."

In classifying the instant case, appellants are entitled to the most favorable construction which can be placed upon the evidence, the rule being that, in determining whether the cause should have been submitted to a jury, the Supreme Court will view the testimony in the light most favorable to the party against whom the verdict has been instructed. The evidence, viewed in its strongest aspect for appellants, is as follows: Appellants had planted 119.8 acres of rice in said county, near a bayou where ample water could be secured for irrigation purposes. The stand was good, and free from grass and weeds. They decided to use electric motor power for pumping purposes, instead of pumping water out of the bayou over the rice field with steam or oil engines, provided they could get the electric power and motor from appellee. Appellee was engaged in the business of fur-

nishing electric power and motors to rice farmers in that section of the State. On June 19, 1924, W. N. Beeble, acting in behalf of appellants R. W. Beeble and J. L. Cartmell, entered into a conditional oral contract with Edward Donan, superintendent of appellee, to supply them with electric power and a motor capable of furnishing from 1,500 to 1,800 gallons of water per minute to irrigate the rice. Donan was informed by W. N. Beeble of the existing conditions and the immediate need of water, as well as the quantity required. The tentative contract was not to be closed until Donan, who was familiar with rice culture in that section, could visit the farm and by personal inspection familiarize himself with the conditions, and by calculations determine the amount of power and the size of the motor necessary to pump 1,500 to 1,800 gallons of water per minute. After making a personal inspection and the necessary calculations, he advised Beeble that a 15-horse-power motor would do the work, and stated that appellee had two motors on hand, one a 15-horse-power and the other a 25-horse-power, and that, if the smaller one would not do the work, appellee could replace it with the larger one. The oral contract was then closed, with the understanding that the power lines should be completed and the motor installed by the following Tuesday. Appellants paid $50 at the time on the motor contract, which was a rental contract for $225 for the season, with the privilege or option to purchase it by paying $350 instead of the rent. Appellee began to construct the power lines to the farm at once, and did not complete them until July 1, and did not install the electrical motor until July 9, although the agent of appellants had urged appellee almost daily, after the completion of the power lines, to install the motor. Appellee put off the installation of the motor from day to day, finally admitting that he had used the motor intended for appellants to replace one which appellee had burned out on another farm, and that it had sent the motor which it had burned out away for repairs, and was sure that it would be back immediately. When it

was returned on the 9th, appellee installed a 15-horse-power motor, but, when tested, it would not pump any water at all. Appellee immediately removed it for the purpose of having it repaired, and, on the 12th day of July, substituted, temporarily, a 10-horse-power motor. About this time appellee required appellants to sign a written contract for the electric power covering a period of years. The 10-horse-power motor which had been substituted until appellee could get the first motor repaired, had capacity to pump only 400 gallons of water per minute, and this amount would only supply sufficient water to irrigate about 30 acres of rice. The necessity of immediate action on the part of appellee was urged by appellants almost constantly, and the superintendent promised from day to day to get the 15-horse-power motor repaired, and finally got it back, but discovered it had been wound the wrong way and could not be used. On the 15th of July, during this period of delay, appellee suggested that it install a 25-horse-power motor, which appellants agreed that it might do, whereupon it took a note from them for the price of the large motor. It then failed to install the large motor until July 25, although urged constantly by appellants to install same, and although it was promising from day to day to do so. When the larger motor was installed, on July 25, it was discovered that the rice on two-thirds of the land had burned up and could not be revived by irrigation. W. N. Beeble testified positively and unequivocally that Donan knew what the result would be if the motor furnished them failed to pump the necessary water on the rice. He further testified that it was discussed and known by both parties that appellants would lose the whole crop unless sufficiently irrigated. He also testified that appellants relied upon the promise of appellee to furnish the motor and its further promise from day to day to install same, until it was too late to provide other means for supplying necessary water for irrigation. He also testified to the damages sustained on account of the breach of the contract.

We think the testimony detailed above brings the case within the rules contended for by appellants, and that the evidence was sufficient to warrant a submission of the cause to the jury upon the issues of notice necessary to recover special damages, and whether appellee met its burden to show that appellants failed to do all within their power to mitigate the damages.

The testimony strongly tended to show that appellee contracted with appellants to furnish a 15-horse-power motor capable of pumping 1,500 to 1,800 gallons of water per minute to irrigate the growing rice crop upon 120 acres of land, and that it made this contract with the knowledge that, if the motor failed to do so, the crop would be destroyed. It refused to rely upon the representations made by the agent of appellants concerning the conditions and situation existing upon the farm, and made its own calculations as to the size and character of the motor needed, after a personal inspection.

The testimony also tended to show that appellants relied upon the promises of appellee from day to day that it would install a motor of the size and character necessary to pump sufficient water to irrigate and mature the rice crop, and that there was nothing they could do to save the crop after they realized that appellee had breached its contract.

Under our view of the law applicable to this case, the court erred in instructing a verdict against appellants, and for that reason the judgment is reversed and the cause is remanded for a new trial.

Mr. Justice SMITH dissents.

KATTER v. HARDIN.

Opinion delivered November 29, 1926.

1. EXCHANGE OF PROPERTY—DRUNKENNESS OF PLAINTIFF.—An improvident exchange of lands, made while one of the parties was in a drunken condition, is voidable at his instance where the other party knew of his condition at the time.
2. EXCHANGE OF PROPERTY—RESCISSION—LACHES.—Where plaintiff was on a drunken spree when he executed an exchange of his land for that of defendant, who knew his condition, delay of several months after plaintiff sobered up before suing to rescind the exchange was too late.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland*, Chancellor; reversed.

Cravens & Cravens, for appellant.

John Brizzolara and *Wm. A. Falconer*, for appellee.

SMITH, J. Prior to the 17th day of January, 1924, appellee owned two lots in the city of Fort Smith, and appellant owned a 326-acre farm in LeFlore County, Oklahoma, about four miles south of Fort Smith, and on that day and the following day they entered into contracts for the exchange of these properties, which contracts were consummated by the exchange of deeds dated January 26, 1924. There were incumbrances on both properties, and the contracts provided for the adjustment and assumption thereof. After the execution and delivery of these deeds, each party went into possession of the property conveyed him. Thereafter, on July 22, 1924, appellee brought this suit for the rescission of this sale and the cancellation of his deed to appellant.

This relief was asked upon the ground that, about the first of the year, appellee became intoxicated and remained in that condition until after the execution of the contracts and deed and did not terminate his spree until about the first of April. He alleged that, as a result of this spree, he became highly nervous and was mentally incapacitated to make either the contracts or the deeds, and he further alleged that he did not recover his equilibrium until the last of June, when he realized, for the first time, the utter improvidence of his trade. He

thereupon made an appointment with appellant to discuss the rescission of the contract, and, when appellant failed to keep this appointment, this suit was brought.

Appellant filed an answer, denying the allegations of the complaint, and alleged that, in any event, appellee, by his conduct subsequent to the execution of the deed, had ratified it.

By consent of both parties the cause was referred to a master to hear testimony and make a finding of fact on the issues involved, and the Honorable Daniel Hon, a former judge of the circuit court of the judicial district of which Sebastian County is a part, was appointed master.

A number of witnesses testified on behalf of both appellant and appellee, and the testimony is very conflicting as to the extent and duration of the spree upon which appellee entered. It was shown very clearly that, prior to this debauch, appellee had been a man of moral habits, of splendid ability, and attentive to his law practice, the profession in which he was engaged, but, about the first of the year, appellee became intoxicated on moonshine whiskey, and its effects were so demoralizing that appellee was unable to right himself and cease drinking until about the first of April, and, even though he ceased drinking and became sober about the first of April, he did not recover his mental faculties sufficiently to realize the imposition practiced upon him until in June of that year. On the part of appellant the testimony was to the effect that appellee was not intoxicated to an extent to render his deed void on that account.

The master, after hearing all the testimony, made a finding of fact fully sustaining appellant's contention, and filed a report embodying that finding. Exceptions thereto were filed by appellee, and, after a hearing before the chancellor, these exceptions were sustained, and a written opinion filed by the chancellor contained the finding that appellant had taken advantage of appellee's inebriated condition to impose an unconscionable

exchange of properties on him, and also found the fact to be that appellee did not ratify this exchange.

We do not review the testimony touching the extent and effect of appellee's spree, for the reason that, in the opinion of the majority, the testimony sustains the chancellor's finding.

In the case of *Cook* v. *Bagnell Timber Co.,* 78 Ark. 53, 94 S. W. 695, 8 Ann. Cas. 251, in the opinion on rehearing it was said: "One who deals with a sober man upon equal footing owes him only the duty not to mislead him to his prejudice by a material false representation concerning the subject-matter, or by a failure to disclose a material fact within his knowledge which the circumstances may make it his duty to disclose, whereas one who deals with a person whom he knows to be partially intoxicated owes him the duty not to take advantage of his condition by knowingly imposing a harsh contract upon him."

In the opinion of the majority the condition of appellee, and appellant's knowledge of that condition, was such that the contracts eventuating in the exchange of deeds were voidable at the election of appellee.

It is, however, the opinion of the majority that this election was not made in apt time. In the case of *Fleming* v. *Harris,* 142 Ark. 553, 219 S. W. 33, the plaintiff, Harris, asked rescission of a sale of land upon the ground that he was induced to purchase through false representations made to him. Plaintiff received his deed in the early part of January, 1918, and brought suit to rescind on the 3rd of November, 1918. The court below granted the relief prayed, and we reversed that decree upon the ground that plaintiff had delayed an unreasonable time before filing the suit. We there said that one who desires to rescind his contract on the ground of fraud must act promptly after discovering the facts; that such a person cannot wait to experiment and see whether the transaction might not, after all, turn out well; that such a person must move promptly in asking a rescission, and, in failing so to do, will be held to have acquiesced in per-

mitting a contract to stand which otherwise might have been avoided. In so declaring the law the court followed the previous holding in the case of *Fitzhugh* v. *Davis*, 46 Ark. 337.

We have said the testimony was sharply conflicting as to appellee's mental condition at the time of executing the contracts and deed sought to be canceled, but the majority uphold the chancellor's finding on this issue. It may also be said that the testimony is in sharp conflict as to the extent of the improvidence of the trade, but we are all of the opinion that the trade was highly improvident. However, we are all of the opinion that the law required appellee to move promptly in asking a rescission, and the difference of opinion among us is whether he did so act under the facts of the case.

The testimony shows that, pending the negotiations for the exchange, appellee visited the farm and inspected it, and caused an examination of the abstracts of title to be made by an attorney who was appellee's friend, and the title was approved subject to the incumbrances, which were to be adjusted pursuant to the contracts between the parties.

Appellee admits he became sober about the first of April, 1924, and that he thereafter returned to his former habit of sobriety and did not thereafter drink at all, but there is a conflict in the testimony as to when appellee became normal, and two witnesses expressed the opinion that appellee had not fully recovered at the time the depositions in the case were being taken.

The testimony shows that, a few weeks after appellee received his deed, he removed to the farm and made it his home, and began actively to make preparations to cultivate the land. About the 10th day of April one of the incumbrances on the land became due. This was about ten days after appellee admitted he had sobered up, and he arranged with a vice president of the First National Bank, which held the note evidencing this loan, for an

extension of from sixty to ninety days. Appellee stated at the time that he expected to pay this note, or a part of it, out of the proceeds of his potato crop. The bank official testified that, during these negotiations, appellee appeared to be both sober and normal. There were certain liens against the city property which appellee traded for the farm, and one was for material which had been used in the construction of a filling station on this city property. Appellee made application to the managing officer of the Deming Investment Company for a loan of $4,000 to take up the note held by the First National Bank and also to pay the past due indebtedness on the filling station. It was required by the investment company, before making this loan, that appellant release a second mortgage which he had taken on the farm, and, when appellant declined to do this, the loan was not made.

After taking possession of the farm, appellee procured the release to himself of a lease outstanding on a portion of the land, and began the cultivation of the land and made some substantial improvements on it, and built a barn. The incumbrances on the farm were so large that appellee was unable to finance the proposition and discharge certain liens on the city property, as he had contracted to do, but it is not contended that appellant made any misrepresentations concerning these incumbrances; indeed, it is not contended that he made any misrepresentations of any character. The contracts between the parties recited correctly the outstanding incumbrances against the respective properties.

The fraud found by the court below was that, while appellee was under the influence of liquor to such an extent that he was unable to protect himself in the trade, appellant imposed a harsh and improvident trade upon him. But, even so, it was his duty, after recovering his faculties, to ask, without unreasonable delay, that the contracts be rescinded, and, as we think this was not done, the decree of the court below canceling the deed

must be reversed, and it is so ordered, and the cause will be remanded with directions to enter a decree conforming to this opinion.

Mr. Justice HUMPHREYS dissents on the question of ratification.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* H. ROUW COMPANY.

Opinion delivered November 29, 1926.

1. CARRIERS—INJURY TO PERISHABLE FREIGHT—JURY QUESTION.—In an action against a railroad for damage to a shipment of strawberries, whether the damage occurred before shipment or in transit *held* for the jury under conflicting evidence.
2. TRIAL—CHARGE CONSTRUED AS A WHOLE.—In an action against a railroad for damage to a car of strawberries, an instruction that a common carrier is an insurer of goods accepted for transportation in interstate commerce was not erroneous where other instructions stated the exceptions to the rule, and the jury were told to consider all the instructions together.
3. TRIAL—INSTRUCTION—GENERAL EXCEPTION.—In an action against a railroad for damages to a car of strawberries, an instruction that the amount of recovery should be the difference between the market value of the berries in sound condition at the time of delivery and their value as delivered, with interest, while an imperfect statement of the law, was not open to a general objection.
4. CARRIERS—NEGLIGENCE IN TRANSPORTATION—EXCESSIVE DAMAGES.—An award of $600 for damage to a carload of strawberries for damages in transportation was not excessive where the evidence would have sustained a recovery of $900.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; affirmed.

James B. McDonough and *Joseph R. Brown,* for appellant.

Roy Gean, for appellee.

HUMPHREYS, J. This suit was instituted by appellees against appellant in the circuit court of the Fort Smith District of Sebastian County, to recover the sum of $900.55 and interest for damages to a car of strawber-

ries shipped by appellees from Mena, Arkansas, to Kansas City, Missouri, on the 2d day of June, 1923, through the alleged negligence of appellant in the following particulars:

"(a). In carelessly and negligently failing to properly ventilate said car while in transit. (b). In carelessly and negligently failing and refusing to furnish a car in proper repair and condition for the transportation of strawberries. (c). In carelessly and negligently failing to properly ice said car while in transit. (d). In carelessly and negligently mishandling said car while in transit by violently jerking, stopping, slamming and pushing said car."

Appellant filed an answer denying the material allegations of the complaint.

The cause was submitted upon the pleadings, testimony adduced and instructions of the court, which resulted in a verdict and judgment in favor of appellees for $600, from which is this appeal.

The undisputed testimony showed that car A.R.T. 16570 arrived iced, and was set on the siding at Mena for loading about 9 o'clock P. M., May 30, 1923; that it was delivered to appellees for loading at 7 o'clock A. M., May 31, 1923; that appellees began loading and continued until completed on June 2, 1923, at 5 o'clock P. M., at which hour the bill of lading was issued by appellant in the name of J. L. Hagen for appellees, from whom said appellees had bought the berries before same were loaded; that it required longer to load the car than the time of twenty-four hours fixed by the Interstate Commerce Commission, so that appellees were required to pay demurrage charges in order to have the required additional time to finish loading; that, during the period of loading, no request was made by appellees themselves or J. L. Hagen, their representative, to have the car re-iced; that no request was made by S. B. Byrd, the inspector of refrigerated cars, to the agent of appellant, who issued the bill of lading, to note thereon that the berries were in a damaged condition before or at the particular time of

the shipment; that the car of berries arrived in Kansas City June 4, 1923, in a soft, overripe and moldy condition; that, on account of their damaged condition, they were sold on the market for $2.10 per crate, whereas merchantable berries were selling for $4 a crate at the time.

The record reflects a dispute in the testimony as to the kind and condition of the berries at the time of shipment. J. L. Cannon, one of the appellees, testified, in substance, that he had been engaged in shipping perishable fruits for ten years; that he purchased this car of berries from J. L. Hagen for himself and his coappellee, and made a thorough inspection of them when loaded, being present almost continuously during the period of loading; that they were hauled about two miles over a good road, in trucks, to the car, immediately after being picked; that they were of uniform size and of good quality, not soft or water-soaked; that he examined a large number of the crates by taking the berries from the tops or sides of the crate and pouring them into a V-shaped holder so that every berry in a box could be seen; that he last saw the berries about thirty minutes before the bill of lading was issued, and that they were in good condition; that he climbed on top of the car on the 2d day of June and found plenty of ice in the bunkers to carry them to the first icing point; that the crates were sufficiently and properly braced to keep them from slipping and jarring the berries in transit, unless roughly handled; that berries in the condition these were could have been in transit from six to seven days without injury, if properly iced, ventilated and handled as they should have been; that these berries could not have been injured in any other way than by a failure to properly ice, ventilate and handle them.

Burrell Collins, who received and marketed the car of berries, testified, in substance, that the condition in which the berries arrived in Kansas City was due to over-heating on account of improper refrigeration, foul air in the car, and the shifting of the bracing in transit;

and that the mold upon them could not have resulted from the manner in which the berries were handled in loading them, or from waiting on the platform before shipment.

S. L. Robinson testified, in substance, that, if the berries arrived in a weakened condition, soft, moldy and overripe, in Kansas City, their damaged condition was probably caused by improper refrigeration; that heat caused berries in cars to become moldy.

The testimony introduced by appellant tended to show that the car was handled carefully, properly refrigerated and ventilated in transit, and that they arrived in Kansas City in the same condition in which they were at the time same were shipped.

Employees of appellant at the icing stations en route testified that the car was properly refrigerated and ventilated while en route from Mena to Kansas City, and the conductors in charge of the train pulling the car testified that the car was carefully handled in transit.

The inspector of refrigeration, S. B. Byrd, testified that he was present at Mena when the bill of lading was issued by the station agent to J. L. Hagen for appellees; that the berries went into the car 60 per cent. small, 30 per cent. medium, 10 per cent. large, 45 per cent. overripe, 30 per cent. ripe, 15 per cent. under-ripe, 10 per cent. bruised and cut, 20 per cent. with rotten spots on them, 40 per cent. water-soaked, and 20 per cent. sandy and covered with field mud.

Appellee J. L. Cannon testified that he did not see S. B. Byrd around the car at any time during the three days it was being loaded, and S. B. Byrd testified that he did not see said appellee around the car during said time.

Appellant first contends for a reversal of the judgment on the alleged ground that the evidence is insufficient to support the verdict. The position taken by appellant is that the relation of carrier and shipper did not exist until the issuance of the bill of lading, and at that particular time S. B. Byrd was the only witness pres-

ent and the only one who inspected and knew the condition of the berries. He testified that the berries were practically worthless and unmerchantable at the time the bill of lading was issued, and learned counsel for appellant takes the position that his testimony was uncontradicted by any other witness. We cannot agree with them in this position, because appellee, J. L. Cannon, testified that he was present during the period the berries were being loaded, and that they were No. 1 berries, placed in the car in good condition, and properly braced. He saw them only a half an hour before the bill of lading was issued, and their condition could not have materially changed in that sort space of time. He was corroborated by Burrell Collins, who testified that the damaged condition in which the berries arrived in Kansas City was due to an overheated car, resulting from a lack of proper refrigeration in transit. He also testified that the braces had shifted, caused by careless and negligent handling. The testimony of these two witnesses, coming out of their experience as shippers of perishable fruits, amounted to a contradiction of Byrd's testimony and produced a conflict in the evidence for determination by the jury. This issue of fact was determined against appellant by the jury, and is binding upon it.

Appellant's next contention for a reversal of the judgment is that the court erred in giving the plaintiff's requested instruction numbered 2. This instruction is as follows:

"You are instructed that a common carrier of freight is an insurer of goods, wares and merchandise delivered to and accepted by such carrier for transportation in interstate commerce." The instruction is assailed because it failed to tell the jury that appellant was not an insurer against the inherent quality of the berries, or where the damage to them occurred through the fault of appellees. These exceptions to the rule announced in said instruction were given under separate instructions, and the jury was told not to decide the case on any one instruc-

tion but to take all the instructions together as the law of the case.

Appellant's next contention for a reversal of the judgment is that the court erred in giving instruction numbered 6, upon the measure of damages. This instruction is as follows:

"If you find for the plaintiff, you will fix the amount of its recovery at the difference, if any, as shown by the evidence, between the fair market value of the berries at Kansas City, Mo., in sound condition at the time of delivery, and their fair market value in Kansas City, Mo., at the time of delivery, in their damaged condition, with interest from such time to date at the rate of six per cent. per annum."

Appellant contends that this instruction in effect tells the jury to assess appellees' damage, if any, by taking the price of a car of perfect berries and subtracting from that figure the price of the berries actually shipped. We agree with appellant that the measure of damages in cases of this class is the difference between the market price of the commodity at destination in the condition it would have been in if it had not been damaged through the carrier's negligence, and the market price in its damaged condition. We cannot agree, however, with appellant upon the construction it has placed upon said instruction. We think the court imperfectly announced the rule contended for by appellant. If there was anything misleading in the instruction, it should have been pointed out to the court by a specific exception. Only a general exception was made to the instruction.

Appellant's last contention for a reversal of the judgment is that the verdict is excessive. The testimony in the case showed that appellees were damaged in a greater amount than the jury awarded them. The proof in the case would have supported a verdict for $900.

No error appearing, the judgment is affirmed.

MAYS v. ROBERTSON.

Opinion delivered November 29, 1926.

1. SHERIFFS AND CONSTABLES—INDICTMENT FOR NONFEASANCE.—An indictment alleging that a sheriff, knowing that certain persons were exhibiting gambling devices in the county, failed to arrest them, *held* to state an offense under Crawford & Moses' Dig., § 2633.
2. STATUTES—CONSTRUCTION.—In construing statutes every word used therein should be given its ordinary meaning, if possible.
3. SHERIFFS AND CONSTABLES—SUSPENSION FOR NONFEASANCE.—Under Crawford & Moses' Dig., § 10335, providing for suspension of county officers for criminal conduct amounting to nonfeasance in office, a sheriff may be suspended from office during the pendency of an indictment for knowingly failing to arrest exhibitors of gambling devices in his county, as enjoined by § 2633, *Id.*

Prohibition to Phillips Circuit Court; *E. D. Robertson,* Judge; writ denied.

W. G. Riddick, for appellant.

Brewer & Cracraft, for appellee.

HUMPHREYS, J. The petitioner herein is the duly elected, qualified and acting sheriff of Phillips County, Arkansas, whose term of office will expire on December 31, 1926. On the 5th day of November, 1926, the grand jury of said county returned an indictment against him, which, omitting caption and matters of form, is as follows:

"The said J. D. Mays, in the county and State aforesaid, on the 1st day of February, A. D. 1926, then and there being the duly elected, qualified and acting sheriff of Phillips County, Arkansas, and then and there knowing and having knowledge that A. L. Keller, W. B. Chaney, Clay Pryor, Eugenia Miller, and divers other persons, were then and there guilty of the crime of setting up, keeping and exhibiting certain gambling devices, commonly called slot machines, which said machines were adapted, devised and designed for the purpose of playing a game of chance at which money and property might be won or lost, in said county and State, did unlawfully, knowingly and willfully fail, neglect and refuse to

give notice that said persons were so setting up, keeping and exhibiting the gambling devices aforesaid in the manner and form aforesaid and for the purposes aforesaid, to some judge or justice of the peace of Phillips County, Arkansas, in accordance with the statutes and laws in such cases made and provided, and did unlawfully, knowingly and willfully fail, neglect and refuse to arrest said persons aforesaid, who were so setting up, keeping and exhibiting the gambling devices aforesaid, in the manner and form aforesaid, and to carry them before some magistrate or court having jurisdiction to examine into the matter, as provided by law."

The respondent herein is the duly elected, qualified and acting judge of the First Judicial Circuit of the State, and was presiding over the circuit court in Phillips County at the time the indictment was returned against said petitioner.

On the 10th day of November, 1926, the petitioner herein applied to this court, by petition, for a writ of prohibition to prevent the respondent herein from suspending him from office during the pendency of the indictment, or before the final trial thereon, upon the following alleged grounds:

First, that the indictment failed to charge any offense.

Second, that there is no statute authorizing a suspension of petitioner from office before a trial, under the circumstances of this case.

Respondent filed his answer, joining issue upon the alleged insufficiency of the indictment to charge a crime, and the alleged want of authority to suspend respondent from office during the pendency of the indictment and before the final trial upon the charge contained therein.

A determination of the issues joined involves:

First, a construction of § 2633 of Crawford & Moses' Digest, under which petitioner claims the indictment was drawn; and

Second, whether § 10335 applies to the crime charged in the indictment.

1. The respondent claims that the indictment was drawn under § 2642 of Crawford & Moses' Digest, making it the duty of a sheriff to notify a judge or justice of the peace of the county, if it should come to his knowledge that any person is guilty of setting up gambling devices, etc., and a failure to do so is covered by § 10335 of Crawford & Moses' Digest, which provides for a suspension of a sheriff for such failure during the pendency of an indictment and before final trial. In arriving at this conclusion, the respondent contends that the last six lines of the indictment may and should be treated as surplusage. It is further claimed by the respondent that the language of the indictment is sufficient to charge a crime against petitioner under § 2633 of Crawford & Moses' Digest.

The petitioner claims that § 2642 of Crawford & Moses' Digest was repealed by § 2633 of said Digest, and that the facts stated in the indictment are insufficient to charge a crime against him under the latter section.

It is unnecessary to decide whether the former section is repealed by the latter, as we agree with respondent that the facts alleged in the indictment constitute a crime under the latter section. The facts stated in the indictment are that the petitioner, being sheriff of said county, and knowing that certain persons (naming them) were guilty of the crime of exhibiting certain gambling devices (specifying them and the use for which designed), in said county and State, did unlawfully, knowingly and willfully fail, neglect and refuse to arrest said persons and take them before some magistrate or court having jurisdiction to examine into the matter, as provided by law, against the peace and dignity of the State of Arkansas.

It is contended by petitioner that it is not a crime, under § 2633 of Crawford & Moses' Digest, for a sheriff to fail to arrest a person who exhibits a gambling device, but that the only crime provided against a sheriff therein is a failure to arrest a person engaged in running a gambling house. The section reads as follows:

"If any sheriff, or deputy sheriff, knows or is informed that a gambling house is being operated, or that any person or persons are engaged in the exhibiting of a gambling device or devices, within his county, it shall be his duty to forthwith proceed to the place where such gambling house is located and arrest the person or persons engaged in running or operating said gambling house, and to carry such persons before some magistrate or court having jurisdiction to examine into the matter, and, upon such sheriff, or deputy sheriff, failing to comply with the provisions of this section, he shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than one hundred dollars, and shall be discharged from office."

If it had not been the intent of the Legislature to require a sheriff to arrest and take one before a magistrate or other court who was engaged in exhibiting a gambling device or devices anywhere in the county, then the following language, "or that any person or persons are engaged in the exhibiting of a gambling device or devices," used in the section, is meaningless. In construing statutes every word used therein should be given its ordinary meaning, if possible. This clause, containing a number of words, should not be stricken out of the section by construction, but should be left as a coherent part thereof, if possible. This can be done by attaching the meaning of "place" to the word "house" in the section. By attaching this meaning to the word "house" the section may be read as a harmonious whole, imposing the duty alike upon the sheriff to arrest and take one running a gambling house and one exhibiting a gambling device, anywhere in the county, before a magistrate or court for investigation. The obvious intent and purpose of the statute was to provide a remedy for immediately and effectually stopping the operation of gambling houses and the exhibition of gambling devices anywhere in the county. It is suggested that another section of Crawford & Moses' Digest covers the exhibition of gambling devices, and for that reason the Legislature

did not intend to impose the duty upon a sheriff to arrest parties exhibiting same; but this cannot be, for another section of the statute likewise covers the running of gambling houses.

2. The reason advanced by petitioner to support his position that the respondent is without authority to suspend him from office before a trial upon the presentment or indictment is that § 2633 of Crawford & Moses' Digest, creating new and distinct crimes, is exclusive, having no relation whatever to the crimes enumerated in § 10335 of Crawford & Moses' Digest, in which provision is made for the suspension of county officers during the pendency of indictments against them. Section 10335 of Crawford & Moses' Digest is as follows:

"Whenever any presentment or indictment shall be filed in any circuit court of this State against any county or township officer, for incompetency, corruption, gross immorality, criminal conduct amounting to a felony, malfeasance, misfeasance or nonfeasance in office, such circuit court shall immediately order that such officer be suspended from his office until such presentment or indictment shall be tried. Provided, such suspension shall not extend beyond the next term after the same shall be filed in such circuit court, unless the cause is continued on the application of the defendant."

This statute is founded upon a sound public policy, and has no relation whatever to punishment for the crimes mentioned therein. In the enactment of the section the Legislature concluded that it would be unwise to allow county officers who had been indicted for delinquencies to continue in the performance of their duties before purging themselves of the charges preferred against them. The petitioner, however, contends that the delinquencies, or other acts of omission and commission enumerated in § 10335 of Crawford & Moses' Digest, do not embrace the crimes created in § 2633 of Crawford & Moses' Digest. The former section mentions nonfeasance in office. According to "Words and Phrases," nonfeasance by an officer is an omission to

do or perform something which he ought to do and perform. The gravamen of the offense charged in the indictment under § 2633 of Crawford & Moses' Digest was an omission or failure on the part of petitioner to arrest certain persons exhibiting gambling devices in said county, which he was required to do by law.

The application for a writ of prohibition herein is therefore denied.

RAINWATER v. MERCHANTS' NATIONAL BANK.

Opinion delivered December 6, 1926.

1. BANKS AND BANKING—AUTHORITY OF BANK COMMISSIONER.—Under Acts 1921, No. 496, the Bank Commissioner, as receiver of an insolvent bank, is entitled to institute action on behalf of the bank's creditors against a depository bank which knowingly participated in a transfer of a deposit of the insolvent bank constituting a wrongful preference.
2. BANKS AND BANKING—UNLAWFUL PREFERENCE—NOTICE.—Where a director of an insolvent bank transferred a bank deposit belonging to the firm of which he was manager to the credit of the bank to raise its cash reserve as required by Crawford & Moses' Dig., § 692, under stipulation that the fund could be withdrawn only by his authority, *held* that the deposit was general and not special, and the director's subsequent application of the balance to payment of his firm's note to the depository bank was not of itself sufficient to put such bank on notice that such payment constituted an unlawful preference of the firm, within Acts 1921, No. 496.
3. BANKS AND BANKING—UNLAWFUL PREFERENCE—NOTICE.—Where it was customary for banks to transfer funds on telephone orders with same effect as if checks were drawn, the withdrawal of an insolvent bank's deposit on verbal orders of its directors did not put the depository bank on notice that such withdrawal was an unlawful preference, under Acts 1921, No. 496.
4. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—The findings of fact of the chancery court will not be disturbed on appeal unless against the preponderance of the testimony, and this rule applies to inference as well as to direct proof.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland*, Chancellor; affirmed.

Moore, Smith, Moore & Trieber, for appellant.

Daily & Woods, for appellee.

Norwood & Alley, for Dover Mercantile Company.

McCULLOCH, C. J. The Bank Commissioner, as receiver in charge of the defunct Bank of Hatfield, instituted this action against the Merchants' National Bank of Fort Smith, to recover the sum of $10,268.11, held on deposit by appellee bank to the credit of the Bank of Hatfield after the latter became insolvent, and alleged to have been wrongfully diverted from the use of the Bank of Hatfield and paid over to the T. M. Dover Mercantile Company as a preferred creditor of the Bank of Hatfield. The answer of appellee, Merchants' National Bank, contained appropriate denials of all the allegations as to knowledge of insolvency on the part of the Bank of Hatfield, and the cross-complaint against the T. M. Dover Mercantile Company prayed for a decree over and against that concern, in the event that the court should find that the Merchants' National Bank was liable to the Bank Commissioner as receiver for the Bank of Hatfield. The cause was heard by the court upon the pleadings and an agreed statement of facts, and a decree was rendered dismissing the complaint of appellant for want of equity.

The Bank of Hatfield was a banking institution doing business at the town of Hatfield, in Polk County, Arkansas, and M. J. Dover was a stockholder and director of the bank. He was also the managing officer of the Dover Mercantile Company, a concern doing business at the town of Hatfield.

During the latter part of January, 1923, the Bank Commissioner discovered, on examination, that the Bank of Hatfield had permitted its cash reserve to fall below the statutory requirement (Crawford & Moses' Digest, § 692) of fifteen per cent. of its deposits, and he made demand on the Bank of Hatfield to comply with the statute by raising its cash reserve. Pursuant to this order of the Bank Commissioner, M. J. Dover, acting for the Bank of Hatfield, applied to its regular correspondent in Fort Smith, the First National Bank of Fort Smith, for a loan

of money to be held as its cash reserve, but that institution refused to make the loan, and Dover then applied to appellee, Merchants' National Bank, for a loan of $20,000. At that time the Dover Mercantile Company had a large sum on deposit with the Bank of Hatfield, and was interested in seeing that the solvency of the bank and its capacity to do business were preserved. The Dover Mercantile Company also had on deposit with the Merchants' National Bank of Fort Smith the sum of $8,832.34. Appellee, Merchants' National Bank, agreed with Dover to make the loan, and, pursuant to that agreement, the deposit of $8,832.34 was charged to the mercantile company and credited to the Bank of Hatfield, and the loan of $20,000 was made to the mercantile company and also credited to the account of the Bank of Hatfield, thus making a deposit to the credit of the Bank of Hatfield in the total sum of $28,832.34. In this manner the cash reserve of the Bank of Hatfield was raised to conform to the statutory requirement.

M. J. Dover, acting for the mercantile company, executed to the appellee bank a note for $20,000 to cover the loan. At the time of these transactions it was agreed between appellee bank and M. J. Dover, acting for the Bank of Hatfield, that the money thus deposited to the credit of the Bank of Hatfield could be withdrawn only on checks signed or approved by M. J. Dover, and a deposit card was signed and delivered pursuant to that agreement. The funds were drawn against from time to time, in accordance with this agreement, from then until the time the bank closed its doors, and the amount on deposit fluctuated, at one time the amount being reduced to about $6,000. On October 17, 1923, the balance of the deposit on hand with appellee bank to the credit of the Bank of Hatfield was $10,268.11, the sum sued for in this action. Prior to that date, the mercantile company had paid its note to appellee bank down to $10,000 and had executed its renewal note for that amount to appellee bank, and the note had not become due on the date last mentioned above. On the morning of that day, October

17, 1923, at 8 o'clock, M. J. Dover called the cashier of the appellee bank over the telephone and gave verbal instructions that $10,000 of the sum remaining to the credit of the Bank of Hatfield be applied on the note of the mercantile company to the bank, that the note be canceled, and that the remaining sum of $268.11 be remitted to the mercantile company by check and charged to the Bank of Hatfield, thus entirely wiping out the deposit and balancing the account. On the day before this occurred, the Bank of Hatfield had drawn and forwarded various checks, payable to its regular customers, aggregating the sum of $5,000, the checks being drawn on the First National Bank of Fort Smith, and, on the same day, drew a check on appellee bank in favor of the First National Bank to cover those remittances to customers. And, in the telephone conversation between M. J. Dover and the cashier of appellee bank, instructions were given to refuse payment on the $5,000 check drawn in favor of the First National Bank of Fort Smith.

Immediately after these transactions occurred between Dover and appellee bank, Dover gave instructions to the Bank of Hatfield to charge the deposit in appellee bank to the mercantile company, and also on that day appellee bank forwarded a charge ticket to the Bank of Hatfield. The Bank Commissioner was immediately notified that morning of the insolvency of the bank, which was closed and ceased to do business, and the Bank Commissioner took physical charge of the affairs of the bank two days later, that is to say, on October 19, 1923.

It is agreed in the statement of facts that the Bank of Hatfield was insolvent on October 17, 1923, and had been insolvent for a considerable time theretofore; that "the Merchants' National Bank had no knowledge of the insolvency of the Bank of Hatfield on October 17, 1923, but the statement last made does not preclude plaintiff from arguing inferences of knowledge on the part of said Merchants' National Bank from facts appearing in this statement." There is also a paragraph in the agreed

statement of facts which reads as follows: "It is customary for banks to make transfers of funds on 'phone orders with the same effect as if checks were drawn." It was also agreed that appellee bank was never advised of the fact that Dover had applied to the First National Bank to borrow funds, or that the funds were borrowed for the purpose of raising the cash reserve on the demand of the Bank Commissioner. It also appears in the agreed statement of facts that examinations of the Bank of Hatfield were duly and regularly made by the Bank Commissioner between the date of the deposit with appellee bank and the failure of the Bank of Hatfield, and that the bank examiner had forwarded to appellee bank a reconcilement statement to be verified by appellee bank concerning the amount of funds deposited to the credit of the Bank of Hatfield.

The statutes of this State regulating the banking business (§ 7, act No. 496, session of 1921) prohibit unlawful preferences by banks in contemplation of the Bank Commissioner taking charge of the assets and property of the bank, and this suit is maintained by the Bank Commissioner on the theory that the transactions hereinbefore set forth, in disposing of the funds deposited with appellee bank, constituted an unlawful preference in favor of the Dover Mercantile Company, and that appellee bank is liable for the funds by reason of having knowingly participated in the wrongful act. The theory is correct, and, if the evidence in the case sustains a finding that appellee bank participated in the unlawful act, the Bank Commissioner is entitled to recover for the creditors of the defunct bank the amount of funds thus wrongfully diverted.

It is perfectly clear, from the facts recited in the agreement, that the transfer of funds on deposit with appellee bank was made by Dover for the express purpose of giving a preference to the mercantile company, of which he (Dover) was the managing officer. A different question of fact, however, is presented with reference to the attitude of appellee bank. It is true that

Dover committed a wrongful act for the benefit of the mercantile company, but he was clothed with express authority to withdraw the funds from appellee bank for the purpose of transferring the same to any of the creditors or customers of the Bank of Hatfield. It was expressly stipulated that the funds could only be withdrawn by the authority of Dover acting for the Bank of Hatfield. The funds thus deposited constituted a general deposit and not a special one, notwithstanding the fact that the method of withdrawal was restricted. Therefore Dover had the authority to withdraw the funds, and the fact that the transfer was in favor of the mercantile company, of which Dover was the managing officer, was not of itself sufficient to put appellee bank upon notice that the withdrawal was wrongful.

These facts do not present a case where the act done was, on its face, one for the benefit of the actor himself so as to charge the person being dealt with with knowledge of that fact. Nor did the fact that the withdrawal of funds was verbal instead of by check necessarily constitute such an irregularity as to put the bank on notice that the withdrawal was wrongful. According to an express recital in the agreed statement of facts, it was customary for transfers of funds to be made on telephone orders; therefore we are not at liberty to treat the fact that it was a telephone message as a suspicious circumstance to be given any considerable force in the case. There was also, as we have already shown, an express agreement in the record that appellee bank had no knowledge of the insolvency of the Bank of Hatfield at the time the funds were withdrawn. There is a reservation in the agreement that this did not "preclude plaintiff from arguing inferences of knowledge upon the part of said Merchants' National Bank from facts appearing in this statement," but we construe the whole of the stipulation on this subject to mean that there was no actual knowledge on the part of appellee bank as to the insolvency of the Bank of Hatfield, and that the question was to be left open as to inferences which might or might not be

drawn from the stipulated facts sufficient to put the bank upon inquiry. We therefore have before us an express stipulation that there was no actual knowledge of insolvency, and a finding by the trial court that the facts stipulated did not warrant inferences sufficient to put appellee bank on notice of such insolvency and wrongful diversion of funds. The well-settled rule here is that the findings of the chancery court will not be disturbed unless found to be against the preponderance of the testimony, and this applies to inferences as well as to direct proof.

There is, on the side of appellant, the fact that the funds were withdrawn early in the morning, before banking hours, and in a telephone conversation instead of by check, and that the funds were transferred to the mercantile company of which Dover was the manager. There might be drawn an inference of more or less force that the withdrawal was irregular and was for the benefit of the mercantile company, and not for the Bank of Hatfield. On the other hand, there is, on the side of appellee bank, as we have already seen, the agreement that the withdrawal of funds on verbal orders was in accordance with customary methods, and that appellee bank had no knowledge of the insolvency of the Bank of Hatfield. There is also the fact that the funds on deposit to the credit of the Bank of Hatfield were placed there by the mercantile company and that the latter was a creditor, to that extent at least, of the Bank of Hatfield. We are therefore unable to say, with any degree of certainty, that the trial court erred in declining to draw an inference of knowledge on the part of appellee bank that the withdrawal of the funds in favor of the mercantile company was for the purpose of consummating an unlawful preference to the mercantile company as a creditor of the Bank of Hatfield.

This being the state of the record, it becomes our duty to leave the finding undisturbed and to affirm the decree. It is so ordered.

WALDEN v. McCOLLUM.

Opinion delivered December 6, 1926.

1. INSURANCE—BY-LAW LIMITING BENEFICIARIES.—In a suit on a benefit certificate by the beneficiary, a by-law of the society which limited the beneficiaries to the family of members did not divest the wife's right as such on a subsequent divorce, as the by-law relates only to her eligibility at the time of issuing the policy.
2. INSURANCE—INTEREST OF BENEFICIARY.—Where a beneficiary has an insurable interest under the laws and regulations of the insurance company at the time of the issuance of the policy, the subsequent termination of that interest does not affect the right to receive the benefits, unless there is an express provision in the contract to that effect.
3. INSURANCE—INTEREST OF BENEFICIARY—BY-LAW OF SUCCESSOR TO INSURER.—In an action by a divorced wife as beneficiary of a policy, a by-law of a successor to the insurer providing that a divorce of the beneficiary from the insured should render the divorced wife ineligible to the benefits of the policy *held* not to affect her right to the insurance, in the absence of any showing that the successor had a right to change contracts assumed without the policyholder's consent.

Appeal from Clay Circuit Court, Western District; *W. W. Bandy,* Judge; affirmed.

C. T. Bloodworth, for appellant.

C. T. Carpenter, for appellee.

McCULLOCH, C. J. N. K. McCollum, a resident of Clay County, Arkansas, became a member and certificate holder on August 2, 1915, of an insurance organization known as the National Council of the Knights and Ladies of Security, a foreign corporation domiciled at Topeka, Kansas. The policy, or benefit certificate, issued by said organization to McCollum in the sum of $2,000 was payable to his then wife, Mary McCollum, who is the appellee in this case. McCollum and his wife, the appellee, were divorced in October, 1923, by decree of the chancery court in a suit instituted by her, and McCollum died April 28, 1924, without having changed the designation of beneficiary or attempted to do so. He was in good standing up to the time of his death, all of the premiums, assessments and dues having been paid in accordance with the

contract. Some time after the issuance of the policy to McCollum, the Security Benefit Association, another insurance concern domiciled at Topeka, Kansas, took over or absorbed the National Council of the Knights and Ladies of Security and assumed all of its obligations to policyholders. The time when this was done is not shown definitely in the record.

Appellee made proof of death to the Security Benefit Association, and the latter concern expressly admitted liability for the amount of the benefit, but refused to pay it to appellee on the ground that all benefits under the policy were claimed by appellants, who were children of McCollum by a former marriage. Appellee instituted this action against the Security Benefit Association to recover the amount of the policy, and appellants intervened and claimed the amount involved, on the ground that, under a by-law of the association, appellee's interest in the policy ceased upon a divorce from the assured, and that the benefit fell to appellants as the children and heirs. The Security Benefit Association paid the amount of the benefit into court, upon stipulation of all of the claimants that the funds should be held subject to final decision. This eliminated the Security Benefit Association from the controversy, and the cause proceeded upon the issues between appellants and appellee. There was a trial before a jury, which resulted in a verdict in favor of appellee, and judgment was accordingly rendered in her favor for the recovery of the sum involved.

Appellants base their claim upon certain by-laws of the two associations—one of the National Council of the Knights and Ladies of Security, and two others of the Security Benefit Association. The one relied on of the National Council of the Knights and Ladies of Security is § 1, art. 7, which reads as follows: "The beneficiaries shall be confined to the families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon the member." This provision, however, does not deprive appellee of the benefit on account of the

divorce, for it relates only to the eligibility of beneficiaries at the time of the issuance of the policy. The prevailing doctrine on that subject is stated in 19 R. C. L., p. 1219, as follows:

"Ordinarily a designation valid in its inception continues to be so. Thus, if the by-laws of a benefit society provided that a beneficiary designated by a member and named in the certificate shall, in every instance, be one or more members of the family, or some one related to him by blood, or shall be dependent upon him, such provision must be construed as referring to the relationship at the date of the certificate, and the designation of a beneficiary, valid in its inception, remains, although such relationship has ceased by divorce, or otherwise, unless it is stipulated to the contrary in the contract of membership."

The text is supported by the following authorities: *Filly* v. *Illinois Life Ins. Co.,* 91 Kan. 220, 137 P. 793, L. R. A. 1915D, 130; *White* v. *U. S. Brotherhood of American Yeomen,* 124 Iowa 293, 99 N. W. 1071, 66 L. R. A. 164; *Overheiser* v. *Mutual Life Ins. Co.,* 63 Ohio St. 77, 50 L. R. A. 553; *Snyder* v. *Supreme Ruler T. N. C.,* 122 Tenn. 248, 45 L. R. A. (N. S.) 209; *Wallace* v. *Mutual Benefit Life Ins. Co.,* 97 Minn. 27, 3 L. R. A. (N. S.) 478; *Schmidt* v. *Hauer,* 139 Iowa 531; 2 Joyce on Insurance, § 902. The doctrine has also been announced by this court that, where a beneficiary has an insurable interest under the laws and regulations of the insurance organization at the time of the issuance of the policy, the subsequent termination of that interest does not affect the right to receive the benefit, unless there is an express provision in the contract to that effect. *Atkins* v. *Cotter,* 145 Ark. 326. There was nothing of that kind in the contract with the organization which issued the certificate, therefore, under the doctrine announced, appellee was not cut out of her right to recover the amount of the benefit because of her divorce from her husband.

The two provisions in the by-laws of the Security Benefit Association relied on by appellants read as follows:

"Section 1. The payment of death benefits shall be confined to wife, husband, relative by blood, not further removed than first cousins, father-in-law, mother-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption or to a person or persons dependent upon the member; provided, that the member may, with the consent of the association, make an incorporated charitable institution his beneficiary. In case a husband or wife is designated as beneficiary and subsequent thereto becomes divorced from the member, such divorce shall render either of the parties ineligible as a beneficiary and shall annul the designation."

"Section 81a. Who may be beneficiaries. The beneficiaries shall be confined to those named in article 7 of § 1 of the constitution. In all cases the person intended as beneficiary shall be specifically named in the beneficiary certificate. No payment shall be made upon any beneficiary certificate to any person who does not bear the required relationship at the time of the member's death."

Under the facts shown in the record in this case, we do not think that the quoted provisions in the by-laws of the Security Benefit Association have any effect upon the contract of insurance now involved. It is undisputed that the organization known as the National Council of the Knights and Ladies of Security has been "absorbed and its obligations assumed by the Security Benefit Association." Such are among the undenied allegations of appellee's complaint, and there is an express stipulation in the record to that effect. According to the facts thus shown in the record, there was an unconditional assumption by the Security Benefit Association of all the obligations of the National Council of the Knights and Ladies of Security, and this included an agreement to comply with the contract represented by the policy or benefit certificate issued to McCollum and payable to appellee. The contract between the two associations is not shown in the record, further than the stipulation with regard to the assumption of obligations, but there is

nothing which would, either in express terms or by necessary implication, confer upon the Security Benefit Association the right to change any of the original contracts which had been assumed, and this could not be done without the consent of the policyholder. *American Insurance Union* v. *Robinson,* 170 Ark. 767, 281 S. W. 393. Therefore appellee, upon the undisputed facts in the record, is entitled to collect the amount of the benefit.

There are numerous assignments of error with respect to the rulings of the court in admitting and excluding testimony and also with reference to the court's charge to the jury, but, as the material facts of the case are undisputed, it is unnecessary to discuss the other questions presented.

Judgment affirmed.

McWILLIAMS v. LANTZ.

Opinion delivered December 6, 1926.

1. EQUITY—INTERLOCUTORY ORDER.—An order sustaining a demurrer to an intervention, without anything further, is not final, but interlocutory, and may be set aside at a subsequent term.
2. EQUITY—JURISDICTION AT ADJOURNED TERM.—Where a demurrer was sustained to a plea in intervention, the court had jurisdiction subsequently at an adjourned day of the same term to proceed to a final decree dismissing the intervention.

Appeal from Ouachita Chancery Court; *George M. LeCroy,* Chancellor; affirmed.

Hardy & Machen, for appellant.

Streett & Streett, for appellee.

McCULLOCH, C. J. This action was originally instituted by E. L. Miller in the chancery court of Ouachita County against George Babare and Nick Babare to adjust the accounts between those parties in the operation of a joint ownership or copartnership in an oil well and lease. Numerous creditors of the copartnership were named as defendants, and in the prayer of the com-

plaint there was an application for the appointment of a receiver. The court appointed a receiver to take charge of the property, and directed notice to creditors to be published, so that the claims of all could be presented. There was a final decree for the sale of the property for the purpose of distributing the proceeds among the creditors and the several owners. During the pendency of the action, Miller sold and conveyed his interest to a concern known as the Crandall Producing Company, and that concern sold and transferred the interest to appellee Lantz. The property was sold by a commissioner, and the sale was confirmed. Before the final distribution of the proceeds, appellant McWilliams intervened and asserted a claim against Miller in the sum of $2,000, evidenced by a promissory note containing a recital that the note "acts as a lien on my interest in section 34, township 15 south, range 15 west, Ouachita County, Arkansas, being more particularly described as southwest quarter of southeast quarter, containing 40 acres, of the above section mentioned." The claim of appellant was against the interest of Miller in the proceeds of the sale, which had been transferred by the latter to Crandall Producing Company and by that concern to Lantz.

Appellant's claim was filed on January 26, 1925, and, on February 17, 1925, appellee Lantz filed a demurrer to the intervention, which was sustained by the court on that day. The order of the court did not, however, dismiss the complaint of appellant but merely sustained the demurrer, and allowed time to appellant to plead further. On March 25, 1925, appellee filed an additional motion to strike out the intervention of appellant, setting up grounds for holding that appellee's purchase of the Miller interest was superior to any claim by appellant. The court made an order vacating the original order of the court sustaining the demurrer on February 17, 1925, and proceeded to final decree in favor of appellee, dismissing appellant's intervention for want of equity. An appeal has been duly prosecuted, and appellant bases his grounds for reversal solely upon the contention that the order sus-

taining the demurrer on February 17 was final, that the court adjourned before the order was made on March 25 vacating the former order, and that the court was therefore without jurisdiction of the cause. There are two all-sufficient answers to this contention. In the first place, the order sustaining the demurrer, without anything further, was not final, but was interlocutory, and could have been set aside at a subsequent term. *Benton County* v. *Rutherford,* 30 Ark. 665; *Radford* v. *Samstag,* 113 Ark. 185, 167 S. W. 49; *Davis* v. *St. Louis-San Francisco Ry. Co.,* 117 Ark. 393, 174 S. W. 1196. In the next place, the record does not bear out the contention that the court had adjourned for the term between the date of the order sustaining the demurrer on February 17 and the date of the final decree, March 25, 1925. On the contrary, the records show that the court did not finally adjourn, as the time for the date for new term of court had not arrived. These proceedings were in the second division of the chancery court of Ouachita County, which convenes on the third Mondays of February and May, and the order of March 25, 1925, was rendered on an adjourned day of the February term.

Appellant has not attempted to bring up the evidence upon which the court based its decree, but contents himself with the claim that the court was without jurisdiction to render the decree for the reason that the case had been finally disposed of at a prior term of the court. This contention being unfounded, the decree must be affirmed, and it is so ordered.

DRACE *v.* SUBSIDIARY DRAINAGE DISTRICT NO. 13.

Opinion delivered December 6, 1926.

1. DRAINS—VALIDITY OF DISTRICT—BURDEN OF PROOF.—Under Acts 1909, No. 235, § 3, providing that, in a suit to enforce delinquent taxes due to the drainage district, it shall be sufficient to allege generally the incorporation of the district, the nonpayment of the taxes, the description of the lands proceeded against, and the amount chargeable to each tract, with prayer for foreclosure,

held that one who attacks the validity of the district in an action for delinquent assessments where the complaint alleged the above facts, has the burden of proof.

2. DRAINS—PUBLICATION OF NOTICE OF ORGANIZATION.—Evidence *held* to show publication of notice of organization of subsidiary drainage district required by Special Acts 1911, No. 196, § 9.

3. DRAINS—SPREADING ORDER CREATING DISTRICT ON RECORD.—The organization of a subsidiary drainage district was not invalid for failure to spread the order creating the district on the record of the county court at the time it was made as required by Special Acts 1911, No. 196, § 9, where the omission was cured later by spreading it on the record, and a new opportunity was given to landowners to appear and protest against same.

4. DRAINS—APPROVAL OF ASSESSMENT OF BENEFITS.—Under Acts 1909, No. 235, and Acts 1911, No. 196, there is no requirement that the assessment of benefits in a subsidiary drainage district be approved by the county court.

Appeal from Clay Chancery Court, Eastern District; *J. M. Futrell,* Chancellor; affirmed.

Arthur Sneed, for appellant.

W. E. Spence, for appellee.

McCULLOCH, C. J. Appellants are the owners of real property within the boundaries of a subsidiary drainage district in Clay County, and this is an action instituted against them in the chancery court by the directors of the district to enforce payment of delinquent assessments. Appellants, in defending the case, attacked the validity of the organization of the district and also the validity of the assessment of benefits.

The district is a subsidiary of the St. Francis Drainage District of Clay and Greene counties, which was created by special act No. 172 of the General Assembly of 1905. The statute was amended by act No. 235 of the session of 1909, and also by act No. 196 of the session of 1911. Section 9 of the act of 1911, *supra,* authorized the creation of subsidiary districts by order of the board of directors of the principal district, on petition of three or more owners of real property in a proposed subsidiary district. The statute provides, in substance, that, upon the presentation to the board of directors of a peti-

tion of three or more owners of real property in the territory sought to be organized into a subsidiary district, accompanied by a bond to pay for the expenses of a survey, the board should enter an order appointing an engineer, who should forthwith make a survey and report to the board; that the board should give notice by publication for two weeks in a newspaper, calling upon all owners of property to appear at the time and place named and show cause "in favor of or against the establishment of said subsidiary district." The statute further provided that the board should meet on the day named and hear the property owners, and that, "if the board deems it to the best interest of the owners of real property within said district that the same shall become a subsidiary drainage district, it shall make an order upon its records establishing the same as a drainage district, subject to all the terms and provisions of this act, and fixing its boundaries, and shall file a certified copy of said order in the office of the county clerk, where it shall be spread on the records of the county court for the information of the public." The statute further provides for the assessment of benefits by the same method as provided for such assessments of lands in the principal district.

Several of the points of attack in the court below on the validity of the organization of the district have been abandoned, and the first point of attack made here is that there was no publication of notice as required by statute. However, the facts shown in the record are against this contention. The case was tried below on the pleadings and upon the minutes of the board of directors of the St. Francis Drainage District of Clay and Greene counties, and upon an agreed statement of facts. The statute fixing the method of foreclosure (§ 3, act 235, session of 1909) casts upon the defendant the burden of sustaining an attack upon the validity of the district, for there is a provision that "in such suits it shall be sufficient to allege generally the incorporation of the district, the nonpayment of the taxes, the description of the lands proceeded against, and the amount chargeable to each tract, with

prayer for foreclosure." There is, however, evidence afforded by the minutes of the meetings of the board of directors that the notice was given. It appears from the minutes that the petition for the subsidiary district was filed with the commission on July 2, 1918, and that the engineer was appointed on the same day. There was a meeting of the directors on August 6, 1918, at which the report of the engineer was presented. The next meeting was on September 3, 1918, and the minutes contain a published notice of the same date of the prior meeting, August 6, 1918. There was no effort on the part of appellants to show that the recital of the minutes was incorrect and that notice had not in fact been given. This point therefore is not well taken.

The next point made is that the organization is void because the order of the board creating the subsidiary district was not spread upon the records of the county court "for the information of the public," as required in § 9 of the act of 1911, *supra*. It is true that the directors failed to file with the county clerk a copy of the order at the time it was made, and in fact it was not filed until October 4, 1921. In the meantime, the district had been proceeding with its work—the assessment of benefits and the letting of contracts for the construction of the improvement. But the filing of the order on that date and spreading the same upon the records of the county court completed the organization, and everything essential to progress in carrying out the work was thereafter done in accordance with the terms of the statute. It is true that, prior to that time, the board of assessors had completed and filed with the board of directors the assessment lists and the same had been duly equalized, but, after the organization was completed in the manner above stated, a new notice was given of the filing of the assessment lists and a new opportunity was given property owners to appear and protest against the same. It would seem therefore that every act requisite to the legal formation of the district was complied with.

It is also contended that the taxes are not enforceable because the list of assessment of benefits as made by the board of assessors was never approved by the county court. Counsel rely upon § 7 of the act of 1911, *supra,* which reads as follows:

"That in no case shall the board of directors of the St. Francis Drainage District construct or make any improvement contemplated by the provisions of said act unless the benefits estimated by the assessors and approved by the county court shall equal or exceed the primary cost of the making of such improvements; but the cost of making the improvements shall not be held to include the interest accruing on any interest-bearing evidence of debt issued for the purpose of making and maintaining the improvements."

This is the only reference found anywhere in the statute to an approval by the county court, and it will be observed that this section does not relate to the method of completing the assessments, but it operates merely as a restriction upon the cost of the improvement. The method of assessment is regulated by § 2 of act No. 235 of the session of 1909, which provides for the approval of the assessments by the board of assessors, after notice to property owners, and not by the county court, except upon appeal within the specified time. That part of the aforesaid statute which is pertinent to this question reads as follows:

"They shall compare and equalize their assessments and correct their books to conform to said equalization; and their assessments as thus equalized and corrected shall be the assessment of the district, and all levies shall be made accordingly, without further right to question or set aside any assessment so made, until another assessment shall be ordered by the board and made by the assessors in the same manner as hereinabove set out; provided, when the assessors shall meet as provided in this section, any landowner may appear before them and make complaint as to his assessment, or that of any other person, and the said assessors shall have the power to

raise or lower the same. If any owner is aggrieved at said assessment so fixed, he shall have the right to appeal to the county court within twenty days, and not thereafter. No appeal shall in any way interfere with said assessment or collection of drainage and levee taxes, but, if it shall finally be determined that said land was assessed too high, the excess in taxes shall be repaid to said owner; provided, that no subsequent assessment shall be made which will reduce the aggregate assessment of the district, or in any other way impair the security of the creditors of the district."

It will be observed from the foregoing that there is no requirement for approval by the county court except upon appeal, and that the assessments are complete upon approval by the board, unless there is an appeal to the county court. The words, "approved by the county court," in § 7 of the act of 1911, *supra,* were merely used in recognition of the power of the county court to revise the assessments on appeal, and do not constitute a requirement that the assessments shall in all events be approved by the county court. The language of that section was intended merely as a reference to completed assessments, either by final action of the board or by the county court on appeal, and was intended merely to restrict the cost of the improvement to the total amount of the completed assessment.

Our conclusion is that the attacks upon the validity of the assessments, as well as those upon the organization of the district, are unfounded.

Decree affirmed.

KNIGHT v. AMERICAN INSURANCE UNION.

Opinion delivered December 6, 1926.

1. INSURANCE—BENEFIT SOCIETY—LIMIT OF LIABILITY.—Where, in assuming to pay the benefits provided for members of a mutual aid society, the defendant society expressly limited its liability to the net amount to be realized from one assessment of the members of the roll of which he was a member after deducting his proportionate share of the expense of collecting it, and the assured assented thereto, such limitation was binding on his beneficiary.
2. EVIDENCE—COPY OF WRITING.—Testimony of one in charge of the records of a mutual aid society *held* competent to prove its by-laws and the merger contract under which it consolidated with defendant, where he testified that the copy of the by-laws was true and correct and that the copy of the merger contract was examined and compared with the original.
3. EVIDENCE—DELIVERY OF MAIL MATTER.—In the absence of proof to the contrary, it will be presumed that matter properly mailed was received by the addressee.
4. INSURANCE—ACCEPTANCE OF CONTRACT.—Evidence *held* to support a finding that the insured, a member of a mutual benefit society, received a copy of the contract whereby the insurer was consolidated with another insurance society, and that he accepted and became bound by its provisions.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

Chew & Ford, for appellant.

Evans & Evans, for appellee.

WOOD, J. The Home Protective Association of Springdale, Arkansas, hereafter called Association, is a mutual aid society organized and doing an insurance business in this State for the protection of its members on the assessment plan. On the 24th of March, 1919, the association issued its "cooperative graduating certificate" insuring the life of Horace Knight of Van Buren, Arkansas, in favor of Joe Knight. By the terms of the certificate, the association, in consideration of the application of Horace Knight, undertakes to pay Joe Knight, the beneficiary in the certificate, on proof of the death of the assured, the sum of $100 should the death of the assured occur within the first six months, and thereafter

to be increased at the rate of $12.50 per month during 72 months, until it reaches the maximum of $1,000. The payment of the amount stated in the certificate was conditioned only upon the prompt payment of the assessments under the rules set forth in the application for the certificate and by-laws of the association. The application, among other things, provides: "The assessments shall begin at 43 cents, and graduate one cent per month for the first eighty-four months of the life of the certificate, when it reaches $1.27, which is named as the maximum amount which can be assessed against this applicant on any one death loss or accident benefit; provided, if the proceeds of said assessment, together with funds on hand, are not sufficient to provide for the maximum death benefit, a sufficient pro rata assessment shall be levied on all members to provide sufficient funds for such maximum death benefit. * * * It is understood and agreed that the applicant shall become a member of a roll not exceeding one thousand (1,000) members, and certificate shall be issued accordingly, each roll to be given a distinct number by which it shall be known and designated; and assessments for the redemption of certificates shall be made numerically on said rolls as deaths occur, to the end that each roll of certificate holders shall share equally the burden. The value and condition of the certificate for membership to be issued on this application shall be as follows: Should the death of the applicant occur within the first six months from the date of the application, the beneficiary shall receive the minimum certificate value of $100. Value of certificate to increase thence $12.50 per calendar month up to and including the seventy-two months of the life of the certificate, when it reaches its maximum value of $1,000. * * * It is hereby understood that this certificate is a part of the contract and a warranty by the member," etc.

This action was instituted in July, 1925, by Joe Knight, the beneficiary in the certificate, against the American Insurance Union, hereafter called union, on the certificate as above set forth, to recover the sum of

$800 which Knight alleged had accrued and was due under the certificate. He alleged that all the provisions of the contract had been complied with on the part of the assured at the time of his death, that the union had assumed all the debts of the association, that all the provisions of the certificate had been complied with by the plaintiff since the death of the assured, and he prayed for judgment against the union in the sum of $800, together with 12 per cent. interest and reasonable attorney's fees. The union answered, and set up that, according to the by-laws of the association in force at the time the certificate was issued, the association was only bound to pay to the beneficiary, on the death of the assured, the proceeds of one assessment on the members of the roll to which the assured belonged, less the actual cost of making and collecting such assessment and paying out the proceeds thereof. It alleged that the association was consolidated with the union on November 1, 1918, under a contract which, among other things, provides as follows: "The American Insurance Union shall not be legally obligated to pay the claims arising among the membership hereby consolidated in any amount in excess of the amount due the member or his beneficiary or beneficiaries under the by-laws of the Home Protective Association and the by-laws of the board of directors thereof." And further: "The American Insurance Union will pay the benefits provided for members of the association hereby consolidated as provided for under the by-laws of the Home Protective Association and the by-laws of the board of directors thereof, but in no case shall the association be liable in excess of the amount provided therein, it being expressly agreed and understood that the American Insurance Union shall not be liable to the holder of the attached certificate in excess of the net amount realized from one assessment to the members of the roll of which he was a member in the Home Protective Association, after deducting his proportionate share of the expense of operation." The union further alleged that, after the consolidation, it sent a copy of the merger contract to

Horace Knight, to be attached to and become a part of the contract of insurance. It alleged that, in compliance with the by-laws of the association, the union levied an assessment on the members of the roll to which Horace Knight belonged for the month of May, 1924, the month in which he died, and that such assessment produced the sum of $79.82, from which, after deducting the sum of $13.30 to cover the expense of levying, collecting and paying out said assessment, there remained the sum of $66.52, which amount the union tendered to the plaintiff, and paid the sum into court, and prayed that it have judgment for its costs. When the cause was called for trial, and before the testimony was adduced, the union paid into the court the sum of $66.52, together with costs of the action to that time. The plaintiff then introduced in evidence the certificate containing the provisions as above set forth. Thereupon the defendant union admitted that the assessments had all been paid and that the certificate was in full force and effect at the date of the death of the assured, and that the plaintiff had complied with the terms of the contract of insurance as to proof of death of the assured. The defendant read in evidence the deposition of Dr. George Hoglan, over the objection of the appellant that this testimony was irrelevant and incompetent. This witness testified, among other things, that the union and the association entered into a contract on November 1, 1918, the original of which was on file at the home office of the union. He attached to his deposition, as Exhibit No. 2, "a duly examined and compared copy of the merger contract," which was submitted to the insurance departments of the States of Arkansas and of Ohio and approved by them before it became effective. The union sent a copy of this contract with a memorandum to each member of the association, with a receipt attached to the rider, for acknowledgment by the member. His Exhibit No. 3 was a copy of that instrument. The union sent one to Horace Knight. He became a member of the union. The witness then stated that he was familiar with the by-laws of the association.

The original records of these by-laws were kept in the files of the home office of the union. He attached to his deposition, as Exhibit No. 4, "a duly examined and compared copy" of the by-laws of the association that were in force at the time of the consolidation of the association and the union. The union tendered to Joe Knight the sum of $66.52 as the amount due on the certificate, which he refused to receive. One assessment was levied on the entire membership of the roll to which Horace Knight belonged. The records show that this assessment produced $79.82. The full amount was not tendered because § 113 of the by-laws of the union and the merger contract provided that one-sixth of the amount collected should be deducted, leaving the amount of $66.52, which was tendered. The witness testified that he had personal knowledge of the records of the union, and that the records referred to were the original records. He kept the original minutes of the constitution of the union when the same was adopted. They were signed by the witness, and were permanent records of the union. The witness was not present when the constitution and by-laws of the association were adopted, but he was present when copies were made from the original constitution and by-laws when same were turned over by the association to the union in 1918, and witness knew that these were true and correct copies. The assessment levied for the month of May, 1924, the month in which the assured died, were levied on seventy-four members, and the assessments were paid during the month June, 1924. According to § 113 of the constitution and by-laws of the union and the merger contract, one-sixth is deducted for expenses. Exhibit 1 to witness' deposition was § 113 of the constitution and by-laws of the union, which provided, among other things, that the expense and extension fund of the society shall receive one-sixth of all premiums collected for the expenses of levying, collecting and paying out the same. The documentary evidence referred to in the answer and by this witness was all introduced and read to the jury.

In addition to the testimony of this witness there was further testimony to the effect that Horace Knight was entered on the records of the union as a certificate holder, that his death occurred on May 28, 1924, and that, on that day, an assessment was levied on the entire membership roll to which he belonged, which resulted in a collection of $79.82, and that, according to the constitution and by-laws of the union and the merger contract, one-sixth was deducted for expenses. This levy was made under the supervision of the witness, whose duty it was to make the levies and collections.

In addition to the above, the merger contract also contained the following provision: "It is hereby understood and agreed that the members hereby consolidated shall be subject to the constitution and laws of the American Insurance Union now in force or that may hereafter be in force, except as herein otherwise provided."

The plaintiff asked the court to direct the jury to return a verdict in his favor, in the sum of $800, which the court refused to do. The court, instead, instructed the jury that, upon the only issue here, according to the undisputed proof and contract in the case, they should return a verdict in favor of the plaintiff in the sum of $79.82, less the actual expense of collecting the same. The plaintiff excepted to the above ruling of the court. The jury returned a verdict in favor of the plaintiff in the sum of $77.52. Judgment was entered for that sum, from which the plaintiff duly prosecutes this appeal.

1. The appellant has no right to recover the sum of $800, which he claimed was due under the certificate issued by the association, unless the contract by which the association was consolidated with the union gives him such right. The appellant alleged that the appellee, for a valuable consideration, assumed all the debts and liabilities of the association. The appellant thus bottoms his right to recover of the appellee upon the contract by which the appellee union and the association were consolidated.

It will be observed, from the provisions of the merger contract set out above, that the appellee is not obligated to pay the claims of the members of the protective association in any amount in excess of the amount due the member of such association under the by-laws; that it is not liable in excess of the net amount realized from one assessment of the members of the roll of which he was a member in the association and after deducting his proportionate share of the expense of operation. The by-laws of the association provide "in no event shall any beneficiary receive more than the face value of such certificate, nor more than the proceeds of one assessment, less the actual cost of making and collecting such assessment and payment of the proceeds thereof." The amount to be paid the beneficiary, less the cost of making; collecting, and paying the proceeds, is that produced by one assessment on the entire membership of the roll to which the deceased member belonged. Learned counsel for the appellee contend that there is no competent testimony in the record to establish the above provisions of the contract of merger and that there is likewise no competent testimony to prove the above provisions of the by-laws of the association. They rely upon the general rule of practice in the production of evidence, as announced by this court through Judge LACEY, in *Brown* v. *Hicks,* 1 Ark. 232, at page 243, as follows:

"It is a universal rule of practice that a party will never be permitted to resort to secondary or inferior evidence while it is in his power to adduce a higher grade, or more conclusive testimony. The best attainable evidence shall be adduced to prove every disputed fact. This rule of evidence is founded upon a supposition of fraud, and its operation is every way highly salutary and important."

And counsel for appellant cite other Arkansas cases, to-wit: *McNeill* v. *Arnold,* 17 Ark. 154; *Supreme Lodge K. of P.* v. *Robbins,* 70 Ark. 364, 67 S. W. 758; *Rural Home Lodge No. 1720* v. *Sea,* 143 Ark. 167, 220 S. W. 305; and 10 R. C. L. "Evidence," § 66 *et seq.; Mandel* v. *Swan*

Land & Cattle Co., 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313. But we have examined these authorities, and there is nothing in any of them to contravene the well established rule that, whenever a copy of a record or document is itself made original or primary evidence, it must be a copy made directly from or compared with the original. For instance, Judge LACEY, in the case cited above, from which the excerpt is quoted, says: "It does not appear that the subscribing witness ever compared or examined the supposed copy with the original, nor did he pretend to say that he knew it to be an exact or sworn copy. All he states is that he believes the contents of the two instruments are substantially the same, but he has not seen the original for many years."

In *Supreme Lodge K. of P.* v. *Robbins, supra,* Judge RIDDICK, speaking for the court, recognized the rule as to certain books, papers and documentary evidence, when he says: "It appears from the evidence, we think, that these laws of the order were matters of record on the books of the order. It follows that they could not be proved by parol. As it would have been inconvenient to produce the original books, they should have been proved by an examined or authenticated copy. It was therefore not proper to have witness state his opinion of what the law was. He should have produced a copy of the law or record. * * * The witness should have stated that he had compared it with a record of these laws, and that it was a true copy of the same." See also *Miller* v. *Johnson,* 71 Ark. 174, 72 S. W. 371.

In *Rural Home Lodge No. 1720* v. *Sea, supra,* we merely held that the authority to try a member of a benefit society and to suspend him should have been shown by producing the rule, regulation or by-law conferring such authority. So that case is not in point.

And in *McNeill* v. *Arnold, supra,* we held that the statute law of another State can be proved only by the production of the statute, and not by parol. So likewise that case is not in point.

Now, an examination of the testimony of Dr. Hoglan discloses that, according to the rule recognized in *Brown* v. *Hicks, supra,* and in *Supreme Lodge K. of P.* v. *Robbins, supra,* the by-laws of the association and merger contract were proved by competent testimony. Dr. Hoglan's testimony shows that he had charge of these records and documents. Concerning the merger contract, among other things, he said: "I am familiar with such contract and with the terms thereof. The original contract is on file at the home office of the American Insurance Union. I am attaching, as Exhibit No. 2, a duly examined and compared copy of the merger contract," etc. Concerning the proof of the by-laws of the association he said: "I was present when the copies were made from the original constitution and laws which were turned over by the Home Protective Association in 1918, and I know the copy to be a true and correct copy." Therefore we conclude that the by-laws of the association and the consolidation contract were proved by competent testimony. Under the terms of the merger agreement and the by-laws of the association, as above set forth, the appellant was only entitled to recover the net amount realized from one assessment of the members of the roll to which the deceased member belonged, after deducting his proportionate share of the expense of making, collecting, and distributing the assessment. Such is the holding of this court in the cases of mutual benefit insurance societies having by-laws containing similar provisions to that under review here. *Home Mutual Benefit Association* v. *Roland,* 155 Ark. 450, 244 S. W. 719; *Home Mutual Benefit Assn.* v. *Rowand,* 157 Ark. 597, 249 S. W. 3; *Fayetteville Mutual Benefit Assn.* v. *Tate,* 164 Ark. 317, 261 S. W. 634.

2. As we have seen, the by-laws of the association provide that each beneficiary shall receive the proceeds of one assessment of the entire membership of the roll to which the deceased member belonged, and no more than one assessment, less the cost of making and collecting such assessment and paying out the proceeds thereof. The undisputed testimony in the record shows that the

assessment made under the provisions of this by-law yielded $79.82. The court instructed the jury to return a verdict for such amount, less the actual expense of the collection, and the jury returned a verdict in the sum of $77.52. There is no contention by the appellant that the verdict, under the instructions of the court, was excessive, and appellant's only contention is that the court erred in directing the verdict, and that the verdict was not supported by legal testimony. It follows from what we have said that the instruction of the court was correct, and the verdict of the jury was responsive to the undisputed testimony.

3. The case of *American Insurance Union* v. *Robinson,* 170 Ark. 767, 281 S. W. 393, is not in conflict with our decision herein holding that the appellee is not liable for the full amount claimed by the appellant. In that case the plaintiff's action was predicated upon a certificate of insurance precisely similar to the foundation of the action in the case at bar, and the American Insurance Union, the defendant in that case, defended on the same grounds as it interposes here, to-wit, that the contract of consolidation limited the amount of its liability to such amount as should be collected from the membership roll to which the deceased member belonged, less one-sixth of the amount collected as expenses for collecting the same. We held, under the facts adduced in that case, that the defendant, the appellant, was liable for the full amount of the face value of the certificate. But the facts of that case were entirely different from the facts in the case at bar. For instance, the notification of the merger contract to be attached as a rider to the certificate or contract of insurance, as is said in the opinion, "did not attempt to change her membership or the terms of the original contract. It contained no provision requiring her to accept the rules and by-laws of the Home Protective Association of Springdale, nor did it contain a notification that her certificate would be controlled or governed by it. * * * It is true that appellant introduced testimony tending to show that it mailed a rider to Mrs. Robinson to be

attached to her certificate of insurance, embodying the substance of its contract with the Home Protective Association of Springdale limiting its liability in the payment of death losses, but appellee introduced testimony to the effect that Mrs. Robinson never received or heard of such rider. This question of disputed fact was determined against the appellant in the trial, and it is bound by the finding."

The undisputed facts here are entirely different. The undisputed evidence shows that the assured was notified of the terms of the merger contract, to be attached as a rider to his certificate of insurance. The undisputed testimony is that the American Insurance Union, at the time of the merger, sent a copy of the contract with a memorandum to each and every member of the Home Protective Association, with a receipt attached to the rider for acknowledgment by the member. The American Insurance Union sent one of these to Horace Knight by mail. There is no testimony in the record to the effect that Knight did not receive the above rider. The presumption would be, since the same was properly mailed to him, in the absence of proof to the contrary, that he did receive the same. But, aside from this presumption, the conclusion is irresistible that the assured member did receive the rider, for he continued, after the merger contract until his death, to pay the assessments to the appellee. The undisputed testimony therefore justified the trial court in finding that Horace Knight, the assured member, received a copy of the consolidation contract and accepted its provisions. The appellant predicated his cause of action upon such contract, and, having accepted the same, he is bound by its terms.

The record presents no error, and the judgment of the trial court is therefore affirmed.

DAVIS v. FALLS.

Opinion delivered December 6, 1926.

1. EVIDENCE—LETTERS AS AGAINST INTEREST.—In an action on rent notes, letters of the tenant's husband in which he admitted her liability on the notes, are admissible as declarations against interest, and to show that she recognized her liability after she knew of alleged fraudulent representations in procuring the lease.
2. EVIDENCE—AUTHENTICATION OF LETTERS.—Letters may be authenticated by a witness familiar with the signature of the writer.
3. EVIDENCE—SELF-SERVING DECLARATION.—In an action on rent notes, where the defense was that the landlord had fraudulently represented that the land was free of Johnson grass, evidence that, after the lease was executed, the tenant's husband told a third person that the landlord's agent had said that there was no Johnson grass on the land was properly excluded as a self-serving declaration.
4. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The verdict of a jury is conclusive on appeal where there is any testimony of a substantial character to support it.

Appeal from Mississippi Circuit Court, Osceola District; *G. E. Keck,* Judge; affirmed.

STATEMENT BY THE COURT.

Mary C. Falls sued Elizabeth T. Davis to recover the balance alleged to be due her on two promissory notes given for the rent of her plantation in Mississippi County, Arkansas. The suit was defended on the ground that the lease contract had been secured through fraudulent representations. Eugene Davis, husband of E. T. Davis, acted as her agent throughout the transaction. According to his testimony, he rented for his wife the farm of Mary C. Falls, in Mississippi County, Arkansas, for the years 1921-23, for a rental of $1,200 the first year, $1,500 the second year, and $2,000 the third year. The lease contract was signed through the fraudulent representation of the agent of the plaintiff that the land was free of Johnson grass. It subsequently was ascertained by the defendant that the land was full of Johnson grass, and this rendered it unfit for cultivation. The defendant paid

the first year's rent, and subsequently ascertained that the land was unfit to cultivate because of the Johnson grass on it, and refused to pay the rent for the last two years, and sought to rescind the lease contract.

A. B. Falls, a son of Mary C. Falls, was the principal witness for her. According to his testimony, Eugene Davis was upon the land before he leased it for his wife, and examined it. He knew that Johnson grass was on the land, and that feature of it was discussed between the parties before the lease was executed. Davis said that he was going to raise onions on the place, and that he would cultivate it so as to get rid of the Johnson grass.

The jury returned a verdict for the plaintiff, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

Bruce Ivy and *S. R. Simpson,* for appellant.

J. T. Coston, for appellee.

HART, J., (after stating the facts). The first assignment of error urged for reversal of the judgment is that the court erred in admitting certain letters, purporting to have been written by Eugene Davis, to be read to the jury. These letters were written in the fall of 1923, and the lease contract was executed in the fall of 1921. In both of the letters Davis recognized that his wife was liable on the rent notes. The letters were admissible as a declaration against the interest of Mrs. Davis. *Jefferson* v. *Souter,* 150 Ark. 55, 233 S. W. 804. They were also admissible as tending to show that Mrs. Davis recognized her liability under the contract after she had been informed of the alleged fraudulent misrepresentation in procuring it. It will be remembered that the contract was executed in the fall of 1921, and these letters were written in the fall of 1923, long after the alleged fraudulent misrepresentation had been made and long after the agent of Mrs. Davis claims that he had knowledge of it. *Hightower* v. *Sholes,* 128 Ark. 88, 193 S. W. 257.

The letters were authenticated by proving the genuineness of the signature of the writer, and this was suf-

ficient to warrant their reception in evidence. *Barham* v. *Bank of Delight,* 94 Ark. 158, 126 S. W. 394. Joe Young testified that he was familiar with the signature of Eugene Davis, and that the signature to the letters introduced in evidence was the genuine signature of Eugene Davis. Therefore the letters were sufficiently identified to warrant their admission in evidence. *Taylor* v. *State,* 113 Ark. 520, 169 S. W. 341.

The next assignment of error is that the court erred in refusing to allow the defendant to prove by Joe Young that Davis had told him, over the telephone, after the contract had been executed, that Falls had said there was no Johnson grass on the land. The court was correct in refusing to allow this evidence to go to the jury. It was nothing more than a self-serving declaration, and was therefore inadmissible. *Brotherhood of Railroad Trainmen* v. *Fountaine,* 155 Ark. 578, 245 S. W. 17; *Black* v. *Hogsett,* 145 Ark. 178, 224 S. W. 439; and *Arkmo Lumber Co.* v. *Cantrell,* 159 Ark. 445, 252 S. W. 901.

The next assignment of error is that the evidence is not legally sufficient to warrant the verdict. The respective theories with regard to the fraudulent representation, that the agent of Mrs. Fall represented that the land was not infested with Johnson grass, and thereby secured the execution of the lease contract, and the theory of the plaintiff, that no such representation was made, were fully and fairly presented to the jury in accordance with the principles of law decided in *Neely* v. *Rembert,* 71 Ark. 91, 71 S. W. 259. The testimony of the parties on this phase of the case was in direct conflict, and, under our familiar rule of practice, upon appeal we must accept the verdict of the jury where there is any testimony of a substantial character to support it. *St. L. Sw. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768. The jury was the judge of the credibility of the witnesses, and, by accepting the testimony of A. B. Falls, found that he, as agent for his mother, did not represent that the farm in question was not infested with Johnson grass in order to induce the defendant to sign the lease contract. On the

contrary, according to his testimony, the agent of the defendant had been upon the land and was fully aware of the extent to which it was covered with Johnson grass.

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

CAIRO, TRUMAN & SOUTHERN RAILROAD CO. v. ARKANSAS SHORT LINE.

Opinion delivered December 6, 1926.

1. EMINENT DOMAIN—ISSUE AS TO RIGHT TO CONDEMN.—As the condemnation statute provides for no issue on the right to condemn, the only remedy of a railroad company desiring to prevent condemnation of a crossing over its right-of-way by another railroad is in a court of equity, to which the case should be transferred if the facts alleged in the answer justify equitable relief.
2. EMINENT DOMAIN—EXERCISE BY DE FACTO RAILROAD.—A *de facto* railroad corporation can exercise the power of eminent domain.
3. CORPORATIONS—RIGHT TO CHALLENGE EXISTENCE.—When a corporation is organized as the statute requires, neither its purpose nor its validity is questionable, and any proceeding which challenges its right to exist must be instituted and maintained by the State under whose laws it is organized.
4. EMINENT DOMAIN—POWER OF DE FACTO CORPORATION.—The fact that a railroad company's articles of incorporation recite that the purpose of its incorporation is to operate as a carrier of freight only does not prevent it from being a *de facto* railroad exercising the power of eminent domain.
5. EMINENT DOMAIN—ELIMINATION OF DAMAGES BY STIPULATION.—Where a railroad company seeks to condemn a right-of-way across the right-of-way of another company, the former may eliminate the element of damages for maintenance of such crossing by stipulating to maintain same at its own expense.
6. EMINENT DOMAIN—COST OF MAINTAINING FLAGMAN.—A railroad company cannot claim, as compensation for taking its land for right-of-way of another company over its tracks, the cost of maintaining a flagman or the cost of stopping and starting trains at such crossing, as statutes requiring a flagman and the starting and stopping of trains at crossings are police regulations.
7. EMINENT DOMAIN—DAMAGES—POLICE REGULATION.—Neither a natural person nor a corporation can claim damages on account

of being compelled to obey a police regulation designed to secure the common good.

8. EMINENT DOMAIN—CROSSING OF RAILROAD.—Every railroad corporation takes its right-of-way subject to the rights of the public to have other highways constructed across it when necessary.

Appeal from Poinsett Circuit Court; *W. W. Bandy,* Judge; affirmed.

Gautney & Dudley, for appellant.

N. F. Lamb and *Allen Hughes,* for appellee.

HART, J. This is an appeal from a judgment of the circuit court fixing the compensation to be paid by the appellee, Arkansas Short Line, to the appellant, Cairo, Truman & Southern Railroad Company, for a railroad crossing over its right-of-way. It appears from the record that both appellant and appellee are railroad corporations duly organized to construct railroads between points within the State of Arkansas.

Article 17, § 1, of our Constitution provides that every railroad company shall have the right with its road to intersect, connect with or cross any other road. In pursuance of the provision of this section of the Constitution, the Legislature of 1883 passed an act giving every railroad corporation created and organized under the laws of this State, or created and organized under the laws of any other State or the United States and operating a railroad in this State, the power to cross, intersect or unite its railroad with any other railroad. The act further provides that every railroad company whose railroad shall be crossed by any new railroad shall unite with the corporate owners of such new railroad in forming such crossing, and shall grant to such railroad all the necessary facilities for that purpose. Crawford & Moses' Digest, § 8489.

Section 8490 provides that, if the two corporations cannot agree upon the amount of compensation to be made for the purpose set forth in the preceding section, or the points or manner of such crossing, the same shall be ascertained and determined by a court of competent

jurisdiction in the same manner as provided for the ascertainment of damages for right-of-way for railroads.

It is contended, however, that, inasmuch as no provision is made in our condemnation statute for an issue upon the right to condemn, the only remedy is in a court of equity to which the case should have been transferred upon the facts alleged in the answer of appellant. *Niemeyer & Darragh* v. *Little Rock Junction Ry.*, 43 Ark. 111; and *St. L. I. M. & S. R. Co.* v. *F. S. & V. B. Ry. Co.*, 104 Ark. 344, 148 S. W. 531. Counsel for appellants are right in this contention, provided the facts alleged by appellants are sufficient to justify the equitable relief.

It is first contended that appellee is not a *de jure* railroad corporation, because nearly all of its stock was subscribed by a corporation which had no power to subscribe to the stock of another corporation, and that, not being a corporation *de jure*, it had no right to condemn a crossing over the right-of-way of appellant. In short, it is contended that a *de facto* corporation cannot exercise the power of eminent domain. This is contrary to the weight of authority on the question.

In *Natural Docks R. Co.* v. *Central R. Co.*, 32 N. J. Eq. 755, it was held that a court of chancery would not, on a motion for a preliminary injunction to restrain the Natural Docks Railway Company from constructing its railroad across the Central Railroad Company's land, inquire into the *de jure* existence of the former company as long as it had complied with all formal requirements and was a *de facto* corporation. It was said that there was no jurisdiction in a court of chancery to determine the legality of the existence of such a corporation.

The general rule is that, when a corporation is organized as the statute requires, neither its purpose nor its validity is questionable, and any proceeding which challenges its right to exist must be instituted and maintained by the State under whose laws it is organized. Most of the decisions in support of the rule say that it would produce manifest confusion and hardship if the right of the corporation to exist could be called into ques-

tion by every litigant with whom it came in contact during its business career, and that therefore the principle is wisely established that, after a corporation is organized as by law required, no adverse litigant can, in a collateral proceeding, challenge its right to exist. *Calor Oil & Gas Co.* v. *Franzell,* 128 Ky. 715, 109 S. W. 328, 36 L. R. A. (N. S.) 456; *Central of Georgia Ry. Co.* v. *U. S. & N. Ry. Co.,* 144 Ala. 639, 39 So. 473, 2 L. R. A. (N. S.) 144; *Sisters of Charity* v. *Morris R. Co.,* 84 N. J. L. 310, 86 Atl. 954, 50 L. R. A. (N. S.) 236; *Chicago & W. Ind. R. Co.* v. *Heidenreich,* 254 Ill. 231, 98 N. E. 567, Ann. Cas. 1913C, p. 266; and *Morrison* v. *Indianapolis, etc., R. Co.,* 166 Ind. 511, 9 Ann. Cas. 587.

In *Cumberland Tel. & Tel. Co.* v. *Louisville Home Tel. Co.,* 114 Ky. 892, 72 S. W. 4, the court said that the reason for the rule is that it would produce endless confusion, and destroy the corporation, if the legality of its existence could be drawn in question in every suit to which it was a party, for then no judgment could be rendered which would finally settle the question.

This holding is in accordance with our own decisions. *Brown* v. *Wyandotte & Southeastern Ry. Co.,* 68 Ark. 134, 56 S. W. 862, and *Jones* v. *Dodge,* 97 Ark. 248, 133 S. W. 828. In *Niemeyer & Darragh* v. *Little Rock Junction Ry.,* 43 Ark. 111, it was recognized that, under a statutory proceeding to condemn land for right-of-way for railroads, no provision is made for any issue upon the right to condemn, and the owner cannot in that proceeding question the legality of the corporation. In discussing the question the court said:

"To attack its existence collaterally is not permissible. (See cases cited in Abbot's Dig. of Law of Corp., pp. 365 *et seq.*). A plea in the nature of *nul tiel* corporation would not be safe in the face of complete articles of association. If the objection were made on the ground of fraud in obtaining the franchise, it would still be true that the jurisdiction and proceedings in chancery to relieve such fraud are more complete and effective than at law."

Neither will the fact that the articles of association of appellee recite that the purpose of its incorporation is to operate as a carrier of freight only prevent it being a *de facto* corporation. Everything necessary to constitute it a corporation has been done, colorably at least. The act of the Legislature providing for the incorporation of railroad companies was followed. The question of whether the State could compel it to perform all the duties required by statute is not before us.

It follows that the right of eminent domain may be exercised by a *de facto* corporation, and, even under the allegation made by appellant, appellee was organized as a railroad corporation according to the forms of law, and was at least a *de facto* corporation. In this view of the matter, no useful purpose could have been served by transferring the case to chancery, for the result should have been that the chancery court would have dismissed the complaint of appellant to enjoin appellee from proceeding to condemn a crossing over its right-of-way, for the reason that appellee was a *de facto* railroad corporation, and, under our Constitution and laws, had the right to cross the railroad of appellant.

This brings us to the real question in the case, which is, did the circuit court adopt the correct rule as to the measure of damages?

One element of damages was eliminated by a stipulation to the effect that appellee obligated itself to maintain in suitable and proper repair, at its own expense, the entire crossing at the junction point between the two railroads. *Kansas City S. & G. R. Co.* v. *Louisiana. W. R. Co.,* 116 La. 178, 40 So. 627, 5 L. R. A. (N. S.) 512.

In this and other cases it has been held that, when the land of a railroad company is taken for a right-of-way of another company for a crossing, under the condemnation proceedings provided by law, the measure of damages to which the owner is entitled is the value of the land, and in addition thereto any additional expense created in the ordinary use of its road, and any other injury or damage to its track or right-of-way occasioned

by the crossing, and which may be properly considered as the natural, necessary and proximate cause thereof. *Toledo, A. A. & N. M. Ry. Co.* v. *Detroit L. & N. R. Co.* 62 Mich. 564, 29 N. W. 500; *K. C. Suburban Belt R. Co.* v. *K. C. St. L. & C. R. Co.* 118 Mo. 599, 24 S. W. 478; *Chicago & Alton R. Co.* v. *Joliet, L. & A. R. Co.,* 105 Ill. 388, 44 Am. Rep. 799; *Old Colony & Fall River R. Co.* v. *County of Plymouth,* 14 Gray (Mass.), 155; *Mass. Central R. Co.* v. *Boston, C. & F. R. Co.,* 121 Mass. 124; and *Lake Shore & Mich. So. Ry. Co.* v. *Cincinnati, S. & C. Ry. Co.,* 30 Ohio St. 604.

Under the principles of law decided in these cases, appellant was not entitled to claim as compensation the cost of maintaining a flagman at the crossing or the cost of stopping and starting trains The statute requiring trains to stop at crossings is a police regulation, and so would be the cost of keeping a flagman there. Both railroad companies were subject to police regulations, and compensation cannot be demanded for observance of statutes to promote the public good. Neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common good.

The reason for the application of this rule in cases like the one at bar is well stated in *Lake Shore & Mich. So. Ry. Co.* v. *Cincinnati, S. & C. Ry. Co.,* 30 Ohio St. 604. In that case the court said: "While the elder road can demand compensation for its property to the extent of the appropriation, it had no right to demand tribute from the junior road for the enjoyment of the same corporate franchises that it possesses. Each owes its authority to operate its road to the same source, the State, and neither has the right to tax the other for the enjoyment of these mutual privileges. It is true that the crossing imposes a new burden, but it is one to which it is subject by the nature of the case and the terms of its charter.

"Every railroad corporation line takes its right-of-way subject to the rights of the public to have constructed other highways across it, when necessary, in the same

manner as it is the subject of future taxation or to reasonable regulation in the mode of using its property."

To the same effect see 10 R. C. L. 150; 2 Lewis on Eminent Domain, 3d ed., § 729; and 3 Elliott on Railroads, 3d ed., § 1607 (1127).

The result of our views is that the court allowed appellant all proper elements of damages proved by it. It follows that the judgment will be affirmed.

ARKANSAS MINING COMPANY v. EATON.

Opinion delivered December 6, 1926.

1. APPEAL AND ERROR—SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT.—In testing the legal sufficiency of evidence to sustain a verdict, the evidence must be viewed in the light most favorable to plaintiff.
2. MASTER AND SERVANT—DUTY TO ADOPT RULES.—Where the conduct of a business is complicated or dangerous or where it is obvious that the safety and protection of employees depend upon the adoption and enforcement of proper rules, failure to adopt such rules constitutes negligence.
3. MASTER AND SERVANT—FAILURE TO ADOPT RULES—BURDEN OF PROOF.—In an action by a servant for personal injuries, the burden of showing the master's negligence in failing to adopt or enforce proper rules rests upon the servant; the presumption being that the master has adopted and enforced all rules necessary to the operation of the business.
4. MASTER AND SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—In an action for injuries to a servant operating a coal-cutting machine in a mine, caused by the failure of a fellow-servant to give notice of placing a defective coal-car in the entry of the room used by the plaintiff, where no rule requiring notice thereof to be given was shown and no such rule was necessary, it being plaintiff's duty to look out for such cars, evidence *held* insufficient to sustain recovery.

Appeal from Johnson Circuit Court; *J. T. Bullock*, Judge; reversed.

STATEMENT BY THE COURT.

George Eaton sued the Arkansas Mining Company and R. A. Blackwood, trustee, to recover damages for

personal injuries received while working in the mine of the defendants.

George Eaton was a witness for himself. According to his testimony, on the 14th day of August, 1924, he was running a Sullivant coal-cutting machine for the defendants in their coal mine in Johnson County, Arkansas. The machine was operated by electricity, which ran from a cable extending from the main entry of the mine into the room where the machine was operated. The cutting machine weighed several tons, and was carried into the room where it was operated on a truck on the mine tracks. It was moved from one place to another on steel tracks in the mine. After Eaton had worked for an hour and a half and had finished cutting the coal in the room, he and his assistant started to back the machine out of the room. He had a carbide light on his head, and faced the machine in operating it. The cutting machine is twelve feet long and three feet wide. Eaton had to kneel on a platform on the machine in operating it. On backing out, his right side was towards the machine and his face was to the side watching the cable which carried the electricity. His assistant also carried a carbide light, and it was his duty to follow the machine and watch the cable so that the machine would not be dragged over it. Eaton had been operating such a machine for ten or twelve years at the time he was injured. As he was backing the car into the neck or tunnel which extended from the room where he had been cutting coal to one of the main entries of the mine, he backed against a coal-car, and hit it before he noticed the car being there. At once he applied the brake on his machine, and, when he took his hand off the brake, the machine jumped, and this caused his hand to be caught between the cutting machine and the coal-car. His finger was broken and permanently injured by the accident.

At one place in his direct examination Eaton testified that he had not been notified that the coal-car had been set in there. In this connection we quote from his testimony the following:

"Q. State whether or not it is customary to put those cars in an entry that way behind a coal cutting machine. A. It isn't practical, for, whenever they do, they generally notify us."

Again we quote from his testimony the following:

"Q. Hadn't the driver the right, under your mining regulations, to put the car in there without saying a word to you or anybody else? A. Yes, he has a perfect right to put a car in there. Q. Isn't it your duty to watch and see when cars are put there? A. Yes. Q. As a matter of safety to yourself, it is your duty. A. It was; but if the car had been in the right condition, them bearings hadn't been there, he would not have put the car there the first time, because he couldn't get any further. Q. You mean the mine car was broken down? A. It was."

Again we quote from his testimony the following:

"Q. You say whenever they put a car in there behind one of those machines the custom is to notify you? A. Walker does; yes sir."

Norman Gardner was the helper of Eaton, and corroborated his testimony as to the manner in which he was injured as he was backing the cutting machine out through the neck or entry of the room where it had been cutting coal.

Earnest Walker was also a witness for the plaintiff. He was the driver who left the defective coal-car in the entry or neck of the room where Eaton had been cutting coal with the machine. According to his testimony, he set the car in the entry because it was defective, and testified that he did not notify Eaton that he had set the car in there. We quote from his direct examination the following:

"Q. Is it customary to set a car in a room, behind one of those rooms, without notifying the machine runner? A. Well, I don't know as it is customarily or not customarily. I always try to work to the advantage of anything that way, to keep any one from getting hurt or anything, but I always generally notify the people, or digger. Q. You notify them that the car is in that situa-

tion? A. Yes sir. Q. And you ordinarily do that for the purpose of preventing an injury to them, is that it? A. I do. I try to keep any one from getting hurt."

We also quote from his cross-examination as follows:

"Q. You've been there four years? A. Yes sir. Something like that. Q. You stated to Mr. Patterson that you did not notify Eaton that you had placed the car there? A. I didn't that time. At times, why, if it is handy and such like, I hollo, 'Here is a car'. Or 'Watch out, George,' I generally say, 'Here is a car here', or something like that. But, if it was handy for me to put in on other switches, I do so on account of not having to handle no cable. Q. There is no rule requiring you to give him notice? A. I haven't had any notice served on me to do that at all. Q. You never had any orders to serve notice on him? A. No sir. I just taken it for granted on myself. Q. Just do it yourself? A. In order to keep any one from getting hurt or anything like that."

Again, we quote from his direct examination:

"Q. You didn't notify Mr. Eaton that you had put it in there? A. No sir. Not that time I didn't. Q. You ordinarily do that to prevent a fellow getting hurt? That is your custom? A. Yes sir. I take that on myself to hollo at them."

According to the evidence for the defendants, there was no rule or regulation requiring Eaton to be notified that a coal-car, whether defective or otherwise, had been set in the entry of the room where an employee was operating the cutting machine. It was also shown by the defendants that one of their servants notified the plaintiff that the car was in the entry room and directed him to switch it. The plaintiff was injured while engaged in switching the car. It was also proved by the defendants that it was the duty of the operator of the cutting machine to keep a watchout to see whether there were any obstructions on the track when he started to move his machine out of the room where he had been cutting coal.

The jury returned a verdict for the plaintiff in the sum of $225, and from the judgment rendered the defendants have duly prosecuted an appeal to this court.

James B. McDonough, for appellant.

G. O. Patterson, for appellee.

HART, J., (after stating the facts). It is earnestly insisted by counsel for the defendants that the evidence is not legally sufficient to support the verdict, and in this contention we think counsel is correct. Counsel for the plaintiff asked a recovery upon the theory that the defendants were negligent in failing to notify the plaintiff that one of their servants had placed a defective coal-car in the neck or entry of the room where the plaintiff had been engaged in operating a coal-cutting machine.

In testing the legal sufficiency of the evidence to sustain a verdict in favor of the plaintiff on the ground of the negligent failure of the defendant to notify him that the coal-car had been placed in the entry, the evidence must be viewed in the light most favorable to the plaintiff. When this is done, however, we are of the opinion that the plaintiff, by his own testimony, has precluded himself from recovery. It failed to establish the fact that it was a rule or regulation of the company to notify him that a defective or other coal-car had been set in the entry of the room where he had been operating the cutting machine. He says in one place that they generally notified him, but this falls short of establishing a regulation to that effect. We have quoted from his cross-examination upon the question of notice. In this the plaintiff admitted that, under the mining regulations, the driver of the coal-car had a perfect right to put the coal-car in the neck or entry of the room where he was operating the cutting machine, and that it was his duty to watch and see when cars were put in there. His only excuse is that, if the coal-car had not been defective, Walker would not have put it there. Thus it will be seen that, under the plaintiff's own testimony, there was no duty upon the part of Walker to notify him that the defective car had been placed in the entry.

On the other hand, the plaintiff expressly admitted that it was his duty to watch out for himself and see when coal-cars were placed in the entry. Once more, in his testimony, the plaintiff was asked if it was not the custom to notify him when a car was placed in the entry, and he answered, "Walker does, yes sir." This merely shows that it was the practice of Walker to notify the operators of cutting machines when he placed coal-cars in the entries of the rooms in which they were working, but it does not establish that there was any rule or regulation to that effect.

Indeed, the testimony of Walker himself shows that, while he generally notified his fellow-servants that he was leaving a car in the entry, he did that to prevent them from getting hurt, and not because of any rule or regulation requiring him to do so. He was expressly asked if there was a rule requiring him to give such notice, and answered that he was not required to give the notice by the company, but he just did it himself in order to keep any one from getting hurt. As he expressed it, he took it for granted, and gave the notice usually by holloing at his fellow-workmen that he had placed a car there. Thus it will be seen that no duty devolved upon Walker to notify Eaton that the defective coal-car had been placed in the entry.

There being no rule or regulation requiring such notice to be given, no recovery could be had against the defendants because of their failure to do something which, under their rules and regulations, they were not required to do.

In this connection it may be stated that rules are important and necessary where the conduct of the business is complicated or dangerous, or where it is obvious that the safety and protection of the employees depend upon their adoption and enforcement, the failure to adopt and enforce proper rules or regulations for the proper management of the business in such cases is negligence. *Ft. Smith Lbr. Co.* v. *Shackleford,* 115 Ark. 273, 171 S. W. 99; *Evans* v. *B. L. & A. S. R. Co.,* 147 Ark. 28,

227 S. W. 257; and *Arkansas Natural Gas Co.* v. *Sealy,* 167 Ark. 1, 267 S. W. 569.

In such case, however, the burden of showing an omission of duty in these respects, if they existed, is upon the plaintiff; and, in the absence of any evidence to the contrary, the presumption is that the defendants adopted and enforced all rules and regulations reasonably necessary to the management of their business. In the case at bar, no proof that the business was so dangerous or complex that a rule requiring notice to be given that defective or other coal-cars had been set in an entry of the mines was necessary for the protection of those operating the coal-cutting machines. On the other hand, the undisputed testimony shows that no such rules or regulations are necessary. Two men are engaged in operating a coal-cutting machine, which is run into the room where it is used, on tracks extending into the room from the main entry, and the cutting machine is backed out on the same tracks. The operator of the machine, by looking behind him for an instant, before he backed his machine into the neck or entry of the room, could tell whether or not there was a coal-car on the track. It is true that, for their own convenience and safety, drivers of coal-cars generally told operators of cutting machines when they placed a coal-car in the entry, but this they were not required to do, under the rules and regulations of the company, and such practice was not necessary for the safety of the operators of the cutting machines. Hence negligence could not be predicated upon the failure of the driver of the coal-car to give notice to the operator of the cutting machine that he had deposited a coal-car in the entry of the room.

It follows that the court erred in not directing a verdict for the defendants, and, for that error, the judgment will be reversed; and, inasmuch as the case on the facts seems to have been fully developed, the cause of action will be dismissed.

UNITED ORDER OF GOOD SAMARITANS v. LOMAX.

Opinion delivered December 6, 1926.

1. EVIDENCE—DECLARATIONS AS TO BIRTH.—In a suit by a beneficiary to recover insurance on her father's life, her testimony that her father told her that he was born in 1870, *held* admissible to establish her father's age at the time of his application for the insurance.
2. EVIDENCE—HEARSAY.—In a suit on a life insurance policy, testimony of a witness as to insured's age, as stated on certain applications sent in by various representatives of the insurer and not signed by the insured nor acquiesced in by him, *held* properly excluded as hearsay.
3. EVIDENCE—HEARSAY.—In a suit on a life insurance policy, testimony of a witness as to insured's age, as stated on certain insurance premium receipts found by him among insured's papers, *held* properly excluded as hearsay where the witness did not know when or by whom they had been issued or by what authority insured's age was therein stated.
4. TRIAL—IMPROPER ARGUMENT OF COUNSEL—PREJUDICE.—In a suit on an insurance policy, a statement to the jury by plaintiff's counsel that "these negro insurance companies always want to hold back and never want to pay claims against them" was improper, but its prejudicial effect was removed by the court's statement that the remark was improper, and by counsel's admission that he had departed from the record.
5. TRIAL—IMPROPER ARGUMENT—DISCRETION OF COURT.—Where counsel has gone beyond the bounds of legitimate argument, large discretion is vested in the trial court in determining the action appropriate to eliminating its prejudicial effect.

Appeal from Miller Circuit Court; *James H. McCollum,* Judge; affirmed.

Louis Josephs, for appellant.

William H. Arnold, Jr., for appellee.

SMITH, J. Appellee, who was the plaintiff below, alleged in her complaint that, about July 30, 1920, her father, Isaac Williams, became a member of the United Order of Good Samaritans, hereinafter referred to as the order, which order issued to her father a certificate of membership, or policy of insurance, in which she was named as the beneficiary, in the sum of $350; that her father died December 23, 1923, and, at the time of his

death, the policy was in full force; that proof of death was duly made, whereupon the order paid her the sum of $175, but has refused to pay the balance, wherefore she sues.

The order filed its answer, admitting it had issued to the insured, Williams, a policy in the sum of $300, with funeral benefits in the sum of $50. The answer admitted the policy was in force at the death of the insured, but alleged that it contained the following clause: "Provided, however, that only one-half the amounts will be paid to the beneficiary of the deceased who was between the ages of 51 and 60 on the date of the issuance of this policy."

The answer alleged that, at the time the policy of insurance was issued, the insured was between the ages of 51 and 60, and it was alleged therefore that only $175 was due on the certificate sued on, and, as that sum had been paid, it was denied that anything further was due appellee.

It appears therefore that the only question properly raised by the pleadings and the admissions of respective counsel in open court was the one of fact, whether the insured was over fifty-one years of age at the time the policy or certificate was issued, and, when the cause was submitted to the jury, the order asked instructions reciting that the constitution and by-laws of the order, which had been introduced in evidence, were a part of the contract, and declaring what the effect of the constitution and by-laws was. The court refused all the instructions requested for the order, and submitted the case under two instructions, in one of which the jury was told, if the insured was under fifty-one years of age at the time the certificate was issued, to find for the plaintiff.

The other instruction reads as follows: "You are instructed that, if you find from the evidence in this case that the deceased, Ike Williams, was between the age of 51 and 60 years at the time the certificate was issued to him, then, under the contract and the law governing it, the plaintiff is not entitled to recover further, and your verdict will be for the defendant."

The instruction quoted interprets the provisions of the certificate and those of the constitution and by-laws correctly and submits the only issue of fact in the case to the jury. There was therefore no error in refusing to elaborate the purpose and meaning of the constitution and by-laws, as the instructions given told the jury to find for appellee if the insured was not over fifty-one years of age when the certificate was issued, and to find for the order if the insured was over fifty-one at that time, there being no question as to the amount of the recovery if appellee were entitled to recover at all.

A verdict was returned for the plaintiff for $175, and judgment was rendered accordingly, and the order has appealed.

Appellee was called as a witness in her own behalf, and testified that her father, the insured, told her he was born in 1870. This testimony was objected to as hearsay, and the refusal of the court to exclude it is one of the errors assigned for the reversal of the judgment of the court below.

No error was committed in this ruling. In the case of *Lincoln Reserve Life Ins. Co.* v. *Morgan,* 126 Ark. 615, 191 S. W. 236, it was said: "Besides, it is well settled that the date of a person's birth may be testified to by himself or by members of his family, although he must, and they may, know the fact only by hearsay based on family tradition. This falls within the rule admitting such hearsay evidence in matters of 'pedigree,' which term embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when this occurred." (Citing cases).

In support of the defense that the insured was over fifty-one years of age when the certificate was issued, W. O. Hill testified that he was the secretary of the order and the custodian of its records. He testified that he had a record, made up from applications sent in by various representatives of the order, and he would have testified, had he been permitted to do so, that the records of the

order showed the insured was fifty-six years old when the certificate of membership was issued to him.

It appears from the preliminary examination of the witness, that the applicant for the insurance did not sign an application for membership, but the applications for membership were sent in and signed by the soliciting representatives of the order, and it was these applications which contained the age of the applicants. However, Hill did not offer to introduce these applications. The record before him was one which he said was made up from these applications. In other words, the witness proposed to testify what was shown by a record made up from reports sent in by its own representatives, which were not signed by the insured, and which were not shown to have been acquiesced in by insured. We are of the opinion that this was hearsay testimony, and that no error was committed in excluding it.

H. A. Williams was called as a witness for the order, and was asked to testify concerning the age of the insured Williams, as shown on certain insurance receipts which were found among the insured's papers after his death. This witness testified that he was present at deceased's home when search was being made for the certificate of insurance here sued on, and that there were found among deceased's papers certain receipts for insurance premiums dated in 1908 and 1910, which contained a statement of the insured's age at those times, which, if true, would have made the insured's age greater than fifty-one when the certificate sued on was issued. This witness knew nothing about these premium receipts, except that he had seen them and remembered the age of insured as there given. The receipts were not produced, and the witness did not know when or by whom they had been issued or by what authority insured's age was there stated. We conclude therefore that this testimony was properly excluded as hearsay.

During the closing argument, counsel for appellee made the following statement to the jury: "These negro insurance companies always want to hold back, and never

want to pay the claims against them. I have had several similar suits against other negro insurance companies, and I have had the same trouble with them."

Counsel for appellee seeks to excuse this statement by saying that it was made in response to an argument by counsel for appellant. That argument does not appear in the bill of exceptions, but it is difficult, if not impossible, to conceive of an argument which would excuse a statement of this character. It was improper, and should not have been made.

It appears, however, that, when the statement was made, counsel for appellant objected and asked the court to admonish and reprimand counsel for making it, whereupon the court, addressing the jury, said: "Gentlemen, no; Mr. Arnold, this is not proper; you will not consider anything except what was in the evidence." The record recites that, after this statement was made by the court, counsel for appellant objected and excepted to the remark, and he now insists that the ruling made and the remarks of the court in making the ruling were not sufficient to remove the prejudicial effect of the statement. As we have said, the remark of counsel was improper and should not have been made, but the court so ruled, and directed the jury not to consider it. In resuming his argument, counsel for appellee conceded that he had departed from the record. Under these circumstances we think the prejudicial effect of the argument was removed.

Necessarily, a large discretion must be exercised by the trial court in determining the action to be taken where counsel has gone beyond the bounds of legitimate argument, the action in each case being such as is deemed appropriate to eliminate the prejudicial effect of the improper argument. We think that was done here.

Upon the whole case we find no prejudicial error, so the judgment is affirmed.

FORD v. WILSON.

Opinion delivered December 6, 1926.

1. ATTACHMENT—DENIAL OF ALLEGATIONS OF AFFIDAVIT.—Though the allegations of an affidavit for attachment must be denied under oath, this may be done by a verified answer, under Crawford & Moses' Dig., § 568, though the usual and better practice is to file a controverting affidavit as provided in § 570, *Id.*
2. ATTACHMENT—LIABILITY OF SURETIES ON DISCHARGING BOND.—Upon the dissolution of an attachment, the court properly refused to render judgment against the sureties on a discharging bond, under Acts 1891, p. 56.
3. ATTACHMENT—QUESTIONS FOR JURY.—Where an attachment was issued as incident to an action to recover for work and labor performed, defendant's liability for the debt sued on was for the jury, but the question of discharging or sustaining the attachment was for the court.
4. ATTACHMENT—GROUNDS—EVIDENCE.—Evidence *held* to support a finding that plaintiff did not establish the grounds of attachment alleged in his affidavit.
5. EVIDENCE—WEIGHT AND SUFFICIENCY—TESTIMONY OF PARTY.—The testimony of a party to an action interested in the result cannot be regarded as undisputed in testing the legal sufficiency of evidence.

Appeal from Union Circuit Court, Second Division; *W. A. Speer,* Judge; affirmed.

Stewart & Oliver, for appellant.

SMITH, J. Appellant, who was the plaintiff below, instituted this action to recover $775 alleged to be due him for work and labor performed for appellee, and, as an incident to the suit, caused an attachment to be issued.

As ground of attachment it was alleged that appellee had sold and was selling and disposing of his property with the fraudulent intent of cheating, hindering and delaying his creditors in the collection of their just demands against him.

Appellee filed what is designated as a controverting affidavit, in which it was denied that he was indebted to appellant in any sum, but it contained no reference to the grounds of attachment. Appellee filed, however, an answer and cross-complaint, in which all the grounds for

attachment were categorically denied, and this pleading was duly verified. Appellee gave a discharging bond, which was conditioned that he should perform the judgment of the court in the cause.

The cause came on for trial, and appellee was not present, and no witness testified in his behalf. Appellant and other witnesses testified touching the demand sued on, and this issue was submitted to the jury, and a verdict was returned in appellant's favor for the full amount sued for. Upon the coming in of this verdict, appellant moved the court to render summary judgment against the sureties on the discharging bond for the amount of the debt; but this motion was denied, and the court refused to sustain the attachment, the attachment being dissolved for the reason "that there was not sufficient evidence to establish the grounds of attachment alleged in plaintiff's affidavit," and judgment was rendered accordingly. Appellant filed a motion for a new trial, and alleged, as ground therefor, the refusal of the court to render summary judgment against the sureties on the discharging bond. For the reversal of the judgment of the court below appellant insists: (a) that the undisputed testimony shows that the attachment should have been sustained; (b) that appellant having recovered judgment, the attachment should have been sustained under either § 542 or § 525, C. & M. Digest; and (c) that there was no issue as to the ground of attachment, in that no controverting affidavit had been filed by appellee.

Considering these questions in reverse order, it may be first said that, while what is called the controverting affidavit does not deny the alleged grounds of attachment, the answer does do so, and, as has been said, the answer was duly verified.

Appellant's argument is that the grounds of attachment must be denied, and can only be put in issue by complying with § 570, C. & M. Digest. This section provides that the defendant in an attachment may file an affidavit denying all the material statements of the affidavit upon which the attachment is issued, and that there-

upon the attachment shall be considered as contested, and that the affidavits of the plaintiff and the defendant shall be regarded as the pleadings in the attachment, and shall have no other effect. This section further provides that, when the attachment is obtained at the commencement of an action, the defendant may file his controverting affidavit in such time as is given by law for filing his defense, and that that period may be extended by the court for sufficient cause. This section of the statute first appears as § 280 of the Civil Code as a part of article 4 of the chapter on Attachments.

It is the usual, and, no doubt, the better, practice for a defendant who wishes to controvert the grounds of attachment against his property to put the right to an attachment in issue by filing a controverting affidavit, in compliance with this statute, but this is not the sole and only way of raising that issue.

Section 568, C. & M. Digest, provides: "If judgment is rendered in favor of the plaintiff, and no affidavit or answer, verified by oath, by the defendant filed, denying the statements of the affidavit upon which the attachment was issued, or motion made to discharge it, the court shall sustain the attachment." This section of the statute appears as § 278 of the Civil Code, and is a part of the same chapter from which § 280 of the Code was taken.

In the case of *Weibel* v. *Beakley,* 90 Ark. 454, 119 S. W. 657, an answer was filed denying two, but not all, of the grounds of the attachment alleged, and, upon the trial, judgment was rendered against the defendant, but the attachment was dissolved. On the appeal from that judgment the same was reversed, and the cause remanded with directions to sustain the attachment for the reason, among others, that § 414 of Kirby's Digest, which was there quoted, had not been complied with. This section of Kirby's Digest has been carried forward, and appears as § 568, C. & M. Digest, as quoted above.

It thus appears that, while the allegations of an affidavit for an attachment must be denied under oath

to make an issue as to the attachment, this may be done in a verified answer as well as by a controverting affidavit.

In the case of *Nelson* v. *Munch,* 23 Minn. 229, the Supreme Court of Minnesota said: "Upon a motion to dissolve an attachment a defendant may properly use his verified answer as an affidavit, so far as its contents are pertinent." See also *Sammoner* v. *Jacobson & Co.,* 47 Ark. 31, 14 S. W. 458; *Ballard* v. *Hunter,* 74 Ark. 174, 85 S. W. 252.

Upon the proposition that the attachment should have been sustained when judgment was awarded in plaintiff's favor, appellant cites § 525, C. & M. Digest. It is, however, pointed out in the case *Burgener* v. *Spooner,* 167 Ark. 316, 268 S. W. 6, that the digester had failed to include the amendment to this section found in the act of March 6, 1891 (Acts 1891, p. 56), adding a proviso as follows: "Provided, that the giving of this bond by the defendant shall not preclude his right to controvert the existence of the grounds stated by the plaintiff in his affidavit for the order of attachment." It was also pointed out in that case that the amendatory act of 1891 had, by implication, also amended § 542, C. & M. Digest, upon which appellant relies.

In the case of *Swift & Co.* v. *Cox,* 138 Ark. 606, 212 S. W. 83, it was held that liability on an attachment bond was discharged by the dissolution of the attachment.

It follows therefore that, having dissolved the attachment, the court was correct in refusing to render judgment against the sureties on the discharging bond, and therefore only the question remains to be considered whether the court erred in dissolving the attachment.

The court submitted the question of the liability of appellee for the debt sued on to the jury, but reserved to itself the question of discharging or sustaining the attachment. This has been held not only a proper, but the better, practice. *Von Berg* v. *Goodman,* 85 Ark. 605, 109 S. W. 1006; *Bank of Wynne & Trust Co.* v. *Stafford & Wimmer,* 129 Ark. 172, 195 S. W. 397; *Webber* v. *Rodgers,* 128 Ark. 27, 193 S. W. 87.

As has been said, the court found the fact to be "that there was not sufficient evidence to establish the grounds of attachment alleged in plaintiff's affidavit." It is earnestly insisted that this finding is contrary to the undisputed evidence.

It appears that no witness testified concerning the existence of the grounds for attachment except appellant himself, and the only testimony of this witness bearing directly upon this question is as follows: The witness, after testifying how appellee had become indebted to him, was asked the following questions: "Q. You allege in your complaint that, at the time you brought this suit and secured an attachment, the defendant was selling and disposing of his property. Tell the jury what you know about that." Appellant replied: "A. He sold everything he had left on the lease—standard rig—and disposed of everything." Appellant also testified that this sale was made before the suit was brought, and after appellee had promised to pay him and had failed to do so.

This is an indefinite and somewhat ambiguous answer, and more than one inference might be drawn from it. The property sold may have embraced only the property left on the lease. It does not necessarily or certainly show that appellee had removed or was about to remove his property, or a material part thereof, out of the State, not leaving enough therein to satisfy the plaintiff's claim or the claims of defendant's creditors, or that he had sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat, hinder or delay his creditors, these being the grounds of attachment alleged.

In the case of *Kansas City Sou. Ry. Co.* v. *Cockrell,* 169 Ark. 698, 277 S. W. 7, it was said: "* * * The rule established by our court is that the testimony of a party to an action, interested in the result, cannot be regarded as undisputed in testing the legal sufficiency of the evidence. *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764." See also *Brotherhood of R. R. Trainmen* v. *Foun-*

taine, 155 Ark. 578, 245 S. W. 17; *Gist* v. *Scantland,* 151 Ark. 594, 237 S. W. 98; *Paxton* v. *State,* 114 Ark. 393, 170 S. W. 80.

We conclude therefore, in view of this rule and the nature of the testimony quoted, that the court was warranted in the finding made.

As no error appears, the judgment must be affirmed, and it is so ordered.

DRIVER v. ROAD IMPROVEMENT DISTRICT No. 1.

Opinion delivered December 6, 1926.

EMINENT DOMAIN—COMPENSATION—ENHANCEMENT IN VALUE.—The general rule that, where the public use for which a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner has received compensation, has no application to a taking by a road improvement district, for the reason that he pays for his benefits in taxes, the same as other property owners.

Appeal from Mississippi Circuit Court, Osceola District; *G. E. Keck,* Judge; reversed.

E. S. Driver and *J. T. Coston,* for appellant.

Harrison, Smith & Taylor, for appellee.

HUMPHREYS, J. This suit originated in the county court of Mississippi County, under § 4 of act 380 of the Acts of 1919 of the General Assembly of Arkansas, creating Road Improvement District No. 1 in said county. The section referred to is as follows:

"Should the board of directors find it necessary or desirable to change the location of the road described in § 2 of this act, or to widen the right-of-way of said road, they shall file a petition, signed by a majority of the members of said board, with the clerk of the county court of Mississippi County, describing the nature of the alteration or change, the point of beginning and terminus of said change, the width and description of any property that may be taken or damaged by reason of said change. Said court shall cause an order to be entered of

record in accordance with its findings, and establish said record, if it deems best, and any landowner aggrieved may present his claim for damages to the county court, and any such claim not presented within twelve months shall be barred. All damages so awarded shall be paid by said road district. The said directors shall have the right to open such road so established."

The road designated in § 2 of said act, to be improved, extended from the Missouri State line through the town of Osceola, in Mississippi County, to the Crittenden County line. The original route through Osceola passed down Pecan Street, one block east of the Frisco Railroad to Keiser Avenue, thence west across the railroad tracks and along the south boundary line of a twenty-six acre tract of land belonging to appellant, situated in the southwest corner of the corporate limits of Osceola, thence continuing on west. The road was to be constructed out of concrete, with a warrenite surface. The road was constructed in accordance with the plans along the south side of the twenty-six acre tract in question. After constructing the road to this point, the route through Osceola was changed so as to run down Walnut Street, through said twenty-six acre tract, one and a-half blocks west of the Frisco Railroad, taking 1.93 acres. The effect of the change was to make a spur out of the original road constructed along the south side of said tract. The new route and the original route were two and one-half blocks apart, and were so close together that a new assessment of benefits was not assessed against the property in the district on account of the change in route. The plans for changing the road were filed with the board of directors in February, 1924. Appellant filed her petition or claim for damages under § 4 of said act, on March 2, 1925, for the value of the strip of land occupied by the new road resulting from the change in the route.

On the trial of the cause in the county court, appellant was awarded damages in the sum of $800, from which award both parties appealed to the circuit court of Mississippi County, Osceola District, where the case was

tried *de novo,* resulting in a judgment of $300 against appellee, from which is this appeal.

The case was tried in the circuit court upon conflicting testimony as to the value of the strip of land actually taken for the new road out of the twenty-six acre tract, less the enhanced value to the balance of the tract on account of the construction of the concrete road with warrenite surface through it.

During the trial of the cause the court excluded testimony offered by appellant, over her objection and exception, to the effect that special benefits in the sum of $1,610 had been assessed and levied as a tax against said twenty-six acre tract on account of the construction of the proposed improvements. The testimony was excluded upon the theory that the market value of the strip of land taken should be offset by the enhanced value of the balance of the tract by reason of the construction of the road.

The trial court instructed the jury, over the objection and exception of appellant, as follows: "You are instructed that your verdict in this case will be for the plaintiff for the market value of the land taken by the defendant at the time same was taken, less any sum you may find from the evidence the rest of the land has been enhanced in value, if you find it has been enhanced in value, by the construction of this road through that land."

Appellant contends for a reversal of the judgment on account of the exclusion of said testimony and the declaration of law announced by the court as to the measure of damages. In excluding the evidence and formulating the rule for the measure of damages, the trial court was governed by the rule announced in the case of *Cribbs* v. *Benedict,* 64 Ark. 555, 44 S. W. 707, and reaffirmed in the case of *Paragould* v. *Milner,* 114 Ark. 334, 170 S. W. 78, to the effect that "where the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the

whole was before the taking, the owner in such case has received just compensation in benefits."

The rule announced in those cases is not applicable in the instant case. The twenty-six acre tract out of which the strip of land was appropriated by the district to make the change in route was assessed according to the benefits it would receive from the improvements, to help pay for same. If the benefits accruing to the tract of land on account of the construction of the improvements should be deducted from the market value of the strip actually taken, in arriving at appellant's damage, he would be compelled to pay twice for the benefits—once in taxes and once in land.

The instant case is governed by the rule announced in the case of *Gregg* v. *Sanders,* 149 Ark. 15, 231 S. W. 190, to the effect that "there can be no deduction of any part of the damages from the compensation to be allowed to a property owner for that portion of his property which is taken and used in the construction of the improvement, for the reason that he pays for his benefit in taxes, the same as other property owners, and it would destroy the rule of equality to require him to contribute to the common use any part of his property without compensation." The eminent domain portions of our Constitution guarantee just compensation to the owner of private property taken for public use. Article 2, § 22, of the Constitution of Arkansas of 1874.

On account of the erroneous classification of this case the judgment is reversed, and the cause is remanded for a new trial.

RHODES v. UNITED STATES CASUALTY COMPANY.

Opinion delivered December 13, 1926.

INSURANCE—ACCIDENT POLICY—DEATH BY DROWNING.—An accident policy which limits the insurer's liability to injuries caused in manner therein specified *held* not to cover the death of insured by accidental drowning, where that was not one of the specified accidents.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

Rogers, Barber & Henry and *Sam M. Wassell,* for appellant.

Malcolm W. Gannaway and *A. Carlyle Gannaway,* for appellee.

McCULLOCH, C. J. Appellant instituted this action against appellee on a policy of accident insurance issued to H. B. Rhodes, the benefit under the policy being payable to appellant.

H. B. Rhodes came to his death by accidental drowning at a swimming beach near Little Rock, and his death occurred during the existence of a policy of insurance issued to him by appellee. The case was tried by the court, sitting as a jury, and the facts were undisputed. The court rendered judgment against appellant, and an appeal has been prosecuted.

The parts of the policy which are deemed material to this controversy read as follows:

"This is a limited policy, and provides indemnity for loss of life, limb, sight or time, by accidental means, only to the extent herein provided.

"Policy No..... Series No. '600A'

"United States Casualty Company
"80 Maiden Lane, New York.

"In consideration of the payment of the premium and subject to the terms, conditions and limitations contained herein, the United States Casualty Company of New York, herein called the company, does hereby insure the owner of this policy, herein called the insured, against

loss caused by bodily injuries as hereinafter provided and in the sums hereafter specified:

"Section A."

(Here follows a list of injuries to different parts of the body covered by the policy, and the respective amounts).

"* * * provided such injuries are not caused or contributed to by voluntary exposure to unnecessary danger, or by violation of the law on the part of the insured, and are effected exclusively by external, violent and accidental means, which shall, independently of all other causes, immediately, continuously and wholly disable the insured or be the sole cause of the death of the insured within one month of the date of the event causing such injury, and said injuries to the insured shall occur:

"While actually riding as a passenger and not being a railroad employee on duty, in a place regularly provided for the transportation of passengers within a surface or elevated railroad or subway car, steamboat or other public conveyance provided by a common carrier, for passenger service only, and while not being upon the step or steps, or getting on or off such conveyance; or

"While riding as a passenger in a passenger elevator used for passenger service only in a place regularly provided for the sole use of passengers."

Section B of the policy provides indemnity for loss of time resulting from certain accidental injuries not specified in the foregoing section, but this does not include death by accidental drowning. Section C provides indemnity against loss of life occurring within a month after certain accidental injuries, and the clause is restricted to certain kinds of injuries and does not include the loss of life by drowning. The policy ran for a term of one year, and the annual premium was fifty cents.

The contention of appellant is that there is liability under section A of the policy, and the argument in the brief is devoted to the contention that death by accidental drowning comes within the definitions contained in that section. Conceding that accidental death by drowning

is one "effected exclusively by external, violent and accidental means," as contended by counsel, it does not follow that such an injury comes within the terms of the policy, for the indemnity is, in express terms, limited to injuries which occur while the insured is riding as a passenger "within a surface or elevated railroad or subway car, steamboat or other public conveyance provided by a common carrier," or while riding "in a passenger elevator used for passenger service only." The policy is declared on its face to be a limited one and only to apply to the extent therein provided. This is further shown by the fact that the premium is only fifty cents per annum, and the strict limitations in the policy are expressly stated in clear language. It is not a general accident policy, but one confined to particular injuries accurately described.

We think the court was correct in holding that death by accidental drowning did not come within the terms of the policy, therefore the judgment of the trial court is affirmed.

NELSON v. FORBES.

Opinion delivered December 13, 1926.

1. FRAUDULENT CONVEYANCES—TRANSFER OF PERSONALTY.—Under Comp. Stat. of Okla. 1921, § 6021, providing that transfers of personal property shall be void as to creditors and subsequent purchasers or incumbrancers in good faith, unless followed by immediate delivery and continued change of possession, *held* that the change of possession must be actual and continued and so open and notorious as to apprise the community or those accustomed to deal with the property of such change.
2. FRAUDULENT CONVEYANCES—TRANSFER OF PERSONALTY.—Transfer of cotton by a mortgagor to his landlord in payment of rent before the date of a mortgage, where the cotton was left on the tenant's premises until after the mortgage was executed, was fraudulent as against the mortgagee, under Okla. Comp. Stat. 1921, § 6021, because unaccompanied by a change of possession.
3. APPEAL AND ERROR—FORMER OPINION NOT BINDING.—Where the court on a former appeal decided that the cotton in question had

been delivered, but left open for decision the question of the date of delivery, such decision would not be binding on a subsequent appeal where the facts on the issue of delivery were different from those on the former appeal.

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

George W. Johnson and *G. L. Grant,* for appellant.

Holland, Holland & Holland, for appellee.

WOOD, J. L. D. Nelson brought this action in the Sebastian Circuit Court against Forbes & Sons to recover twelve bales of cotton which had been mortgaged to him in the State of Oklahoma by one William Bromley. The cotton was brought into Arkansas and sold to Forbes & Sons at Hackett City, Arkansas, by one Z. R. Smith, to whom it had been turned over by Bromley in payment of an alleged rent note upon a farm sold to Bromley by Smith prior to the maturity of the note. Smith had contracted to sell Bromley the land on which the cotton was grown, and, on November 11, 1919, executed a deed to Bromley for the recited consideration of $7,500 cash in hand. This deed was not then delivered, but was placed in escrow until Bromley could raise the cash payment required. Before the delivery of the deed Smith rented the land to Bromley for $1,000 for the year 1920 and took a note for that amount, dated January 27, 1920, due November 15, 1920. Eighteen bales of cotton were grown on the place in 1920, twelve of which were stored in the barn on the place, and, on August 2, 1921, these twelve bales were mortgaged by Bromley to Nelson. The mortgage was duly executed and filed according to the laws of Oklahoma.

The defendants defended the action on two grounds: First, that they were innocent purchasers; and, second, that Smith was Bromley's landlord, and, as such, had a lien on the cotton for the year 1920 which was superior to appellant's mortgage, and Smith had a right to sell the cotton to the defendants and to apply the proceeds thereof to the payment of his rent.

This is the second appeal in this case. See *Nelson* v. *Forbes & Sons,* 164 Ark. 462, 261 S. W. 912. The issues and facts as above set forth are fully stated in the opinion in the above case. On the former appeal we said: "The mortgage from Bromley to Nelson was dated August 2, 1921, and one of the disputed questions of fact in the case is whether the cotton so stored had been delivered to Smith prior to the execution and delivery of the mortgage, and the conflict in the testimony makes a question for the jury whether there had been a delivery to Smith prior to August 5, the date the mortgage was filed. Had that been done, this, of course, would be decisive in the case, as the title to the cotton would have passed to Smith upon its delivery to him. It is insisted, however, that the testimony shows that no delivery of the cotton to Smith had ever been made until after the execution of the mortgage, and that Bromley was in possession of it for himself, holding it to be sold when the market price advanced." On the former appeal the judgment of the trial court was reversed, and the cause was remanded "with directions to submit the case under an instruction to the effect that a verdict should be rendered in favor of the plaintiff, unless the jury finds the fact to be that, before the filing of the mortgage, the cotton had been delivered to Smith." On the retrial of the cause in the circuit court, witness Bromley testified in part as follows: That the cotton in controversy might have been rolled from the place where he stacked it in his barn shed in 1920 to a different place. He owed Smith $1,000 for rent. The note was due, and Smith came to see witness in regard to collecting same. Witness told Smith that the only thing he could do was to give him the cotton, which he did. He was asked if he delivered the cotton to Smith at that time, and answered, "Sure, as near as we can call it delivered. I called it delivered, because I never did claim it any more and never thought about selling it after that." The cotton remained at witness' place some time after that. Smith left it there because it was under a shed. He had

no place to put it. Smith asked witness to let it remain there until the market got higher. To the best of witness' knowledge, this occurred when the note came due, November 15, 1920. That was the day that witness sold and delivered the cotton to Smith to pay the note and when Smith asked the witness to let the cotton remain there until he got ready to sell it. Witness was asked if Smith moved the cotton from the place where it was when witness turned it over to him, and answered, "It was never moved from that place until it was taken by Smith to Hackett, Arkansas, and sold to Forbes. The cotton remained in the same place until January, 1922."

Smith testified concerning the delivery of the cotton as follows: Bromley owed him a debt and paid it with twelve bales of cotton in November, 1920. He held the cotton in Bromley's shed, and sold it to Forbes in 1921 or 1922. Witness further described the circumstances of the delivery of the cotton as follows: "He owed me, and says, 'I got twelve bales of cotton, but the price is down. I will deliver it to you, and you can do what you want to with it.' I said: 'We will hold it awhile, and, if it brings more, all right.'" Witness took charge of the cotton there as his, and went and got it when he got ready to sell it. This witness' testimony further shows that Bromley paid witness, on January 13, 1922, $742. That was the date witness sold the cotton to Forbes and gave Bromley credit on his note to witness of that date. That was the date on which the cotton was hauled from Bromley's place to Hackett. This credit was entered in 1922, because they did not know what the cotton would bring until that time. Witness did not know the amount to indorse on the note until the cotton was sold to Forbes. Witness was asked what he did toward exercising actual ownership over the cotton after October 5, 1920, when he claimed the cotton was delivered to him, and stated that he went to Spiro to try to sell the cotton to cotton buyers and Bromley delivered to him the cotton.

The plaintiff asked the court to instruct the jury to return a verdict in his favor. The court refused plain-

tiff's request. The court gave, on its own motion, over the objection of the appellant, among other instructions, the following: "The court instructs the jury that a verdict should be rendered for the plaintiff Nelson, unless the jury finds the fact to be that, before the filing of the mortgage, the cotton had been delivered to Smith, and in that event you should find for the defendant Forbes."

At the request of the defendants, the court instructed the jury that, "to constitute a delivery of personal property, it is not necessary that there be an actual removal of the goods, but if, at the time of the alleged delivery, it was the intention of the parties that the title and ownership of the property should pass from one to the other and the property is put in the control of the party to whom it is conveyed, and is done openly and notoriously, this constitutes a delivery." At the request of the plaintiff the court further instructed the jury as follows:

"The court tells you that, under the laws of the State of Oklahoma, any transfer of title of personal property, to be valid, must be accompanied with immediate, actual, visible and continuous change of possession. Every transfer of personal property, if made by a person having at the time possession or control of the property, is conclusively presumed to be fraudulent and void unless it is accompanied by an immediate delivery of said property and followed by an actual and continued change of possession of the things transferred. In this case, before you can find for the defendants, you must find from a preponderance of the testimony that Bromley not only told Smith to take the cotton, sell it, and apply the proceeds of it upon what Bromley owed Smith, but that Smith immediately and actually took possession and continued a visibly changed possession of said cotton, exercising such rights of ownership over it as to apprise those dealing with Bromley and the cotton that said cotton was the property of Smith and not the property of Bromley prior to Bromley's giving the mortgage to the plaintiff, Nelson."

The jury returned a verdict in favor of the defendants, and from the judgment in their favor is this appeal.

1. Section 6021 of the Compiled Statutes of Oklahoma for the year 1921 reads as follows: "Every transfer of personal property, other than a thing in action, and every lien thereon, other than a mortgage, when allowed by law, is conclusively presumed, if made by a person having at the time possession or control of the property and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors and against any person on whom his estate devolves in trust for the benefit of others than himself and against purchasers or incumbrancers in good faith subsequent to the transfer."

Under the above statute of Oklahoma, as construed by the Supreme Court of that State, there must be an actual and continued change of possession which is open, notorious and unequivocal. Such a change as to apprise the community, or those who are accustomed to deal with the property, that the property has changed hands and the title has passed from the vendor to the vendee. See *Sankey* v. *Suggs,* 111 Okla. 293, 239 S. W. 149; *Ellett-Kendall Shoe Co.* v. *Ross,* 28 Okla. 697, 115 P. 892; *Cochran Grocery Co.* v. *Harris,* 28 Okla. 715, 116 P. 185; *Swartzburg* v. *Dickerson,* 12 Okla. 566, 73 P. 282; also *Israel* v. *Day,* 41 Colo. 52, 92 Pac. 698. In the case of *Sankey* v. *Suggs, supra,* it is said: "Where the facts are undisputed, it is for the court to determine as a question of law whether such facts show such an actual and continued change of possession as will render a transfer of personal property valid as against creditors of the seller."

Under the above statute of Oklahoma, we are convinced that the undisputed testimony in this record shows that there had been no delivery of the cotton to Smith before the appellant Nelson filed his mortgage covering

the cotton in controversy. Indeed, there had been no delivery of the cotton in controversy such as is contemplated by the Oklahoma law until the cotton was hauled from Bromley's barn to Hackett, Arkansas, and sold to Forbes, in 1922. The undisputed testimony shows that Bromley's mortgages to Nelson covering this cotton were duly filed long before that, to-wit, during the years 1920 and 1921. The court therefore, under the undisputed evidence, should have given appellant's prayer for an instructed verdict in his favor.

2. Learned counsel for the appellee contend that the only question that could have been submitted to the jury at the second trial was the issue as to the time of the delivery of the cotton. We do not so construe the language of the former opinion. On the contrary, it occurs to us that the issue to be determined in the trial court, under the directions of this court on the former appeal, was whether the cotton had been delivered to Smith before the filing of appellant's mortgages. This necessarily involved a mixed question of law and fact to be determined under the Oklahoma law, to which our attention was not directed on the former appeal. But, even if this court had decided on the former appeal that the cotton had been delivered by Bromley to Smith, and had left open for decision only the question of the date when such delivery took place, nevertheless such would not be the law of the case on this appeal, because, on the last trial, the facts were different on the issue of whether or not there had been a delivery of the cotton, from the facts developed on the first trial. Hence the rule of "law of the case" cannot avail the appellees. *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475-479, 96 S. W. 393.

3. The undisputed testimony shows that the value of the cotton in controversy was $1,000. For the error of the court in refusing to grant appellant's prayer for a directed verdict in his favor, the judgment is reversed. Inasmuch as the cause seems to have been fully developed, judgment will be entered here for appellant against appellees in the sum of $1,000.

FORT SMITH, SUBIACO & ROCK ISLAND RAILROAD COMPANY *v.* MOORE.

Opinion delivered December 13, 1926.

1. MASTER AND SERVANT—NEGLIGENCE—JURY QUESTION.—Whether defendant's engineer negligently backed a train at unusual speed, so as to cause a sudden jerk and throw the fireman under the tender, *held* under the evidence to be a question for the jury, in a suit under the Federal Employers' Liability Act (U. S. Comp. Stat. § § 8657-8665).
2. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION.—Whether the deceased fireman, killed by being thrown from a tender by a sudden jerk in making a coupling, had assumed, as a risk of his employment, the danger of falling in going back over the tender with a bucket of compound while the train was moving, *held* for the jury.
3. TRIAL—CONSTRUCTION OF INSTRUCTIONS.—An instruction that deceased fireman assumed the risk of injury from all ordinary dangers incident to his employment, but not from the danger arising from the negligence of the railroad's other employees, *held* not objectionable, when considered with other instructions, as taking from the jury consideration of whether the danger of going back over the tender while the train was in motion was so obvious that he must have known and appreciated it.
4. DEATH—WIDOW'S PECUNIARY LOSS.—An instruction as to the right of a widow to recover for her husband's death, under the Federal Employers' Liability Act (U. S. Comp. Stat. § § 8657-8665), *held* properly limited to pecuniary loss.
5. EVIDENCE—FORMER TESTIMONY.—Where one who testified on a former trial has since died, his testimony, on both direct and cross-examination, may be proved.

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

STATEMENT BY THE COURT.

William Moore, fireman, was killed while at his work on a mixed passenger and freight train at Ola, Arkansas, on October 11, 1922. This is the second appeal in the case. The judgment upon the former appeal was reversed because the court erred in submitting to the jury the negligence on the part of the brakeman in failing to give proper signals, or negligence in employing an unskillful and incompetent engineer, when there was no evidence

upon which to base instructions submitting these issues to the jury. *Fort Smith, Subiaco & Rock Island Rd. Co.* v. *Moore,* 166 Ark. 459, 266 S. W. 971. After the mandate of the Supreme Court was filed in the circuit court, an amended complaint was filed and the right to recover was limited to the issue of negligence on the part of the engineer in backing the train, at unusual speed, against some box-cars, which caused the fireman to fall from the tender. It was conceded on the retrial of the case that the suit was brought under the Federal Employers' Liability Act (U. S. Comp. Stat. §§ 8657-8665).

Fort Smith, Subiaco & Rock Island Railroad Company operates a line of railroads from Paris to Ola, Arkansas, and connects with the main line of the Chicago, Rock Island & Pacific Railway Company at Ola, and uses the same station and switch-yards at that point.

The train crew which was operating the train on the morning of the accident consisted of A. S. Hendrix, the conductor; E. J. Reed, the engineer; William Moore, the fireman; and Roy Scott and P. T. Little, the brakemen. On the morning in question, the west-bound passenger train on the main line of the Rock Island was due at 5:53 A. M. and the mixed train in question was due to go out at 7:15 A. M. The passenger train on the main line was late, and the crew on the mixed train endeavored to make up its train and take water at the tank on the main line of the Rock Island before going on the line of the defendant *en route* to Paris.

According to the testimony of the engineer, he backed his train on one of the sidetracks of the main line and fastened on to a string of cars and pulled them out on the main track. This was done for the purpose of setting out two cars which were wanted to be placed in the defendant's train. The string of cars, consisting of between 10 and 15 box-cars, was then pulled back from the main line onto one of the sidetracks.

P. T. Little was on one of the box-cars, giving signals to the switchman. These signals were repeated to the engineer by Roy Scott, who stood on the ground. The

sidetrack on which the string of cars was standing was down grade towards the east, and it was the intention of the train crew to connect them with four other cars attached to the engine and then shove the whole string of cars further east on the sidetrack so as to be in the clear of trains passing on the main track.

The engineer was looking out on the right-hand side of the cab, watching Scott giving the signals. As he made the coupling with four cars attached to the engine with the string of the cars on the sidetrack, he saw something at the back end of the tender drop out of sight, as he expressed it. The engineer immediately set the air-brake and shut off the air in the engine. The engine was going about two or three miles an hour, and did not go over three or four feet after the engineer applied the brake. The engineer then looked to see if he could see his fireman anywhere, and couldn't see anything of him. He went back to see if the fireman had climbed down the train further back, and did not see him. He then looked under the tender, and saw the fireman, three or four feet from the back end of the tender, under the first two wheels. The fireman was lying under the tender, against the sand-beam. The sandbeam had caught and twisted him on his side. One wheel had run over his leg just above the ankle.

The water in the tank at Ola was dirty and muddy, and a compound was used to keep it from foaming. It was the duty of the fireman to mix this compound in hot water drained from the boiler of the engine and to pour it in the tank on the tender when they took water. There was an opening at the back end of the tank to put the compound in. It was the duty of the fireman to mix the compound in a bucket on the engine, and, when the engine stopped to take water, to carry the compound in the bucket over the coal in the tender to the place where he would pour it in the water tank. It was the intention of the engineer to pull off of the main track of the Rock Island after he had pushed back the string of cars in the clear on the sidetrack, and had coupled the engine to the cars

on the main track which were to be attached to his train. The engineer could take water from the tank either while his train was on the main track or from the sidetrack on the other side of the tank. The bucket of compound was found on the top of the tender, and was within an inch of the top of the bucket. None of it had spilled out when the engineer had coupled the four cars attached to the engine to the string of cars on the sidetrack. No unusual jar or jerk was caused when the coupling was made.

The testimony of the engineer was corroborated by that of the two brakemen, Scott and Little.

According to the testimony of other witnesses for the plaintiff, the body of Moore was found under what was called the sandbeam, about six or eight feet from the rear of the tender. He was twisted under it. His body was found right where the main line joined the sidetrack. One of Moore's gloves, containing some of his finger nails and bits of his fingers, was found between fifteen and twenty feet west of where he was taken out from under the tender. The glove was on the right side of the rail and south of it. Moore's body looked to be torn up, and his clothing was badly torn. His body looked like he had been turned over and over. The cinders and dirt had been rubbed into his wounds. Some blood was found on the rails about two and a-half rails' length west of where Moore's body was found under the tender.

Another witness testified that the body of Moore had been dragged down the track through the cinders and dirt. He saw blood about twenty or thirty feet up the track, while he was looking for the fingers which showed to have been cut off of Moore's hand. He said that Moore was mangled just the same as a dog, and his overalls were like they had been dipped in a tub of blood and cinders. His body appeared to be all covered with cinders, and his face was swollen and black.

Evidence was introduced by the defendant tending to show that it was dangerous for a fireman to go over a tender filled with coal while the train was in motion. Other evidence was also introduced by the defendant

tending to show that there was no negligence in the operation of the train at the time Moore was killed.

The jury returned a verdict for the plaintiff in the sum of $5,000, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

James B. McDonough, for appellant.

Evans & Evans and *White & White,* for appellee.

HART, J., (after stating the facts). As above stated, it was conceded by counsel for the plaintiff that the suit was brought under the Federal Employers' Liability Act, and that the plaintiff's right to recover was based upon that act.

Upon the former appeal it was earnestly insisted that the defendant was not guilty of negligence in any respect. This court, under the facts proved at the first trial, held that, under the evidence of the plaintiff, the jury might find that the negligence of the engineer consisted in backing the engine and tender with the four cars attached thereto against the string of cars on the sidetrack at unusual speed, which caused a sudden jerk in the operation of the train and threw Moore from the tender, and thereby caused the wheels of it to run over him and crush him to death under the sandbeam of the tender.

The engineer testified on the first trial, as he did on the retrial of the case, that the engine and tender were only running at the rate of two or three miles per hour, and that he stopped the train within three feet after he applied the airbrake. As we said upon the former appeal, the jury might have found that the engineer's testimony and that of the brakeman on this point was not wholly true. The evidence shows that Moore was a stout, active man, only thirty-one years of age, and it is not likely that he would have fallen under the wheels of the tender if it had only been going at the rate of two or three miles an hour and had been stopped within three feet. It will be remembered that the engineer testified that he saw something going over the tender, and immediately applied the brake. He then went back to look for his fireman. The jury might have inferred from this that the engineer saw

the fireman fall from the rear end of the tender and knew that he would likely be hurt, for he immediately went back to look for him. The condition of Moore's body and the fact that cinders and earth appeared to have been rubbed into his wounds indicated that he was dragged for some distance after he fell from the tender. One of his gloves, with the ends of some of his fingers in it, was found about fifteen feet west of where his body was found. Some blood was found on the rails still further west. This indicated that Moore's body was carried under the tender for a much greater distance than three feet.

The jury might have accepted that part of the engineer's testimony which showed that he saw something fall from the back of the tender, and immediately stopped his train and went back to see if it was not his fireman. When he went back, he did find the body of the fireman, all mangled, under the tender. From this evidence the jury was warranted in finding that the mangled condition of the body of the fireman, the fact that his glove with bits of finger in it was found fifteen feet west of where his body was, and the further fact that blood was found on the tracks still further west, indicated that the train was going at a much greater rate of speed than that testified to by the witness, and that, on account of the unusual rate of speed, the impact with the string of cars on the sidetrack was much greater. The jury might have inferred from the testimony that the fireman believed that the engineer would make the coupling just as he testified that he did make it, and that he felt that he could, with safety, go back over the tender with the bucket of compound and be ready to pour it in the tank when the engineer was ready to take water, and that, by reason of the coupling being made with an unexpected and unusual jerk or jar caused by the engineer running the engine and tender at an unusual rate of speed, the fireman lost his balance and fell from the tender.

It is contended, however, that the undisputed proof shows that the bucket of compound was filled within an inch of the top, and that none of it had spilled out, which

would have happened had the coupling been made at an unusual rate of speed or had it been accompanied by a sudden jerk. While the engineer and other witnesses testified that none of the bucket of compound appeared to have been spilled, this might not have been accepted by the jury as undisputed evidence. The question of whether any of the bucket of compound had spilled depended upon the recollection of the engineer and the other witnesses on that point. The jury might have found from the attendant circumstances that they had testified falsely on that point, intentionally, or perhaps due to a faulty memory. In other words, the undisputed facts show that the fireman was found with his body crushed and mangled under the tender, and that the engineer thought he saw something fall off of the rear end of the tender. In any event, he saw something fall off, and was so of the opinion that it was the fireman that he immediately applied the airbrake and stopped the train. The jury might have inferred, as above stated, that this was caused by a sudden and unexpected jerk in making the coupling, and that some of the compound did spill out of the bucket, although the engineer testified to the contrary.

It cannot be said as a matter of law that the fireman assumed the risk of going back over the tender with a bucket of compound while the train was moving. The jury might have inferred that the fireman believed that the coupling would be made in the usual way and would be attended by no danger to him, but, due to the fact that he was in a hurry, the engineer ran the engine and tender with the four cars attached to it at a much greater speed than he thought he was, or at least at much greater speed than he testified to, and thereby caused a sudden and unexpected jar or jerk of violence when the cars ran against the string of cars on the track. Therefore we think the question of the negligence of the defendant and the assumption of risk by the fireman were proper questions of fact to be submitted to the jury for its determination.

It is next contended that the court erred in instructing the jury on the subject of assumption of risk. The court gave instructions Nos. 5 and 6, which are as follows:

"5. The deceased, Will Moore, by engaging in the defendant's service, assumed the risk of injury from all the ordinary and usual dangers and hazards incident to the employment in which he was engaged, but he did not thereby assume the risks of injury from any danger or hazard arising from the negligence of the other employees of the defendant.

"6. Before the deceased can be held to have assumed the risk of injury from any danger or hazard arising from the negligence of any of defendant's other employees, it must appear from a preponderance of the evidence that deceased knew of such negligence and appreciated the danger therefrom to himself, or that the danger from such negligence to deceased was so obvious that the deceased, in the exercise of ordinary care for his own safety at the time, must have known of such negligence, and appreciated the danger to himself therefrom."

Counsel for the defendant insists that these should be treated as separate instructions, and that number 5 is erroneous because it takes away from the jury the consideration of whether, under the facts, the danger was so obvious and patent that the fireman must have known and appreciated it. It will be observed that these two instructions follow each other; and, from the language used, it is apparent that they should be read together, and, when so read together, they harmonize with each other. We cannot see how the jury could have been misled when the two instructions were read and considered together. Each one supplements the other, and they were doubtless so understood by the jury as well as by the counsel for the respective parties in their arguments to the jury. *St. L. I. M. & S. R. Co.* v. *Rogers,* 93 Ark. 564, 126 S. W. 375; *Kelly Handle Co.* v. *Shanks,* 146 Ark. 208, 225 S. W. 302; and *St. L. S. F. R. Co.* v. *Pearson,* 170 Ark. 842, 281 S. W. 910.

It is next insisted that the court erred in giving instruction number 12, which reads as follows:

"If you find for the plaintiff, but do not find that the deceased was guilty of contributory negligence, you will fix the amount of her recovery at such sum as, in your judgment, from the evidence, will fairly compensate her, as the widow of the deceased, for the pecuniary loss, if any, which she has sustained by reason of the death of her husband, such amount not to exceed the amount sued for herein. In fixing such amount you may take into consideration her husband's age, health, expectancy of life, and his earning power, and also the contributions, if any, which she might reasonably expect from her husband had be survived. If you find for plaintiff, and further find that her husband was guilty of some contributory negligence, you will reduce the damages recoverable by the plaintiff in proportion to the amount of negligence attributable to the deceased."

Counsel for the defendant insists that this instruction is contrary to the rule laid down by the Supreme Court of the United States in *Kansas City Sou. Ry. Co.* v. *Leslie,* 238 U. S. 599, and other cases on the subject. We do not agree with counsel in this contention. The language used in the instruction shows that the court expressly limited the right of the widow as a beneficiary entitled to recover to her actual pecuniary loss. The instruction is in accord with the rule on the subject laid down by the Supreme Court of the United States in the cases cited in *St. L.-S. F. R. Co.* v. *Pearson,* 170 Ark. 842, 281 S. W. 910, to which reference is here made, that the damages to be recovered by the widow are limited strictly to the financial loss sustained by her.

Error is assigned in giving other instructions by the court and in refusing some asked by the defendant. We do not deem these assignments, however, of sufficient importance to warrant a separate discussion. It is sufficient to say that we have carefully considered them, and find them not well taken. The instructions given by the

court fully and fairly submitted to the jury the respective theories of the parties.

Finally, it is insisted that the court erred in allowing the plaintiff to give the testimony of Frank S. Johnson as shown by the bill of exceptions on the former appeal. There was no error in this respect. Johnson was a witness for the plaintiff on the former trial, and was examined and cross-examined at length. His testimony was taken down by the court stenographer in shorthand and transcribed by him in the bill of exceptions. Johnson has since died. Where it is shown that a witness is dead, his testimony given at the former trial between the same parties should be received as evidence. *Railway Co.* v. *Sweet,* 60 Ark. 550, 31 S. W. 571.

But it is insisted that the court erred in allowing the cross-examination of Johnson to be read to the jury. There was no error in this. *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885. In that case the cross-examination as well as the examination was held to be competent.

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

LIVEOAK v. HOPPER.

Opinion delivered December 13, 1926.

1. SALES—TITLE ACQUIRED.—Where a chattel is sold by the owner to two persons, he who first lawfully acquires the possession will hold it against the other.
2. SALES—DELIVERY.—Delivery of a thing sold is a question of intention of the parties, as manifested by overt acts.
3. SALES—DELIVERY.—A sale of chattels will be treated as complete where any act has been done which was intended by the parties as a delivery.
4. SALES—CONSTRUCTIVE DELIVERY.—Where the buyer and seller of an automobile went to a garage and notified the keeper that a sale had been made to the buyer and the keeper agreed to hold it for him, *held* that an actual delivery was effected, which was good as against a subsequent purchaser.

5. SALE—POSSESSION OF THIRD PERSON.—Where a chattel at the time of sale was in the possession of a third person, who agreed to keep it for the buyer, his possession thereafter became the possession of the buyer.

Appeal from Montgomery Circuit Court; *Earl Witt*, Judge; affirmed.

STATEMENT OF FACTS.

F. C. Liveoak recovered judgment before a justice of the peace against John F. Hopper for the possession of a Ford touring car. Hopper appealed to the circuit court, and the case was tried anew there.

According to the testimony of F. C. Liveoak, the plaintiff, C. H. Shields, owed him a board bill of approximately $167. Shields sold him the Ford touring car in question in payment of his board bill, and gave him a written bill of sale for the car, on the 20th day of January, 1925.

John F. Hopper, the defendant, was a witness for himself. According to his testimony, he purchased the car from C. H. Shields for $110 on the 19th day of January, 1925. Shields owed Hopper $70, and he advanced him $40 in addition. On the same day the parties went to the garage of W. C. Barton, where the car was stored for the purpose of being repaired, and Barton and Shields showed Hopper where the car was. The car had a tire off, so that it could not be used. Hopper said, "Now, Mr. Barton, this Shields car is my car. Don't you let it go out of here without my permission in any way. I am responsible for the garage fees." Mr. Barton replied, "All right."

W. C. Barton was also a witness for the defendant. According to his testimony, John F. Hopper and C. H. Shields came to his garage on the 19th day of January, 1925. Hopper said, "Mr. Barton, I have bought this car from Mr. Shields. I haven't got any place to put it, and I would just like to leave it here." Hopper further stated that he would be responsible for the garage bill. After making the statement, Hopper turned around to Shields and said, "That is right?" Shields replied, "Yes sir."

Again, the witness stated that Hopper said that he had bought the car and that it was his. He asked the witness to keep the car there in the garage, and the witness agreed to do so.

Allen Tolleson was present and corroborated Barton as to what was said and done in the garage.

The court instructed a verdict for the defendant, and from the judgment rendered in his favor the plaintiff has duly prosecuted an appeal to this court.

C. H. Herndon, for appellant.

Isaac L. Awtrey, for appellee.

HART, J., (after stating the facts). It is earnestly insisted by counsel for the plaintiff that the circuit court erred in directing a verdict in favor of the defendant.

It is a well settled rule of law that, when the same chattel is sold to two persons, he who first lawfully acquires the possession will hold it against the other. The plaintiff claims under the bill of sale executed to him by Shields on the 20th day of January, 1925, and the defendant claims under a verbal purchase from Shields on the preceding day. It has been uniformly held by this court that delivery is a question of intention of the parties, as manifested by overt acts, and that a sale of chattels will be treated as complete where any act has been done which was intended by the parties as a delivery. *Elgin* v. *Barker,* 106 Ark. 482, 153 S. W. 598; *Hodges Bros.* v. *Bank of Cove,* 119 Ark. 215, 177 S. W. 925; and *Nance* v. *Bell,* 153 Ark. 229, 240 S. W. 8.

In the case at bar it was established by the testimony of the defendant and by that of two disinterested witnesses that the Ford car, which was in the garage of one of the witnesses, was turned over by Shields to the defendant, and that the owner of the garage agreed to hold the car for the defendant and to charge the repairs on it to him. This constituted an actual delivery of the car. It was the only delivery of the car which could be made under the circumstances. The delivery was made and sale consummated on the 19th day of January, 1925, which was the day before that on which the plaintiff

claimed to have purchased the car. Thus it will be seen that the undisputed facts show that the defendant bought the car and acquired the open and exclusive possession of it before the plaintiff claims to have acquired any title to it.

Again, the general rule is that, where the property, at the time of the sale, is in the possession of a third person, and he is notified of the sale, and agrees to keep it for the vendee, his possession henceforth becomes the possession of the vendee. 35 Cyc. 193.

In *Field* v. *Simco,* 7 Ark. 269, there was a complete oral contract of sale of chattels in the hands of a bailee who was notified of the sale. The property was seized by a creditor of the seller after the notice to the bailee but before there was any attempt by the purchaser to remove it. It was held that the bailee's possession became that of the purchaser, and satisfied the law as against the creditor.

It follows that the judgment must be affirmed.

McCOY & SON *v.* ATKINS.

Opinion delivered December 13, 1926.

1. REPLEVIN—JUDGMENT ON DELIVERY BOND.—Judgment against the surety on a delivery bond in replevin should be for the value of the property in case it is not returned, instead of for a greater amount named in the bond.
2. REPLEVIN—JUDGMENT AGAINST DEFENDANT—LIABILITY OF SURETY.—In replevin by a mortgagee for mortgaged chattels, judgment against the mortgagor is authorized by Crawford & Moses' Dig., § 7410, in order that he may prevent foreclosure by paying the judgment, but such judgment does not affect the surety on his delivery bond.

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

STATEMENT OF FACTS.

This is an action in replevin by J. E. McCoy & Son against A. Atkins to recover an automobile and three

mules under a chattel mortgage executed by the defendant to the plaintiffs. Upon a former appeal in the case the judgment was reversed because the circuit court had erred in holding that the plaintiffs had not complied with the statute in furnishing to the defendant a verified statement of his account, which is required by our statute as a prerequisite to the foreclosure of a chattel mortgage. *McCoy & Son* v. *Atkins,* 167 Ark. 250, 267 S. W. 779.

Upon a remand of the case the plaintiffs proved the amount of their mortgage debt, and also introduced in evidence a bond, filed in the case by the defendant, with W. W. Mitchell as surety, the body of which is as follows:

"We undertake and are bound to the plaintiffs, J. E. McCoy and R. T. McCoy, composing the firm of J. E. McCoy & Son, in the sum of one thousand dollars, that defendant, A. Atkins, shall perform the judgment of the court in this action."

The jury returned a verdict for the plaintiffs in the sum of $1,284.23 debt, with the accrued interest. The jury further found for the plaintiffs for the return of the property sued for or its value in the sum of $225. It was therefore adjudged by the court that the plaintiffs recover of the defendant the sum of $1,284.23 for his debt, with the accrued interest. It was further adjudged that the plaintiffs recover from the defendant the possession of the automobile and the three mules sued for, and that, in case delivery thereof cannot be made, the plaintiffs recover from the defendant and W. W. Mitchell the sum of $225, the value of said property. The plaintiffs have duly prosecuted an appeal to this court.

George Brown, for appellant.

Woodson Mosley, for appellee.

Hart, J., (after stating the facts). It is conceded that the sole issue raised by the appeal is whether or not the circuit court erred in rendering judgment against W. W. Mitchell, the surety in the replevin bond of the defendant, for the sum of $225, which the proof showed

to be the value of the mortgaged property, instead of for $1,000 as named in the bond.

It is insisted by counsel for the plaintiffs that W. W. Mitchell, the surety on the delivery bond given by the defendant in the replevin suit, is liable for the full amount named in the bond instead of the value of the property, and that the court erred in only rendering judgment against Mitchell for the value of the property as found by the jury. We cannot agree with counsel in this contention. The liability of Mitchell as surety on the delivery bond in the replevin action is fixed by the terms and conditions of his bond. The terms of a delivery bond in a replevin action are fixed by statute, and the bond signed by Mitchell in this action is in conformity with the statute. Section 8655 of Crawford & Moses' Digest reads as follows:

"In all actions for the recovery of personal property, where the defendant has given a delivery bond as now provided for by § 8649, the court or jury trying the cause may not only render judgment against the defendant for the recovery of the property, or its value, together with all damages sustained by the detention thereof, but also, upon motion of the plaintiff, render judgment against the sureties upon his said delivery bond for the value of the property, and also damages as aforesaid, as the same may be found and determined by the court or jury trying the case."

Mitchell, by the terms of his bond, bound himself unto the plaintiffs in the sum of $1,000 that the defendant, A. Atkins, should perform the judgment of the court. Under the provisions of § 8655, relating to actions in replevin, it was the duty of the court to render judgment against the defendant for the recovery of the property or its value, and also, upon motion of the plaintiff, to render judgment against the surety on the delivery bond for the value of the property and the damages sustained by the detention thereof. In the case at bar no damages were proved, and the value of the property was fixed by the jury, upon the evidence introduced, at $225. The cir-

cuit court correctly rendered judgment in favor of the plaintiffs against Mitchell for this amount.

It is true that the jury also found for the plaintiffs against the defendant in the sum of $1,284.23 for their debt, but the surety on the delivery bond was not concerned with the amount of the mortgage debt owed by the defendant to the plaintiffs. This, under our statute, is only done for the benefit of the defendant in order that he may pay the judgment for the balance due on his mortgage indebtedness and thereby prevent a foreclosure of the mortgage. Crawford & Moses' Digest, § 7410. This part of the judgment, however, does not affect the surety on the delivery bond. Judgment can only be rendered against him for the value of the property in case it is not returned by the defendant as provided in the judgment. *Spear* v. *Ark. N. B.*, 111 Ark. 29, 163 S. W. 568; *Bowser Furniture Co.* v. *Johnson,* 117 Ark. 496, 175 S. W. 516; *Barnett Bros.* v. *Henry,* 133 Ark. 531, 202 S. W. 707; and *Jones* v. *Keebey,* 159 Ark. 586, 252 S. W. 551.

It follows that the judgment will be affirmed.

ROAD IMPROVEMENT DISTRICT NO. 7 *v.* ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Opinion delivered December 13, 1926.

1. RAILROADS—NOTICE TO CONSTRUCT HIGHWAY CROSSING.—Under Road Acts 1919, No. 292, § 24, imposing upon any railroad running through a road improvement district the duty to construct highway crossings, *held* that no notice to a railroad company to construct such crossings was necessary where plans for the crossings had been prepared and filed with the county clerk, of which the railroad was required to take notice.
2. RAILROADS—CONSTRUCTION OF HIGHWAY CROSSINGS.—Where Road Acts 1919, No. 292, creating a road improvement district, imposed upon the railroad company the duty of constructing highway crossings, and it failed to discharge such duty, the improvement district, in constructing such crossings, was not a volunteer, and was entitled to recover the cost thereof from the railroad company.

Appeal from Little River Circuit Court; *B. E. Isbell,* Judge; reversed.

Otis Gilleylen, for appellant.

King, Mahaffey & Wheeler, for appellee.

SMITH, J. Appellant, Road Improvement District No. 7 of Little River County, filed a complaint in the circuit court of that county which contained the following allegations:

Plaintiff is a corporation created by special act No. 292, passed at the 1919 session of the General Assembly (Acts of 1919, page 1205), for the purpose of constructing and improving certain roads within the boundaries of the road district. The defendant, St. Louis-San Francisco Railway Company, operates a line of railroad through said district. In the construction and improvement of the roads in the district, it became necessary to construct the improved highway across the tracks of the railway in four places, which were named. The plans and specifications for the proposed improvement which the commissioners of the district were required to have prepared, included plans and specifications for the construction of the road crossings, and these plans and specifications were duly filed with the clerk of the county court as required by said act 292. Section 24 of act 292 imposed upon any railroad running through the district the duty to construct crossings for the highway over its tracks, and provides that such crossings shall be of the same material and shall be constructed in the same manner as the highway crossing the tracks.

The complaint further alleged: "That on the..... day of ....., 1920, the plaintiff notified defendant, orally, through its section foreman, J. A. Howard, and F. F. Stroud, its station agent at Foreman, of its duty to construct said road across its tracks at the aforesaid crossings, and requested it to make, build and construct said crossings according to the plans and specifications for the construction of said highway on either side of its said track, including the plans and specifications for the crossing on said track. That said defendant then undertook

to construct said crossings according to said plans and specifications; that, in furtherance of its said undertaking, it placed the gravel on the aforesaid crossing number one. That thereafter it failed, neglected and refused to complete the making and crossing of its track at crossing number one, and failed, neglected and refused to make, build or construct crossings numbers two, three and four, or any part thereof."

That, by reason of defendant's failure, neglect and refusal to construct the crossings, it became necessary for the road district to construct said crossings at it own expense, an itemized statement of which was given, aggregating $1,929.36.

The complaint further alleged that, in order to expedite the work of building the roads, it was necessary that the crossings be constructed without delay, and that to have delayed the construction thereof would have worked a great financial loss and irreparable injury to the district, for which it had no adequate remedy, and that, after the wrongful and unlawful failure and refusal of the railroad company to construct said crossings, the same were made by the district and paid for by it, the payment being made under compulsion of the circumstances.

Demand for payment of the cost of the construction was alleged, and the refusal of payment by the railroad company, whereupon the district prayed judgment for the cost to it of the crossings.

A demurrer was filed by the railway company, which was sustained by the court, and, the district standing on its complaint, the same was dismissed as being without equity.

Section 24 of act 292 provides that "whenever any of said highways shall cross the track of any railroad or tramroad, the company owning such track shall make such crossing of the same material and in the same manner as the highway on either side thereof, and shall bear the cost of such crossing and of its maintenance."

Under this statute it was, and is, the duty of the railway company to construct and maintain these crossings. The validity of the statute and the binding effect of the section quoted is not questioned. If it were, the cases of *Hahn & Carter* v. *Gould S. W. Ry. Co.*, 113 Ark. 537, 168 S. W. 1064, and *St. Louis S. W. Ry. Co.* v. *Royall*, 75 Ark. 530, 88 S. W. 555, fully sustain the statute.

It is insisted, however, that the demurrer was properly sustained because the district was a mere volunteer in the construction of the crossings, and cannot recover on that account. It is argued that the district was a mere volunteer because it gave no valid or sufficient notice to the railway company to discharge this duty, and it is said that this notice should have been given, and, upon failure to comply therewith, the railway company could and should have been compelled by mandamus to construct the crossings. We think that no notice to the railway company was necessary to make the duty to construct the crossings binding upon it. This duty was imposed by a statute of the State, of which the railway company must take notice. *Little Rock & N. R. R. Co.* v. *Little Rock, Miss. R. & T. R. Co.*, 36 Ark. 663, 677; *Bevens* v. *Baxter*, 23 Ark. 387; *Carroll County* v. *Reeves Construction Co.*, 154 Ark. 434, 242 S. W. 821.

The complaint alleges, and the demurrer admits, that the plans for the crossings had been prepared and filed with the clerk of the county court of the county in which the district was situated, pursuant to the requirements of the statute. The railway company, like all other owners of property in the district, was therefore charged with notice of these plans, and no additional notice was necessary to make the requirements of the statute binding on the railway company.

The complaint alleges that the railway company had knowledge that the work, pursuant to the plans, had so far proceeded that the installation of the crossings had become necessary in the orderly execution of the plans of the district, and it thereafter failed to discharge the duty imposed on it by the statute to construct the crossings.

This being true, the district was not a volunteer in constructing the crossings. It was compelled to do so under compulsion of the circumstances, as was said in the case of *Hahn & Carter* v. *Gould S. W. Ry. Co., supra.*

If it be conceded, as is insisted by appellee, that the road district might, by mandamus, have required the railway company to construct the crossings, it does not follow that the road district was limited to that remedy. The complaint alleges that delay in the construction of the crossings would have delayed other construction work and have entailed great and irreparable loss to the district, and the district was therefore compelled, by compulsion of the circumstances, to discharge a duty which the law imposed upon the railway company.

In 6 R. C. L., page 588, chapter on Contracts, subtitle Quasi Contract, or Contract Implied by Law, it is said: "* * * Certain legal duties, though of a contractual nature, are not based on consent. These, as has already been stated, are sometimes spoken of as contracts implied in law, but are more properly called *quasi* contracts, or constructive contracts. They are contracts in the sense that they are remediable by the contractual remedy of assumpsit. In the case of such contracts, the promise is purely fictitious, and is implied, as has already been suggested, in order to fit the actual cause of action to the remedy. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. The intention of the parties in such case is entirely disregarded, while, in cases of express contracts and contracts implied in fact, the intention is of the essence of the transaction. As has been well said, in the case of consensual contracts the agreement defines the duty, while in the case of *quasi* contracts the duty defines the contract. The duty which thus forms the foundation of a *quasi* contractual obligation is frequently based on the doctrine of unjust enrichment."

Here, under the allegations of the complaint, the road district has performed a work essential to its own exist-

ence and the performance of its functions, and this was a work which the railway company was required by law to perform, but failed and refused to do. The road district was therefore not a volunteer, and the demurrer to the complaint should have been overruled.

The judgment of the court below is therefore reversed, and the cause will be remanded, with directions to overrule the demurrer.

CLAY v. ENGLAND.

Opinion delivered December 13, 1926.

DRAINS—CONSTRUCTION OF ADDITIONAL OUTLET.—Where a new canal was proposed to furnish an outlet for a drainage system, which outlet was not available until after the drainage improvement, organized under Crawford & Moses' Dig., § 3607 *et seq.*, had been completed, it was not an extension of a canal originally constructed nor a widening or deepening of ditches that were originally completed, and therefore was not authorized by § 3630, *Id.*

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

Ben B. Morris, for appellant.

SMITH, J. The Keo-England Drainage District No. 4 of Lonoke County was organized in 1917 under act 279 of the Acts of 1909 (§§ 3607 *et seq.*, C. & M. Digest) and the acts amendatory thereof. The district embraces about 15,000 acres of land, and the benefits assessed totaled $143,970, against which bonds were sold to the amount of $65,000, the proceeds of which were used in paying the construction costs of the improvement. All the construction work contemplated by the original plans, upon which the assessment of betterments was based, was completed in 1919, and no work has been done since that time, except to clean out the canals.

The principal drainage canal begins at the corporate limits of the town of Keo, and extends in a southeasterly direction to the boundary line between Lonoke

and Jefferson counties, where it empties into Wabbaseka Bayou. This canal is about seven miles long. In addition, there are certain laterals emptying into the main canal, having a combined mileage of about eight miles, so that the total length of all the canals of the district amounts to fifteen miles.

After the completion of the improvement, it became apparent that the outlet provided in the Wabbaseka Bayou was insufficient to take care of the water which the various canals carried and emptied into the Wabbaseka Bayou, as a result of which certain lands in the district are frequently overflowed in the spring, during planting time. As a result of this condition, the improvement has not given the expected relief. On the contrary, considerable land in the district is damaged by the improvement rather than benefited by it, as was contemplated and as would have been the case had the outlet proved sufficient.

At the time the original plans were adopted Wabbaseka Bayou was the only available outlet, and was thought to be sufficient, but, from the completion of the improvement, this outlet has been found to be inadequate. Since the completion of the canals a part of the headwaters of Plum Bayou, which runs along the west boundary of the district, have been diverted into the Arkansas River, as a result of which the high-water mark of this bayou has been so lowered that it has been ascertained, by a survey made for that purpose, that this bayou may also be used for outlet purposes for the drainage district, thus diminishing the quantity of surface water carried and poured into Wabbaseka Bayou.

The facts stated are shown both in the report of the district's engineer and in his testimony given at the trial from which this appeal comes.

After the engineer had made his survey and report, showing that an additional outlet was available, the commissioners of the district filed a petition with the county court of Lonoke County praying an order authorizing the levy of additional taxes upon the lands of the

district to pay the construction cost of the additional outlet into Plum Bayou, and, after due notice to the landowners, the petition was heard and granted.

Thereupon appellant, who is a landowner in the district, brought this suit in the chancery court of Lonoke County to enjoin the commissioners of the district from proceeding with the construction of the new canal, alleging that the county court was without jurisdiction to authorize it.

Under the original plan, a lateral numbered 2 in the northern part of the district ran into the main canal, and it is now proposed to construct the additional outlet from a point in this lateral to Plum Bayou. This new canal would be about 2½ miles long, and the estimated cost of the extension is $14,685. It is proposed to issue additional bonds to construct this additional canal, but its cost, added to the cost of the original improvement, would not exceed the betterments originally assessed.

The answer filed by the commissioners admitted all the allegations of the complaint except one, to the effect that the proposed additional canal constitutes an original and independent construction work, but alleged, on the contrary, that this canal was incidental and essential to the original drainage system, and thus, unless constructed, the money already expended would be largely wasted.

The cause was submitted upon the pleadings and the testimony of the engineer. This testimony was to the effect that the main canal's outlet was never adequate, but was the only one available when the plans for the improvement were made, and that, because of the inadequate outlet, a large body of land in the district not only derives no benefit from the improvement, but, on the contrary, is greatly damaged by the overflowing of the canal. His testimony establishes the fact that an additional outlet may now be had by constructing an additional canal draining into Plum Bayou, as stated above.

The court found, from the testimony of the engineer, that the proposed additional canal is incidental and essential, and not original and independent, to the original drainage system, and that its construction was authorized by the drainage law. The complaint of appellant was dismissed as being without equity, and he has appealed.

The proceeding whereby the county court authorized the construction of an additional canal was had under § 3630, C. & M. Digest, and the question for decision is whether that section of the statute conferred jurisdiction on the county court to make the order authorizing this work.

This section of the statute was § 22 of the drainage acts of 1909 (Acts 1909, page 829), and reads as follows: "The district shall not cease to exist upon the completion of its drainage system, but shall continue to exist for the purpose of preserving the same, of keeping the ditches clear from obstructions, and of extending, widening or deepening the ditches from time to time as it may be found advantageous to the district. To this end the commissioners may, from time to time, apply to the county court for the levying of additional taxes. Upon the filing of such petitions, notices shall be published by the clerk for two weeks in a newspaper published in each of the counties in which the district embraces lands, and any property owner seeking to resist such additional levy may appear at the next regular term of the county court and urge his objections thereto, and either such property owners or the commissioners may appeal from the finding of the county court."

This section of the drainage act was thoroughly considered in the case of *Indian Bayou Drainage District* v. *Walt,* 154 Ark. 335, 242 S. W. 575, in which case the commissioners of the drainage district sought to construct an additional canal and outlet. In that case it is recited that the canal which the commissioners proposed to dig was not an extension of the canal originally constructed pursuant to the plans of the district, nor was it a widening

or deepening of the ditches that were already completed. What was there said is equally true here of the proposed new outlet. It was not a part of the plans of the district; on the contrary, it affirmatively appears that the purpose of the new canal is to furnish an outlet which was not available when the original plans were made and approved, on which the assessment of benefits was based, nor did this outlet become available until after the improvement had been completed.

In the Indian Bayou case, *supra,* it was said that "specific authority for making an improvement of this character must be found in the law, and it is impossible to find in the language of § 3630, *supra,* giving the words 'extending, widening, or deepening,' their plain and natural meaning, any authority for the construction of a new and independent improvement * * *." It was there further said that this section of the statute conferred power upon the commissioners to preserve the drainage system after it had been completed, but that no power was conferred to construct a new and independent drainage canal.

The construction given § 3630, *supra,* in the Indian Bayou case was reaffirmed in the case of *Bayou Meto Drainage District* v. *Ingram.* 165 Ark. 318, 242 S. W. 575. In that case the plans were amended to afford an additional outlet for drainage, and it was contended that this could not be done, once the plans had been made and the assessment of benefits confirmed. After stating that authority was conferred by the statute to make such changes in the plans as were found necessary to afford drainage to the lands in the district after the approval of the plans and the confirmation of the assessment, it was said: "Viewing the statute in that light, we think that the language of the sections referred to is sufficient to authorize a change of plans and an extension of the boundaries at any time before the completion of the improvement as originally planned, and that if, at any time before that point is reached, it is found that the scheme will prove abortive unless there be an extension,

and that other lands will be benefited by such extension, further proceedings may be had to that end."

It was there further said: "If the statute authorizes the change of plans and extension of boundaries, after the approval of the original plans and the assessment of benefits, then it follows that it may be done at any time before the improvement is completed, for there is no other period in the proceedings at which the authority may be limited."

It thus appears that, while authority is conferred to make changes in the plans of the improvement (subject to the duty to reassess betterments to conform thereto), when such changes are found necessary as the work progresses, this authority is at an end, when the plans, original or revised, have been executed.

So here, while the testimony of the engineer shows the necessity for the new outlet to make the proposed improvement a success and to afford the relief contemplated in the organization of the district, it is also shown with equal certainty that this new canal was no part of the plans of the district as originally approved or subsequently revised, and the proceeding in the county court for its construction was not instituted until after the district was a completed project.

The proposed outlet may be necessary and the project without it may be unsuccessful, but this proves only that the original plans, pursuant to which the improvement was constructed, were defective; but this affords no authority, under the statute quoted, as construed in the cases cited, to dig an additional canal after the plans have been fully completed.

It follows therefore that the court was in error in dismissing the complaint of appellant, and the decree is reversed, with directions to grant the relief prayed.

BANK OF DEQUEEN v. TROYER.

Opinion delivered December 13, 1926.

1. JUDICIAL SALES—RECITAL OF CONDITION IN DEED.—A commissioner's deed need not recite that the land is sold subject to the lien of a bank as prescribed in the order of sale, since the deed, though absolute in form, conveys no greater title than the order of sale on which it is based.
2. APPEAL AND ERROR—HARMLESS ERROR.—The question whether a commissioner's deed on sale of land was invalid for failure to recite that the sale was subject to the lien of a bank was immaterial where the supposed paramount lien was disallowed in another case, as, with the disappearance of that lien, an absolute title passed by the sale.
3. JUDICIAL SALES—AUTHORITY OF COMMISSIONER IN SUCCESSION.—An order of the court to a commissioner to make a deed on sale of land under foreclosure was binding on his successor, who might make a deed without an additional order of court, under Crawford & Moses' Dig., § 2196.

Appeal from Sevier Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

Lake, Lake & Carlton, for appellant.

Abe Collins, for appellee.

HUMPHREYS, J. This is an appeal from a decree approving a deed to 217 acres of land, executed on the 27th day of April, 1925, by D. C. Cypert, as commissioner, successor to W. H. Wardlow, commissioner, said deed being based upon the sale of said lands by W. H. Wardlow, commissioner, to Lillian M. Troyer, the appellee herein, pursuant to a decree of foreclosure and order of sale to satisfy a lien upon said land in favor of said appellee for $604.85. The decree of foreclosure and order of sale was entered of record pursuant to a mandate of this court, in the case of *Troyer* v. *Cameron,* 160 Ark. 421, 254 S. W. 688, at the October, 1923, term of the Sevier Chancery Court. The commissioner sold the land on March 15, 1924, after due advertisement, and appellee herein became the purchaser for the sum of $800. When the commissioner's report of sale was filed, one of the appellants herein, the Bank of DeQueen, appeared and filed an intervention asking that it be subrogated to the

lien of Henry Moore, Sr., which was a prior lien to that of appellee, and which prior lien had been satisfied by C. W. and Clara R. Cameron with money borrowed from it. The chancery court of Sevier County sustained the intervention of the Bank of DeQueen by declaring the latter's right to subrogation. Appellee herein appealed from that decree, and this court, on appeal, in the case of *Troyer* v. *Bank of DeQueen,* 170 Ark. 703, 281 S. W. 14, denied the right of subrogation to said bank, and reversed the decree of the chancery court, and remanded the cause with instructions to enter a decree dismissing the complaint of said bank for the want of equity. During the time the case of *Troyer* v. *Bank of DeQueen, supra,* was pending in the Supreme Court, the chancery court approved the sale of the land made on the 15th day of March, 1924, to the appellee herein, subject to the supposed prior lien of said bank, and ordered W. H. Wardlow, commissioner, to make a deed to Lillian M. Troyer, appellee herein. Before presenting the deed, the commissioner was succeeded, as clerk and *ex officio* commissioner, by D. C. Sypert. At the April term, 1925, of the Sevier Chancery Court, D. C. Sypert produced in open court his deed to Lillian M. Troyer, appellee herein, for approval. The deed was absolute and unconditional and made no reference to the supposed rights of the Bank of DeQueen. This deed was approved by the Sevier Chancery Court on the day it was presented.

Appellant contends for a reversal of the decree approving the deed, because the deed, made pursuant to a conditional order of sale, did not recite the condition contained in the order, and because the deed was made without any special order of the court directing D. C. Sypert, as successor to W. H. Wardlow, as commissioner, to execute same.

The condition in the order of sale was that the land should be sold subject to the lien of the Bank of DeQueen, but it was not necessary to recite the condition in the deed to make it a valid instrument. The deed, though absolute in form, conveyed no greater title than the order

of sale upon which it was based. The form of the deed is immaterial now, however, for the supposed prior and paramount claim of the bank was denied to it in the case of *Troyer* v. *Bank of DeQueen, supra,* and, with the disappearance of the aforesaid lien, an absolute title passed under the order of sale and subsequent sale to the appellee herein, who was the purchaser.

The order of the court to W. H. Wardlow, to make the deed as commissioner, was binding upon his successor in office; so D. C. Sypert, his successor, had the right to make the deed without an additional order of the court directing him to do so. Authority was conferred upon him to make the deed by § 2196, Crawford & Moses' Digest, which is as follows:

"The clerks of the circuit courts in the several counties shall be clerks of the chancery courts and *ex officio* masters and commissioners thereof in each of the said counties," etc.

No error appearing, the decree is affirmed.

NEIL *v.* NEIL.

Opinion delivered December 13, 1926.

1. PARTITION—RIGHT TO USE PRIVATE ROAD.—Plaintiff *held* under the evidence to have acquired the right to use a private road across defendant's land as part consideration in a partition of land with defendant.
2. FRAUDS, STATUTE OF—OPERATION AS ENGINE OF FRAUD.—An oral agreement for the partition of lands, including the right of one party to use a private road across another's land, is not within the statute of frauds, which cannot be used as a means of fraud.
3. HOMESTEAD—ABANDONMENT—ADVERSE POSSESSION OF RIGHT-OF-WAY.—In view of the fact that a husband may abandon his homestead, a right-of-way over it may be acquired by adverse user for the statutory period of seven years.

Appeal from Benton Chancery Court; *Lee Seamster,* Chancellor; reversed.

W. O. Young and *Rice & Rice,* for appellant.

John W. Nance, for appellee.

HUMPHREYS, J. Appellant instituted this suit against appellee in the chancery court of Benton County to enjoin him from obstructing a private road on the south side of the south half of the northwest quarter of section 6, township 18 north, range 29 west, in said county. It was alleged in the complaint that appellant acquired the right to the use of said road as a part of the consideration in the division between them of the north half of the northwest quarter and the northwest quarter of the southeast quarter of said section, which was inherited from their father, and used by him from 1892 until November, 1924, when appellee wrongfully and unlawfully obstructed the road by placing stobs and wire across same.

Appellee filed an answer, denying that appellant acquired an easement in the said road as a part of the consideration in the partition of the three forty-acre tracts aforesaid, which they inherited from their father, or that he acquired a right therein by user for more than seven years; and, by way of further defense, pleaded the statute of frauds, and that said road was upon and across his homestead.

The cause was submitted to the court upon the pleadings and testimony introduced by the respective parties, which resulted in a decree dismissing appellant's complaint for the want of equity.

An appeal from the decree has been duly prosecuted to this court, and the cause is here for trial *de novo.*

Appellant and appellee, together with their sister, inherited six forties of land from their father, who died in 1892. They conveyed their undivided interest in three of the forties, not herein described, to their sister, as her full share in the estate, in consideration for her undivided interest in the north half of the southwest and the northwest quarter of the southeast quarter in said section. Prior to the death of their father, appellant purchased the west half of the northeast quarter and appellee the south half of the north-

west quarter of said section from him. They were farmers, who resided upon the respective tracts they purchased from their father. Before and at the time of the purchase a private road was on the south side, adjoining the south line of the south half of the northwest quarter and the southwest quarter of the northeast quarter of said section, used for ingress to and egress from the wire road on the south side of the farm leading to the town of Lowell, the nearest market place to the farm. Each of the parties herein planted apple orchards on a part of the lands they purchased, and afterwards on a part of the lands they inherited, and used the road in question to haul out their products, in order to avoid the hill pulls on the north road leading from appellant's residence on the northwest quarter of the northeast quarter of said section to the wire road. The north road referred to was later converted into a public road and widened by donations of land by appellee and others who owned adjoining lands. In the division of the three forties between appellant and appellee, appellant received the northeast quarter of the southwest quarter, or the middle forty, and the north 30 acres of the northwest quarter of the southeast quarter, and appellee received the northwest quarter of the southwest quarter and the south 10 acres off of the northwest quarter of the southeast quarter of said section. Deeds were made by each to the other in order to effect the division, but no mention was made of the roads in the deeds. According to this division, appellee received a full forty on the main wire road and ten acres on the back side of the farm, whereas appellant received forty acres in the middle and thirty acres on the back side of the farm. Both appellant and appellee testified that it was agreed in the division that appellee should have a road across the south side of the middle forty, next to the south line thereof, so that appellee might have access over same to the ten-acre tract on the back side of the farm, which road was used by him for that purpose until he sold the ten-acre tract.

Appellant testified that he agreed to the partition in consideration that he be allowed the free use of the road on the south side of the south half of the northwest quarter of said section as a means of ingress and egress to and from his land; that it was and is the only practical way to haul apples from his orchard to the nearest shipping point; that his orchard produced from 35 to 40 cars of apples a year, yielding in money between eleven and sixteen thousand dollars annually; that he has used the road under agreement since 1892 until appellee closed it up in 1924.

Frank Wilmoth testified that he is acquainted with the road in controversy; that it had been in use for 43 years; that, during the year 1892, a short time after the division of the three forties between appellant and appellee, they both told him that the agreement was for each to have a road over the lands of the other; that appellant took charge of the road in question and used it the entire time he lived in the neighborhood, which was about seven years; that, during that period, he heard them make the statement detailed above with reference to the division, on several different occasions.

John Walker testified that he lived on the farm for five years, and during the time heard appellee say, on several occasions, that the road in question was agreed upon in the division of the property; that, on one occasion, he heard appellee tell appellant to work it, as it was his road.

John Neil, a son of appellant, testified he had heard both his uncle and his father state each had given the other a road through the land in making the division.

Appellee testified that the only road involved in the division of the three 40-acre tracts between himself and his brother was the road on the south side of the northeast quarter of the southwest quarter which was awarded to him by his brother as a passway to and from the 10-acre tract he got on the south side of the northwest quarter of the southeast quarter of said section; that he

never gave appellant free use of the road in question as part consideration of the division; that occasionally he had permitted him to use the road for a particular purpose, but that his entire use thereof was permissive and not under right.

The first question presented for determination on this appeal is whether appellant acquired the free use of the road in question as part consideration for making the division. The testimony of appellant and appellee is in conflict on this point. Appellant is corroborated by the testimony of his son and two disinterested witnesses, Frank Wilmoth and John Walker. Also by the use of the road for more than seven years. Also by the probability that he would not have accepted the middle and back part of the land in the division if he had not acquired a practical and short route to haul his produce to market, especially in view of the fact that he gave his brother an easement across one of his forty-acre tracts to the ten-acre tract he received on the back side of the farm.

The next question presented for determination on this appeal is whether the statute of frauds is applicable to the facts in the case. It cannot be successfully pleaded and applied in the case, because it would amount to a fraud to allow appellee to retain the property he acquired in the division in violation of the agreement, although not in writing. It is not allowable to use the statute of fraud as a means of fraud. *Keatts* v. *Rector,* 1 Ark. 391.

The next and last question presented for determination on this appeal is whether a right-of-way can be acquired over a homestead by user. The Homestead Act of March 18, 1887, has reference only and solely to conveyancing. *Farmers' Building & Loan Association* v. *Jones,* 68 Ark. 76, 56 S. W. 1062. Notwithstanding said act, the husband may abandon his homestead. *Stewart* v. *Pritchard,* 101 Ark. 101, 141 S. W. 505. In view of the fact that a husband may abandon his homestead, it follows, as a related principle, that a right-of-way can be

acquired over it by adverse user for the statutory period of seven years.

On account of the errors indicated the decree is reversed, and the cause is remanded with directions to enjoin the obstruction of the road.

LOUISIANA PETROLEUM CORPORATION v. OIL WELL SUPPLY COMPANY.

Opinion delivered December 13, 1926.

1. ESTOPPEL—REPRESENTATION AS TO TITLE.—Though the seller of a drilling rig, having no lien, represented to another contemplating extension of credit to the purchaser that the latter owned the rig, the seller will not be estopped to claim title under a subsequent repurchase.
2. ESTOPPEL—REPRESENTATION.—The fact that the purchaser of a drilling rig owed the entire purchase money does not imply that the seller's representation that the purchaser owned the rig was false, where no lien or title was reserved for the purchase money.
3. EVIDENCE—WEIGHT OF TESTIMONY.—Courts and juries need not accept the statements of witnesses, but may weigh the testimony and test the credibility in the light of all the facts and circumstances in the particular case.
4. APPEAL AND ERROR—REMAND FOR NEW TRIAL.—Where the evidence raised a disputed question as to the ownership of property attached, and the trial court upheld the attachment upon an untenable ground, the cause will be remanded for a finding on the question of ownership.

Appeal from Union Circuit Court, Second Division; *W. A. Speer*, Judge; reversed.

Patterson & Rector, for appellant.

Mahony, Yocum & Saye, for appellee.

HUMPHREYS, J. This suit was instituted by appellee against W. E. Hall and H. P. Gann, who composed the partnership of Hall & Gann, in the second division of the circuit court of Union County, for a balance of $7,257.90 due it upon open account; and they sued out an attachment upon the ground of the nonresidence of W. E. Hall, which was directed by the clerk of said county

to the sheriff of Clark County, and levied upon a rotary drilling rig and equipment complete, as property belonging to the said partnership of Hall & Gann.

The appellant and Dr. E. A. Sarter filed an interplea in the attachment proceeding, claiming title to said drilling rig and equipment. Dr. E. A. Sarter claimed an undivided one-sixth and appellant an undivided five-sixths interest in the property levied upon, and they executed a retaining bond in the sum of $5,000 in statutory form, conditioned for the return of the property to the sheriff in the event it should be found to be the property of Hall & Gann.

W. E. Hall filed an answer, denying the indebtedness and all other material allegations in the complaint.

Appellee filed an answer to the interplea, denying that Dr. E. A. Sarter and appellant owned the property and that same was wrongfully levied upon and seized as the property of Hall & Gann, and prayed for a dismissal of the interplea, and for general relief.

When the case was called for trial a judgment was rendered by default against H. P. Gann for $7,257.90, and against W. E. Hall for the same amount, by consent. No appeal has been prosecuted to this court from said judgments. The issue of the ownership of the property levied upon was then submitted to the trial judge, sitting as a jury, which resulted in the finding that appellant was estopped from claiming any interest in the drilling rig and equipment as against appellee, as a creditor of the partnership of Hall & Gann. A decree was rendered, in accordance with this finding, dismissing the interplea and sustaining the attachment as to an undivided five-sixths interest in said rig and equipment, and ordering it sold as the property of Hall & Gann. A decree was rendered, in accordance with this finding, dismissing the interplea and sustaining the attachment as to an undivided five-sixths interest in said rig and equipment, and ordering it sold as the property of Hall & Gann to satisfy the judgment rendered upon the open account, from which is this appeal.

Appellant contends for a reversal of the judgment upon the issue of ownership for the alleged reasons:

First, that it did not estop itself from claiming an undivided five-sixths interest in the drilling rig and equipment by representation of its president and manager that said property was owned by Hall & Gann.

Second, that the undisputed testimony shows that said property belonged to it at the time same was seized under the attachment.

(1). As we understand the record in this case, the finding of fact was made and the judgment was rendered by the court upon the theory that appellant estopped itself to claim an undivided five-sixths interest in said property through the representation made by W. E. Hall, its president and manager, to appellee, that Hall & Gann owned the rig and equipment, as a basis for obtaining a line of credit for said partnership. The undisputed evidence does show that W. E. Hall made such representation to appellee, but this representation cannot be construed into an agreement not to afterwards sell the rig and equipment. The fact, if true, that Hall & Gann had purchased the rig and equipment from appellant on credit, and owed the entire purchase money for same, did not necessarily imply that the representation was false, for it seems that no lien was retained for the purchase money, and that, at the time the representation was made, Hall & Gann actually owned the rig and equipment, free from incumbrances. Under this interpretation of the testimony, it cannot be said that appellant estopped itself from claiming title to the rig and equipment by subsequent purchase, if such purchase was in fact made, on account of representations made by its president and manager, W. E. Hall, to appellee in order to obtain a line of credit for said partnership.

(2). We cannot agree with learned counsel for appellant that the undisputed testimony in the record reflects that the resale of the rig and equipment to it by Hall & Gann was a complete sale, or a *bona fide* sale. Courts and juries are not compelled to blindly accept the

statements of witnesses. In arriving at conclusions they are allowed to weigh the testimony and test the credibility of witnesses, under well defined rules, in the light of all the facts and circumstances in a particular case. Although W. E. Hall testified positively that appellant sold the rig and equipment to Hall & Gann, and that Hall & Gann, being unable to pay for same, turned it back to appellant for the purchase money, yet there are circumstances in the case tending to show that appellant never owned the rig at any time; that, when the rig was first purchased from the Latex Iron Works of Arkansas, a note for $5,000, payable to W. E. Hall, and Hall's individual notes for $1,000, were given as payment for the rig; that the series of transactions whereby the Louisiana Petroleum Corporation attempts to trace its claim of title to the rig and equipment were individual transactions of W. E. Hall and not transactions for the several corporations in which he owned a majority of the stock, and which he controlled and dominated. In view of the fact that the testimony in the record presents a disputed question of fact as to the ownership of the property, and in view of the further fact that the trial court, sitting as a jury, did not determine this issue, but bottomed the judgment on the question of estoppel, the judgment must be reversed, and the cause remanded for a finding as to whether there was a complete resale of the property to appellant by Hall & Gann, and, if so, whether it was a *bona fide* sale.

The judgment is accordingly reversed, and the cause is remanded for a new trial.

McGILL v. MILLER.

Opinion delivered December 20, 1926.

1. EASEMENTS—ADVERSE USE OF ALLEY.—Use of an alley for 19 years by adjoining lot owners under circumstances showing that the use was made as a matter of right and not of permission *held* to establish adverse use, so as to ripen into title by limitation.
2. EASEMENTS—PERMISSIVE USE.—Permissive use cannot ripen into a legal right merely by lapse of time.
3. EASEMENTS—OBSTRUCTION OF ALLEY—RIGHT OF ACTION.—Adjacent lot owners whose only convenient means of access to their properties is through an alley have such special rights therein as entitle them to maintain a suit to prevent its obstruction.
4. EASEMENTS—OBSTRUCTION OF ALLEY—RELIEF.—A lot owner who had built a wall in an alley was properly required to remove it, however inconvenient and expensive it may be for him to do so.

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

T. T. Dickinson and *S. L. White,* for appellant.

Carmichael & Hendricks, for appellee.

McCULLOCH, C. J. This litigation involves a controversy between appellants McGill and Todd on the one side and appellees Miller and Autry on the other side, concerning the right to use an alley between the several properties occupied by the parties in the city of Little Rock.

Appellee Miller is the owner of lot 3, block 2, of Marshall & Wolfe's Addition to the city of Little Rock, and appellants McGill and Todd and appellee Autry are the respective owners of portions of lots 4, 5 and 6 of block 2, in Marshall & Wolfe's Addition. The addition referred to was platted and filed prior to the year 1905 by the then owners, and a man named Booher was the owner of lots 4, 5 and 6, which now comprise the property of McGill, Todd and Autry. Each of these lots are 50x150 feet, and extend east and west, fronting on Wolfe Street. Lot 6 extends full length on Ninth Street on the south, and Booher divided all three of these lots so that the residences established thereon would front on Ninth Street instead of Wolfe.

On March 10, 1906, Booher conveyed to W. S. McCain 54 feet off the west end of lots 4, 5 and 6. He had, prior to that time, conveyed to other parties the other two portions of the lots, namely 48 feet off the east end, which is now the property of Autry, and 48 feet between the two above-mentioned lots, which is now the property of Todd. Booher's deed to McCain contained a stipulation that the conveyance was made "subject to an easement or right-of-way along the north side of lot 4, which easement or right-of-way is hereby reserved for the use of the owners of the remainder of said lot 4, said easement to be ten feet wide." There was no such reservation, however, in the deeds previously executed to other parties covering the other two lots. McCain subsequently reconveyed the property to Booher, but his deed did not carry the stipulation contained in the deed from Booher to him, and Booher subsequently conveyed the property to another party without such reservation, and McGill, in the year 1910, became the owner through mesne conveyances.

Lot 3, in block 2, owned by Miller, has never been subdivided; that lot runs east and west, and Miller's residence fronts on Wolfe Street. Booher built the residence now owned by McGill, and other parties built the residences on the lots now owned, respectively, by Todd and Autry. Todd purchased his property in 1913, and Autry purchased his a few years later. There is an open space of ten feet on the south end of lot 4, along the line of the McGill property and the Todd property, and this has been used as an alley, affording an entrance to each of these properties from Wolfe Street. Todd and Autry have no other means of entering their respective properties from the north or west side. Miller also has been using the open way as an entrance to his property. His use, however, was more limited, as the driveway into his property turns north across his property line a short distance from the mouth of the alley. Several years ago Miller built a stone wall about three feet high near the south line of his property and the

north line of the alley, running from the line of the Autry property west to within a short distance of the mouth of the alley—to the point where he turns from the alley into his own property. It was developed by proof in this litigation that the stone wall built by Miller is not precisely on the line, and extends a short space over into the alley near the west end.

It appears from the testimony in this case that, when the residences were established on the properties now owned by McGill and Todd, the fences and barn were built on the line of this open way or alley so as to leave a space of ten feet along that way. The barn and the fences were destroyed many years ago, and the fences were rebuilt on the line, so as to leave an open way between the fences on the back end of the property occupied by McGill and Todd and the line of Miller's property across the alley. McGill has, within the last few years, built a garage fronting on Wolfe Street at the corner of the alley. Todd has a barn or garage on the rear end of his property, about four feet from the line of the alley. Mr. Autry's garage is situated on his property fronting the east end of the alley.

Shortly before the commencement of this action McGill attempted to place a fence across the mouth of the alley, and Todd also attempted to build a fence across his line. These fences shut up the alley completely and prevented its use by any one, and the present action was instituted in the chancery court of Pulaski County by Miller and Autry against McGill and Todd to prevent them from obstructing the alley. A temporary injunction was granted at the commencement of the action, requiring appellants to refrain from obstructing the alley during the pendency of the suit, and, on final hearing of the cause, the injunction was made perpetual. The court also in its decree required Miller to move back the west end of the wall constructed by him so that the same would be on a continuous straight line, beginning at the east end at the line of the Autry property. McGill and Todd prosecuted appeals, and Miller cross-appealed.

It is the contention of appellees that the way in controversy was left open and marked by the establishment of fences and buildings as an alley-way for the use of other owners of the property in the block and has been so used for a period of nineteen years, up to the commencement of this action, so that an easement has been acquired by limitation. *Scott* v. *Dishough,* 83 Ark. 369, 103 S. W. 1153.

It is the contention of appellant McGill that the use of the way was merely permissive and never ripened into an adverse right, and that he has the privilege of withdrawing the permission and obstructing the alley at any time it suits his convenience. He admits the attempt to close the alley, but seeks to justify it by the claim that no one ever acquired the right to use the alley so as to prevent him from closing it. It is difficult to ascertain from the abstract and brief just what Todd's justification is for closing the alley. His own testimony tends strongly to show that it was left open nineteen years before this litigation arose, for the use of the owners of other property in the block. We are giving no force to the reservation in the deed from Booher to McCain, for the property now owned by Todd and Autry, respectively, was conveyed away by Booher long before the execution of the deed to McCain. McGill and his [illegible] tors took the title free of any reservation. [illegible] gran- Todd nor Autry can base any rights u[illegible] and neither tion for the simple reason that th[illegible] upon the reserva- purchased by them or their pr[illegible] the property was not right to rely upon the res[illegible] ecessors in title with the must turn entirely u[illegible] ervation of the alley. The case use of the alle[illegible] upon the proof concerning unrestricted other own[illegible] for a sufficient length of time to give the and [illegible] ers the right to use the alley as an easement, we are of the opinion that the finding of the chancellor upon that issue is sustained by the preponderance of the testimony. The testimony of both Todd and Miller shows that the way had been kept open and used for about nineteen years prior to the commencement of this suit. The line of the alley was marked by the fences

and a barn along the south line, which constituted an invitation to the public to use it as an alley. It is true that the use originated as a permissive right and not upon any consideration, but the length of time which it was used without objection is sufficient to show that use was made of the alley by the owners of adjoining property as a matter of right and not as a matter of permission. In other words, the length of time and the circumstances under which the alley was opened were sufficient to establish an adverse use so as to ripen into title by limitation. *Clay* v. *Penzel,* 79 Ark. 5, 94 S. W. 705; *Scott* v. *Dishough, supra; Medlock* v. *Owen,* 105 Ark. 460, 151 S. W. 995.

It is true that the testimony of McGill establishes the fact that, after he became the owner of the property in 1910, the alley was frequently used, but that there was an embankment at the mouth of the alley, so that it was difficult to use it; and he also testified that one of his neighbors asked permission to dig down the alley and use it for the purpose of hauling manure. He stated that he agreed for his neighbor to use the alley, but his own testimony shows that the alley was open and plainly marked prior to that time, and was occasionally used. His testimony is not sufficient to show that, prior to that time, during the years that the alley had been open, the use of it had been merely permissive, nor that those who used the alley after he acquired the property did so merely by permission.

We give full recognition to the principle of law established by the numerous decisions cited in the brief of appellants, to the effect that a permissive use cannot ripen into a legal right merely by lapse of time, but we think that the evidence is sufficient to show that this use was made of the alley as a matter of right and in hostility to the right of the original owner to close the strip and prevent its use. The open way was for the especial benefit of the owners of adjoining property, and is the only convenient access that they have to their properties, and this confers upon them such special right as enables

them to maintain a suit to prevent an obstruction. We think that the chancellor was correct in holding that there was an easement for use of the alley, and that neither McGill nor Todd had the legal right to close it.

The court was also correct in requiring Miller to move his wall back so as not to obstruct the alley. He had no right to build the wall there, and it does not lie in his mouth to say that it is inconvenient and expensive for him to remove it.

We think that the decree was correct in its entirety, and it is affirmed.

HUMPHREYS, J., (dissenting). The real purpose of this suit by appellees against appellants was to enforce by injunction an alleged easement over the back or north end of appellants' lots. The alleged easement was not dedicated to the public when the lots were platted, and appellees admit that they never acquired such right by deed or other conveyance. Appellees did not claim the use of the strip of ground by virtue of a technical prescription which presupposes a grant. They base their alleged right to an easement upon seven years' adverse user of the strip of ground. The majority opinion concedes that the case must turn upon this question alone. As I read this record, the evidence is wholly insufficient to support an adverse user for the statutory period. It is conceded that the use by appellants and others originated as a permissive right and not for a consideration. I am at a loss to find anything in the evidence indicating that this permissive use was ever converted into a restricted or adverse use by appellees or any other person. The law is that a permissive use can never ripen into title by limitations. This court is committed to the doctrine that, where an entry is permissive, the statute of limitations will not begin to run against the legal owner until an adverse holding is declared by act or word. *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 414; *Chicot Lumber Co.* v. *Dardell,* 84 Ark. 140, 104 S. W. 1100; *Gee* v. *Hatley,* 114 Ark. 376, 170 S. W. 72; *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830.

The construction by appellants of fences and garages a short distance south of their north line is not inconsistent with the permissive use to their neighbors of the strip left by them on the north side of their lots. They had a perfect right to build fences and garages on their lots at any point or place they desired. Dr. McGill testified positively that, at the time he purchased his lot, he found an embankment on the west side thereof which prevented him or any one else from entering the strip of ground claimed by appellees, and that he gave the party who occupied the lot east of him permission to take down the embankment to haul more manure in that way. He also testified that he assisted his neighbor in taking down the embankment so that he might himself come in that way. He also testified positively that he gave appellees permission to use the strip of ground as a private way as long as they could use it without any friction between themselves.

I do not understand that anybody contradicts the fact that this strip of ground was blocked off by an embankment on Wolfe Street when Dr. McGill purchased his property, or that there is any direct denial of the fact that Dr. McGill extended permission to his neighbors, including appellees, to use the back part of his lot to enter their several properties as long as it could be used peaceably by them all. This testimony is in keeping with the admission of appellees and the declaration in the majority opinion that the original user of the strip in question was permissive.

I am convinced, after a very careful reading of the record, that the decree of the chancellor should be reversed, and the cause remanded with directions to dismiss appellees' complaint.

MARTIN v. KRAEMER.

Opinion delivered December 20, 1926.

NEW TRIAL—INADEQUACY OF DAMAGES.—Where the undisputed evidence showed that plaintiff's automobile was damaged $47 in a collision, but the evidence was conflicting as to responsibility, a judgment for $1 was inadequate, justifying a new trial.

Appeal from Garland Circuit Court; *Earl Witt*, Judge; reversed.

Cobb & Cobb, for appellant.

Martin, Wootton & Martin, for appellee.

McCULLOCH, C. J. An automobile, driven by appellant along a street in the city of Hot Springs, collided with appellee's car, operated by a hired driver, and appellant instituted this action against appellee, alleging that the collision occurred through the negligence of the latter's servant, and praying for the recovery of damages in the sum of $300. In the trial of the case it was undisputed that appellant's car was very considerably damaged—appellee admitted in his testimony that it would take $47 to repair the damage to the car—but there was a conflict in the testimony as to the responsibility for the collision, each party claiming that the other was at fault. Appellee, in his answer, denied the allegations of negligence on the part of his driver, and claimed damages from appellant in the sum of $50 on the ground that the collision was caused by appellant's own negligence. The issues were submitted to the jury on correct instructions, and there was a verdict in favor of appellant for the sum of one dollar. A reversal of the judgment is sought on the ground that the findings of the jury are conflicting in fixing liability upon appellee for the collision, but awarding only nominal damages, the evidence being undisputed that substantial damage resulted to the car.

We are of the opinion that the contention of appellant is sound and that the judgment must be reversed. The verdict is conclusive as to the responsibility for

the collision and the liability of appellee for all damages that resulted to appellant in the injury of the car.

Counsel for appellee contend that, the evidence being conflicting on the question of responsibility for the collision, the verdict of the jury was a mere compromise, and that this accounts for the fact that the jury awarded only nominal damages. This is not, however, a correct interpretation of the verdict, and the conflict therein cannot be reconciled in that way. We can only treat the verdict as settling the question of liability, and, if the amount of damages fixed by the jury was supported by substantial testimony, we would affirm the judgment, but such is not the case. The undisputed evidence is that the damage amounted to at least $47, and, according to the testimony adduced by appellant, it amounted to considerably more than that sum. Under similar conditions this court has reversed judgments of trial courts. *Dunbar* v. *Cowger*, 68 Ark. 444; *Carroll* v. *Texarkana G. & E. Co.*, 102 Ark. 137.

The judgment in this case will therefore be reversed, and the cause remanded for a new trial. It is so ordered.

STEPHENS v. STATE.

Opinion delivered December 20, 1926.

1. HUSBAND AND WIFE—DESERTION OF WIFE—EVIDENCE.—Evidence *held* to sustain a verdict finding defendant guilty of wife desertion, under Crawford & Moses' Dig., § 2596, as amended by Acts 1923, No. 331.
2. HUSBAND AND WIFE—DESERTION OF WIFE—JURY QUESTION.—Where testimony as to whether there had been willful abandonment and refusal to support defendant's wife was conflicting, the weight of the evidence was for the jury.
3. HUSBAND AND WIFE—DESERTION OF WIFE—INSTRUCTION.—An instruction that a husband has a right to select a home for himself and family, and that, if defendant provided a home with his parents for his wife while he solicited insurance elsewhere and provided for his wife as well as his station in life would reason-

ably permit, was properly refused where it was abstract, argumentative and misleading.

Appeal from Howard Circuit Court; *B. E. Isbell,* Judge; affirmed.

Steve Carrigan and *Feazel & Steel,* for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

WOOD, J. The appellant was tried and convicted in the Howard Circuit Court on an indictment which, in apt language, charged him with the crime of wife desertion, under § 2596 of C. & M. Digest, as amended by act 336 of the Acts of 1923. The facts are substantially as follows:

Mrs. Hershell Stephens testified that she married the appellant on the 25th of April, 1924, when she was fifteen years old. They went immediately to the home of appellant's parents at Mineral Springs, Howard County, Arkansas, and had lived there until the day before the indictment was returned against appellant, which was the 27th day of August, 1926. For about eight months past the appellant had been living at El Dorado, and was engaged in the business of writing insurance. During that time he had contributed about $15 to witness for herself. He sent her $10 before her baby came, in addition, and gave her money to buy things for the baby. Witness went to Magnolia, and advised the appellant over the telephone, on Saturday prior to the separation on Sunday, that she had come there to go to El Dorado with him. Appellant said she could not go; that it was too expensive. Witness told him that he would have to rent her a room then, and he said he would not. They came on back to Mineral Springs together, and, when they got there, appellant said, "I have decided while we are young we will quit. I am fixing for the child $12.50 a month, and as he grows older I will increase it." Appellant did not propose to leave witness anything. When they got back to Mineral Springs, appellant put witness out at the hotel. She had no money. Appellant told witness that he was not

going to live with her any longer. He asked witness if there was anything she wanted from the house. Witness told him there were some clothes. Appellant told witness to go up next morning and get her things. Witness went, but did not get anything. She did not see appellant any more after that. She heard he went back to El Dorado. Appellant had bought witness, since their marriage, two nice dresses. Witness purchased the clothing she had on, and had them charged to the appellant at Magnolia. Appellant had bought her six dresses since they were married. Appellant came home recently with a check for $700, and witness didn't know how much more. That was about a week before the separation. Appellant had been paying $25 for his meals and $20 for his room and laundry bill. They were married in Howard County, something over two years ago, and appellant left witness at Mineral Springs. Witness had been trading on appellant's account, before the separation, at Dickinson & Brother's. Witness did not know whether appellant had stopped her accounts anywhere since the separation or not. Witness and appellant lived with the appellant's parents as members of the family. Appellant had taken out two insurance policies on his life, while appellant and witness were living together, for witness' benefit. Of the $700 that appellant brought home with him at one time, $400 belonged to the insurance company. Witness didn't know what became of the other $300. Appellant paid a few bills at Mineral Springs. He stated that he paid $75 on a note. Appellant and witness had not had any falling out, any more than any other young people. Witness had not quit loving the appellant. Their relations while they were at appellant's father's house for a while were pleasant. At the time her husband left her there they were not pleasant. That was one of the reasons witness wished to move. Their little boy was six months old.

Mrs. Ward testified that she was acquainted with the appellant and his wife. Appellant is witness' nephew. Witness kept a hotel in Mineral Springs.

Appellant and his wife came to the hotel last Sunday, about six o'clock in the afternoon, and appellant left his wife there. He came back, and they went off together and were gone about twenty or thirty minutes, and again came back, and the last time appellant didn't stay. When Mrs. Stephens came in the house she was crying. Witness was asked if she heard the defendant, at any time, say he didn't intend to live with his wife—that he would go to the penitentiary before he would do it. Witness answered, "Well, he just stated before he would live with her he would—he made that remark." This conversation was after the indictment was lodged against appellant. Witness told appellant he had better compromise with his wife—that he might have to go to the penitentiary, and, in reply, he said that he would go to the penitentiary before he would do it.

Mrs. C. C. Stephens, another aunt of appellant, testified to a conversation she had recently with the appellant as follows: He was at the hotel, and was talking about this, and I asked him why he didn't compromise, and he said he didn't think he could. I told him I believed he could. I said that might be the best for you if you would, or give her alimony. He said, "Aunt Pearl, I will just go to the pen before I will do that." This conversation with appellant was after he had been indicted and arrested. Witness was advising him as his aunt. He told witness that he would go to the pen before he would pay alimony. It was shown by appellant's father that appellant and his wife had lived with witness since they were married. Appellant had paid part of the grocery bills. There were six in the family when appellant and his wife were there. Appellant and his wife had rooms to themselves. Appellant's wife came up with a truck Monday morning and moved her stuff away. The appellant had come in Sunday night before and said that he had left his wife and boy at a hotel in Magnolia. Appellant was working in El Dorado in the insurance business, and when he left he left some money for his wife. Witness treated appellant's wife like she was one

of his children. They lived there together peaceably and happily. Witness didn't know that there was any trouble between appellant and his wife.

Appellant's mother testified that she and appellant's wife lived together happily. They both did housework. Appellant treated his wife kindly. He was working in the oil fields, and would come home week-ends.

Other witnesses, not members of the family, testified to the effect that the appellant and his wife lived happily, so far as they could observe, in the home of appellant's father and mother.

Appellant himself testified that he did not desert his wife. She called him at El Dorado, and told him that she was going to Magnolia, and he replied, "I will meet you there, sweetheart." Appellant met his wife and baby at Magnolia, and saw she was mad. She refused to eat any dinner, and said that she didn't intend to return to Mineral Springs. Appellant explained to her that he had no money—was just getting started—and that, if she would help him a little while longer, they would move to El Dorado. She replied that she was going to place their baby in the orphans' home and she was going to Dallas. She asked appellant to get a divorce, and he told her he would not do so; that she could get it. She offered him their wedding ring, and he refused to take it. Appellant explained that he had received the $700 check in payment of the premium on the insurance policy and the disposition he made of it, paying $446 of it to the company and using the balance in the payment of bills contracted by himself and wife. Appellant had never refused to support his wife. He felt hurt because she had indicted him while she was mad. He loved his wife and baby, and has never refused to support them. He denied that he had stated to her that they had better quit. Appellant had been making from fifty to a hundred dollars a month, but was then doing better. Appellant had attempted to talk with his wife since the indictment, but she had refused, saying that she would send him some "Chesterfields" at the Tucker farm.

The appellant's wife, in rebuttal, testified, denying that she told her husband she was going to quit him. She stated that she had told him that she would send him a package of cigarettes if he was sent to the penitentiary. There was other testimony to the effect that the appellant was doing fairly well in the insurance business at El Dorado.

The appellant presented the following prayer for instruction, which the court refused to grant:

"A. You are told that the husband is regarded in law as being the head of the family, and has a right to select the domicile of himself and family. Therefore, if you find from the testimony that the defendant in this case has provided a home with his parents for his wife, while he solicited insurance in other parts of the State, and that he did not desert his wife, but, on the other hand, was providing for his wife as well as his station in life would reasonably permit, you will find him not guilty."

The appellant duly excepted to the ruling of the court in refusing the above prayer. The jury returned a verdict of guilty, fixing the appellant's punishment at a fine of $500 and imprisonment in the county jail for thirty days. The court rendered judgment in accordance with the verdict, from which is this appeal.

1. The appellant contends that there was no testimony to sustain the verdict. All the material testimony is set forth above, and it tends to prove that the appellant refused to take his wife to El Dorado with him to live, at her request, claiming that he was not financially able to maintain her there and that he would do so as soon as he was able. Her testimony tends to show that, a short time before the indictment was lodged, he and his wife met in Magnolia, and she there requested him to take her to El Dorado with him, but, instead, he took her to Mineral Springs and left her at the hotel, saying that they would quit while they were young. He proposed to make some provision for their baby but none for his wife. The appellant had left $12.50 with his father for

his wife, when he returned to El Dorado from his last visit, and appellant's father gave her a check for this amount, three or four days after the indictment was returned against appellant.

The aunts of appellant, after the indictment was preferred, interposed their kindly offices to effect, if possible, a reconciliation between appellant and his wife and counseled him to compromise, stating that the prosecution might result in his imprisonment in the State Penitentiary. Whereupon, to this admonition he replied, in substance, that he would go to the penitentiary before he would live with his wife.

In the recent case of *Lindell* v. *State,* 129 Ark. 36, 195 S. W. 382, the court, having under consideration a case of abandonment and nonsupport of wife and child under our statute, in commenting upon the testimony, said: "There is a sharp conflict in the testimony as to whether or not there was * * * a willful abandonment and refusal to support, but the weight of the evidence was a matter within the province of the jury, and we cannot say that there was not enough evidence to support the verdict." That declaration is applicable also to the facts of this record. See also *Miller* v. *State,* 123 Ark. 481, 185 S. W. 789; *Dempsey* v. *State,* 108 Ark. 76, 157 S. W. 734.

2. The court did not err in refusing to grant appellant's prayer for instruction No. A, set out above. The instruction gave undue prominence to the fact that appellant had provided a home with his parents for his wife and child, and was tantamount to telling the jury that, if he did this, he was not guilty of desertion. At least the jury might have so inferred. While as an abstract proposition the husband has the right to select the domicile for himself and family, nevertheless such an instruction, under a charge of this kind, is abstract and misleading, because it conveys the necessary inference that a married man has the absolute right to select the home of his parents as the domicile for himself and family and compel his wife and children to live there. Whether he has such right would depend wholly upon the circum-

stances. Since the prayer for instruction is abstract, argumentative and misleading, the trial court ruled correctly in refusing to grant the same.

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

KOURY v. MORGAN.

Opinion delivered December 20, 1926.

1. VENDOR AND PURCHASER—NOTICE OF LEASE.—Evidence *held* to show that a purchaser of land had actual knowledge of a gas and oil lease thereon, though the lease was not placed of record until after he had acquired title.
2. MINES AND MINERALS—PRIORITY OF OIL AND GAS LEASE.—Where the rights of lessees under an oil and gas lease were acquired prior in time to those of a purchaser of the fee, their rights must prevail in case of conflict.
3. MINES AND MINERALS—LIABILITY OF LESSEE TO FEE-OWNER.—Lessees under an oil and gas lease, executed before a sale of the land, are not liable to the purchaser by reason of operation of the lease, unless they negligently injured the land.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor; reversed.

Powell, Smead & Knox, for appellant.

Allyn Smith, for appellee.

WOOD, J. On May 19, 1922, Ida Bell, a widow, executed a lease to Eli D. Bernstein, by which, for a valuable consideration, the lessor leased to the lessee a parcel or lot of land in the town of Norphlet, Union County, Arkansas. The land described in the lease did not properly describe the lands which were intended by the parties to be leased. This lease, with the imperfect description of the land, was recorded on May 25, 1922. On March 20, 1924, a lease was executed by Ida Bell to Eli D. Bernstein, which was dated as of May 19, 1922. This latter lease described the land as follows: "Beginning at the northwest corner of the northeast quarter of the southwest quarter of section 21, township 16 south, range 15 west,

and running thence east 395 feet for beginning point; thence east 155 feet; thence south 510 feet to the north line of the Missouri Pacific right-of-way; thence north 49 degrees west along said right-of-way line 285 feet; thence north 300 feet to place of beginning, and containing two acres, more or less."

The lease contains this recital: "This lease is made to correct and supersede, in all things pertaining thereto, a certain oil and gas lease executed May 19, 1922, and recorded in book 133, p. 180, of the records of Union County, Arkansas." The lease further recited that it was executed "for the sole and only purpose of mining and operating for oil and gas, laying of pipe lines, building of tanks, towers, stations and structures thereon to produce, save, and take care of said products, and all that certain tract of land situated in the county of Union," etc., describing the same as above. The last lease was recorded April 16, 1924.

In March, 1924, Ida Bell, by warranty deed, conveyed to Lee Morgan the above lands for the consideration of $450, which deed was duly filed for record on the 29th of March, 1924. The land was not correctly described in that deed, but the description was corrected in a later deed executed April 8, 1924, and filed for record on that day. Morgan went into possession of the land and improved the same. On May 22, 1924, Bernstein sold his lease to Mike Koury and his successors and assigns. Koury took possession of the property and drilled a well thereon which produced oil and gas.

This action was instituted by Lee Morgan on May 1, 1924, against Mike Koury, trustee, and others, named as defendants. He alleged, among other things, that the defendants recently, at times unknown to the plaintiff, had been sinking an oil well within 150 feet of plaintiff's premises, and "had wrongfully, willfully and with conscious disregard of the rights of plaintiff in said premises," done certain acts, consisting of the building of tanks on the premises and the driving of heavy wagons across same, the breaking of the gas supply to his prem-

ises, the using of an unsafe engine and boiler; that the boiler exploded, and a portion thereof was blown with great violence through the plaintiff's rooming-house and close to persons occupying the same, endangering their lives, putting them in great fear and alarm, all to the plaintiff's damage in the sum of $10,000. Plaintiff prayed a temporary restraining order to prevent the defendants from continuing their trespasses upon his property, and, upon a final hearing, for a permanent injunction, and for judgment in the sum of $10,000.

The defendants answered, denying specifically the allegations of the complaint as to trespass and negligence, and set up that they were operating as successors and assignees of Eli D. Bernstein under the lease from Ida Bell to Bernstein, executed on May 19, 1922. They further set up that, when the plaintiff obtained his deed to the tract of land in controversy, on which he made his improvements, he was well aware of the lease mentioned from Ida Bell to Eli D. Bernstein, and that plaintiff took title and possession subject to such lease and well knowing at the time of the rights of Bernstein and his successors and assigns under the lease. They further alleged that they entered and took possession of the premises and carried on their drilling operations without objection from the plaintiff.

On the trial of the issues thus raised and the muniments of title of the respective parties as above set forth, the chancery court found that the plaintiff was the owner of the property in controversy and was in possession thereof long prior to the commencement of this action, using the same as a residence for his family and a rooming-house, prior to any oil development in the town of Norphlet, and that the defendants had actual notice of plaintiff's occupancy of the premises and of his improvements and of his ownership before they began their drilling operations. The court further found that the plaintiff was not entitled to the injunction prayed, and denied his prayer for the relief sought in that particular, but found that he was entitled to recover for damages for the

injury sustained by him, and referred this matter of damages to a special master, to take proof and ascertain the amount of such damages and report to the court. The master heard the testimony adduced by the respective parties on the issue as to the amount of the damages, and made his report to the effect that the plaintiff had been damaged by the defendants in the total sum of $6,025, enumerating various items of damage and the amounts thereof, which, in the aggregate, constituted the above sum. Exceptions were filed to this report, and the court sustained these exceptions and found that the "measure of damages in the case is the difference in the reasonable cash market value of this property just before the alleged trespass and injury complained of and the reasonable cash market value of same after such alleged trespass and injury complained of," and again referred to the master to take further testimony, if necessary, and to state the amount of the damages according to the measure of such damages as declared by the court. The master filed another report in which he itemized the plaintiff's damages as follows: The lot in question was worth, prior to the explosion and injury, the sum of $800; the buildings were worth, prior to the injury, the sum of $2,000; the plaintiff was earning with said property, on an average, every month $600; the plaintiff was entitled to one month's earnings of the tent house on account of damages in the sum of $250; that he had sustained damage by reason of the destruction of gas connections in the sum of $25, making a total sum of $3,675. The plaintiff was charged with the value of the lot immediately after the injury in the sum of $100, and of the value of the lumber in the sum of $200. The master therefore reported that the plaintiff was entitled to the sum of $3,375. The master further reported that the lot in question was practically worthless for any purpose as long as the operations of the defendants continued. Both the plaintiff and the defendants filed exceptions to the last report of the master. The cause was finally heard by the court on the entire record and all the testimony taken in

the cause both before the master and before the court. The court sustained the exceptions of both the plaintiff and the defendants to the report of the master and found that the plaintiff was entitled to recover damages of the defendants in the sum of $3,375. A decree was entered in favor of the appellee for that sum. Both parties excepted to the decree, and have duly prosecuted their appeal.

1. It will be observed that the description of the land on which the appellants were operating was not corrected and perfected until the 20th of March, 1924, and this corrected lease was not placed of record until the 16th of April, 1924. In the meantime the appellee had acquired title to the land. He had been in possession of it for over a year, and had obtained a deed correctly describing it on April 8, 1924, which was duly recorded on that day. So, the undisputed record evidence shows that, at the time the appellee took possession of the land and at the time he perfected his deed and had the same recorded, he had no constructive notice of the rights of the appellants under their lease. But Ida Bell, the common source under which the appellants and the appellee claimed, testified that she told appellee, Morgan, at the time she leased to him, that the mineral rights and oils were sold. Says she: "I told all of them, and they all built close to the line on that account." That was when she leased him the land in 1923. Also, when she sold him the land, she told him that the mineral rights were sold on it. The lease was sold on the land. Witness told the scrivener to write it in the deed, and he replied, "It won't make any difference." She further testified that she told the appellee "if he didn't want to take the land with the lease on it he didn't have to."

The appellee testified that Mrs. Bell mentioned to him once or twice that Bernstein had an oil and gas lease on his property. Witness further testified that he never heard of an oil and gas lease being on the property until Bernstein told him of it on March 29, 1924.

P. F. Harold, the notary public who took Mrs. Bell's acknowledgment to the deeds, testified that he heard Mrs. Bell make the statement to appellee, when both deeds were executed, that Eli D. Bernstein had an oil and gas lease on the land; that this was the same land she sold to appellee.

A preponderance of the evidence therefore shows that, at the time the appellee acquired his title to the land in controversy, he had actual notice of the appellant's rights under the oil and gas lease. The appellants had a right, under their lease, to mine and operate for oil and gas, to lay pipe lines and build tanks, towers, stations and structures on the land for the purpose of producing, saving and taking care of oil and gas products. The appellee, according to the preponderance of the evidence, was not holding the lands without notice of the above rights of the appellants under their oil and gas lease. The appellee therefore had notice that appellants had the right to enter upon the lands in controversy to mine for oil and gas and to do whatever was necessary, as prescribed in their lease, for the production, conservation and sale of those products. In doing so the appellants were not trespassers. As their rights were prior in time to the rights of the appellee under his deeds, wherever the rights of the appellants were in conflict with the rights of the appellee, appellants' superior rights must prevail. The appellants therefore are not liable to the appellee in the operation of their oil and gas lease unless, in operating under the terms of their lease, they have negligently injured him. As said in *Grimes* v. *Drilling Co.*, 216 S. W. 202, 204, "as appellant purchased the premises burdened with the terms of the lease, he is in no position to complain of conditions produced by appellees such as are usual and customary during the drilling of an oil well." And, as is said in *Coffindaffer* v. *Hope Natural Gas Co.*, 74 W. Va. 107, 81 S. E. 966, 967, "the principle is well established that injury necessarily inflicted in the exercise of a lawful right does not constitute liability. The injury must be the direct result of the commission of a

wrong. If defendant did no wrong, it is not liable, notwithstanding the injury." See also Thompson on Real Property, vol. 6, p. 282.

2. In the view we have of this record, we deem it unnecessary to set forth and discuss the testimony upon the issue of damages. We are convinced that the cause has been tried upon an entirely erroneous theory. For it appears, from the trial court's decree settling the rights of the parties and referring the cause to a master for the ascertainment of damages, the court proceeded upon the theory that the rights of the appellee to the lands were prior and superior to the rights of the appellants because of the fact, as found by the court, that the appellee had recorded his conveyance prior to the recording of the perfected lease to the appellants; that the possession of the appellee under his prior recorded deeds gave him superior rights in the premises to the appellants. But, as we have seen, the law is to the contrary wherever the rights of the appellants and those of the appellee do not coexist but are in conflict with each other. It will be observed that the court found as follows: "That the plaintiff is entitled to recover damages from the defendants for the injuries sustained by the plaintiff to his property, and the question of the amount of such damages is referred to a special master for ascertainment, and Mr. John Harris is appointed as such special master, with instructions to ascertain such damages from the testimony already taken before the court and that to be taken by him." The master took testimony and made his report, bottomed upon the instructions of the court. This report upon the exceptions of the appellants thereto was disapproved and the cause was resubmitted to the master, and the court in its order found as follows: "The court further finds that the measure of damages in this cause is the difference in the reasonable cash market value of this property just before the alleged trespass and injury complained of and the reasonable cash market value of same immediately after such alleged trespass and injury complained of." The master was directed to consider

the whole of the testimony already taken in determining the amount of such damage, and, if necessary, to take further testimony. The master then made his report based upon the court's additional instructions, to which exceptions were filed by both the appellants and the appellee. These exceptions were all sustained, and the court again disapproved the report of the master and entered a decree for the appellee in the sum of $3,375.

There is some testimony in the record tending to prove that the appellants had negligently damaged the appellee's property, but there is nothing in the decree to indicate that the damages were awarded the appellee upon this theory. In the absence of a finding by the trial court upon the correct theory of the law that the appellants were only liable in damages to the appellee for negligence in the operation of their lease, we deem it unnecessary, indeed improper, to set out and discuss the testimony in this record bearing upon the issue of damages. The trial court ruled correctly, under the undisputed testimony, in refusing to grant appellee's prayer for injunction, but erred in declaring that the measure of the appellee's damages is the difference in the reasonable cash market value of this property just before the alleged trespass and its cash market value after the alleged trespass and injury complained of, and in directing the master to ascertain the amount of the damages from the proof in the record and such further testimony as he might consider necessary.

Now, the operation of appellants' lease, even in the most prudent and careful manner, would necessarily diminish the cash market value of the property for residence purposes and many other uses to which the surface might be devoted. But certainly the appellants, in exercising their rights under their lease in a prudent and careful manner, would not be liable to appellee because such drilling operations diminished the cash value of the property for other purposes. In 6 Thompson on Real Property, p. 282, § 5136, the author has an interesting discussion on the subject of "Incidental Rights of Separate Own-

ers of Surface and Minerals," in the course of which, among other things, he says: "As against the surface owner, the owner of the minerals has a right, without any express words of grant for that purpose, to go upon the surface to drill wells to his underlying estate, and to occupy so much of the surface beyond the limits of his well or wells as may be necessary to operate his estate and to remove the product thereof. This is a right to be exercised with due regard to the rights of the owner of the surface, but, subject to this limitation, it is a right growing out of the contract of sale, the position of the stratum sold, and the impossibility of reaching it in any other manner. * * * It is a well settled principle that injury necessarily inflicted in the exercise of a lawful right does not create a liability. The injury must be the direct result of the commission of a wrong." Although the court, in its final decree, rejected the report of the master predicated upon the testimony and the declaration of law of the court as to the measure of damages, nevertheless the testimony was taken and the cause heard by the master and by the court upon the testimony and erroneous declaration of law which the court announced to guide the master in the matter of taking proof and formulating his report. The parties are entitled to a decision of the chancellor upon the issues joined and proof taken on a correct theory of the law. See *Greenlee* v. *Roland,* 85 Ark. 101, 107 S. W. 193; *Reeder* v. *Epps,* 112 Ark. 562, 166 S. W. 747. Therefore, since the cause was heard and determined upon an erroneous theory of the law, the judgment must be reversed, and the cause will be remanded with directions to the trial court to hear the cause upon the competent and relevant testimony already in the record, and, if the parties so elect, to take further proof and to develop the cause according to the principles of law herein announced. It is so ordered.

CHAPMAN & DEWEY LAND COMPANY v. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT.

Opinion delivered December 20, 1926.

1. LEVEES—RECOVERY OF TAXES ILLEGALLY ASSESSED.—Where plaintiff paid levee taxes illegally assessed on land which had been taken by the levee district for levee purposes, he cannot recover such taxes, though he did not know how much of his land had been appropriated, since his payment was voluntary, and by refusing to pay he could have made his defense in the suit which the district would have had to bring to collect the taxes.
2. TAXATION—RECOVERY OF WRONGFUL TAXES—COERCION.—The coercion which will render a payment of taxes involuntary must consist of some actual or threatened exercise of power, from which the taxpayer has no reasonable means of immediate relief, except by making payment.
3. APPEAL AND ERROR—HARMLESS ERROR.—Refusal to transfer an action to recover taxes paid to a levee district to the chancery court was not prejudicial, both because the circuit court was the proper forum, and because, if the cause had been transferred to equity, the result would have been the same.

Appeal from Crittenden Circuit Court; *W. W. Bandy,* Judge; affirmed.

STATEMENT BY THE COURT.

Chapman & Dewey Land Company brought this suit in the circuit court against the board of directors of the St. Francis Levee District to recover $3,138.84 for taxes which, it claimed, had been illegally levied and collected on its lands.

Under the allegations of the complaint, the plaintiff is the owner of large bodies of land in Mississippi and Poinsett counties, in the State of Arkansas, which are in two drainage districts created under the laws of the State of Arkansas by the General Assembly of 1917. Said drainage districts filed plans and specifications for the construction of drainage systems in said counties, and, under their plans, certain lands belonging to the plaintiff were condemned and appropriated by the drainage districts for right-of-way purposes. The amount of land so taken was used in constructing drainage ditches, levees, and that part of the improvement known as flood-

ways. Notwithstanding the condemnation of said lands, said drainage districts demanded and collected from the plaintiff drainage and levee taxes upon said lands for the years 1918, 1919 and 1920.

Plaintiff filed an amended complaint which alleges that the acts creating said drainage districts set out what lands were embraced within the districts, but did not prescribe the location of the ditches. After the creation of said districts, plans and specifications were filed showing what part of the lands of the plaintiff were to be used in constructing the ditches, levees and floodways, but no survey was made showing the amount and location of said lands. After the improvement had been completed in 1921, and it was definitely known what lands had been actually taken, they were stricken from the taxbooks of the levee district. The amended complaint also alleges that, prior to 1921, it was impossible for the plaintiff to locate the lands actually taken by the drainage districts for the construction of the drainage ditches and levees.

The circuit court sustained a demurrer to the complaint and to the amended complaint, and, the plaintiff refusing to plead further, its complaint was dismissed. The case is here on appeal.

W. Chapman Dewey and *Wils Davis,* for appellant.

Mann & McCulloch, for appellee.

HART, J., (after stating the facts). The judgment of the circuit court was correct, according to the principles of law decided in *Brunson* v. *Board of Directors,* 107 Ark. 24, 153 S. W. 828. In that case a landowner in a levee district made a payment of levee taxes under an illegal assessment, with knowledge of the fact, and it was held that the payment was voluntary and that the taxes could not be recovered. In that case, as here, if the landowner had refused payment of the improvement district taxes to the collector, the latter would have had no authority to sell the lands to enforce payment. Under the statute, the board of directors would be required to institute an action in the chancery court to collect the taxes. The landowner could make his defense in that suit, and thus would have

had his day in court. *White River Lumber Co.* v. *Elliott,* 146 Ark. 551, 226 S. W. 164, and *Paschal* v. *Munsey,* 168 Ark. 58, 268 S. W. 849.

Under these decisions, the coercion which will render a payment of taxes involuntary must consist of some actual or threatened exercise of power possessed by the party exacting or receiving payment over the person or property from which the latter has no reasonable means of immediate relief except by making payment.

But it is insisted by counsel for the plaintiff that the taxes alleged in the complaint takes the case at bar out of the operation of the principle decided in these cases and brings it within the rule announced in *Dickinson* v. *Housley,* 130 Ark. 260, 197 S. W. 25. We do not think so. In that case the collector refused to accept any sum less than the full amount demanded, and had the power to have sold the lands of the taxpayer in payment of the illegal tax. This would have constituted a cloud upon the title, and it became necessary for the owner to pay the illegal demand in order to prevent the sale. No such power existed in the board in the case at bar. If the plaintiff had refused to pay the taxes, the board of directors would have been compelled to institute proceedings against the landowner in the chancery court to collect the taxes, and the plaintiff could have presented the same matters as are set up in this case to defeat the collection of the taxes. In short, it could have defended a suit to collect the taxes upon the same ground that it bases its right to recover the taxes which it voluntarily paid.

It is true that the amended complaint sets up the fact that it did not definitely know how much of its land had been taken for the construction of the drainage ditches, levees and floodways until it had paid the taxes for the years 1918, 1919 and 1920. But it could have required the levee districts to have set forth and shown how much land had been taken for the construction of the proposed improvements before they could have recovered the taxes. In other words, the burden of proof would have been upon the board of directors to have shown how much

taxes were due before they could have recovered any amount. In ascertaining this fact, they would have had to eliminate the lands which they had taken in the construction of the improvements in the various ways set out above.

It is also insisted by counsel for the plaintiff that the court erred in refusing to transfer the case to the chancery court, as requested by it after it had filed its amended complaint. In the first place, it may be said that the circuit court was the proper forum in which to bring the action. *Brunson* v. *Board of Directors,* 107 Ark. 24, 153 S. W. 828. In the next place, if the case had been transferred to the chancery court the result must have necessarily been the same. It would have been the duty of the chancery court to have decided the principles of law as they were decided by the circuit court. Hence no prejudice whatever could have resulted to the plaintiff by the failure to transfer the case to equity.

It follows that the judgment of the circuit court was correct, and it will therefore be affirmed.

ROACH *v.* KNAPPENBERGER.

Opinion delivered December 20, 1926.

1. ADVERSE POSSESSION—SUBORDINATION TO UNITED STATES.—The general rule is that one claiming title by adverse possession in subordination only to the United States may assert such possession as against another claimant.
2. ADVERSE POSSESSION—POSSESSION CONSISTENT WITH THAT OF ANOTHER.—Possession of land by one who recognizes the title of another thereto may be adverse as against the true owner.
3. JUDGMENT—CONCLUSIVENESS AS TO STRANGER.—One acquiring possession of land before applying to the United States for a homestead right therein was not precluded from claiming adverse possession in the land by a judgment adverse to the United States in a suit against another, to which he was not a party, though he afterwards acquired knowledge of such suit.

Appeal from Mississippi Circuit Court, Chickasawba District; *G. E. Keck*, Judge; reversed.

STATEMENT BY THE COURT.

This is an action of ejectment by appellee against appellant to recover the possession of a tract of land in the Chickasawba District of Mississippi County, Arkansas, described in the complaint. Appellee showed a clear paper title to the land. Appellant pleaded title by adverse possession under the statute of limitations.

The record shows that the Holly-Matthews Manufacturing Company conveyed the land to Jake and Alvin Huffman. They reconveyed the land to the Holly-Matthews Manufacturing Company, and it, in turn, conveyed it to appellee. In 1913 the United States Government brought suit in an Arkansas Federal court against the Holly-Matthews Manufacturing Company, which, at that time, had the paper title to the land, to recover possession of it. In May, 1918, the suit was decided adversely to the United States, and the title to the land was decreed to be in the Holly-Matthews Manufacturing Company. In the early part of 1915 appellant purchased from a man by the name of Carroll certain improvements which he had constructed upon the land in question and entered into possession of it. On June 14, 1915, appellant received a certificate of entry and receipt from the United States Land Office at Little Rock, Arkansas. This was after he had entered into possession of the said land.

According to the testimony of appellant, he has lived on the land since that time and has had the same at all times inclosed with a fence. He made improvements on the land of the value of $700. He denied that he in any manner recognized the title of the Huffmans, and testified that he had held the actual and exclusive possession of said land against all the world except the United States Government.

Evidence was introduced by appellee tending to show that appellant had agreed with Jake Huffman to make improvements on the land, and that, if he lost title to the land, he might remove the improvements from the land. Other facts will be stated or referred to in the opinion.

The court directed the jury to return a verdict against the appellant. The case is here on appeal.

Nelson & Crawford, for appellant.

C. A. Cunningham, for appellee.

HART, J., (after stating the facts). According to the testimony of appellant, he entered into the possession of the land involved in this suit in the early part of 1915, and held the actual and exclusive possession of it against all the world except the United States for more than seven years before this suit was brought, and had the possession of the same when the suit was commenced on the 20th day of May, 1924.

In a case-note to 20 Ann. Cas. 538, and in 31 L. R. A. (N. S.) 153, it is said that the general rule is that one claiming title by adverse possession in subordination only to the United States may assert such possession as against another claimant. It is said that the decisions rest upon the theory that it is not absolutely necessary that adverse possession should be held against the whole world in order to enable one claiming by it to assert it against another claimant; and further, that, as the statute of limitations can never run against the United States, unless by express statute, a holding in subordination to the United States, but adversely to everybody else, cannot be deemed to be inconsistent. The soundness of the rule has been recognized by the Supreme Court of the United States. *Iowa R. Land Co.* v. *Blumer,* 206 U. S. 482. Other cases on both sides of the question from the courts of last resort of various States may be found cited in the case-notes just referred to.

In *Clemens* v. *Runckel,* 34 Mo. 41, 84 Am. Dec. 69, it was held that a party's possession is adverse to the true owner when he enters and holds actual, open, uninterrupted and notorious possession of land to which he expects to acquire title by preemption whenever the land should be brought into market. It was said that such possession will ripen into an absolute title at the expiration of the time provided by the statute of limitations.

In *Hayes* v. *Martin,* 45 Cal. 559, it was held that it was not requisite that a party who relies upon the statute of limitations should show that he claims title in hostility to the United States. It was said that he might admit title in the United States, either with or without a claim on his part of the right to acquire the title from the United States, and that it was sufficient if he had such possession as is required by the statute and claims in hostility to the title which the plaintiff might establish in the action.

It has been held by this court that the possession of land by one who recognizes the title of another thereto may nevertheless constitute an adverse holding as against the true owner. *Skipwith* v. *Martin,* 50 Ark. 141, 6 S. W. 514.

In discussing the question the court said: "It is urged that a defendant, claiming by possession as against the plaintiff in ejectment, must not only show that he has held adversely to the plaintiff during the period of limitation, but that he must go further and show a possession 'exclusive of the title of any other person.' The statement of this proposition arouses our skepticism at once, and, when we look into the numerous authorities cited to support it, we are not surprised to find that the cases do not justify the argument on this point. It is most broadly asserted in *New Orleans & S. R.* v. *Jones,* 68 Ala. 48, but the proper qualification is made in the later case of *Dothard* v. *Duncan,* 75 Ala. 482. So, if it were conceded, as appellants contend, that the possession of the county was not adverse to the original proprietors, it would not follow that the appellee could not claim the statute bar as against Beebe and his heirs."

The reason is that the adverse holding need not be against the whole world to put the statute of limitation in motion, but the term is used to impart notice.

But it is insisted that, even under this rule, the circuit court did not err in directing a verdict in support of appellee, for the reason that appellant would be precluded from claiming title by adverse possession by reason of

the suit of the United States against the Holly-Matthews Manufacturing Company to assert title to said land. The record shows that appellant acquired possession of the land before he applied to the United States for a homestead right therein. It is true that evidence was introduced tending to show that he afterwards acquired knowledge of the pendency of the suit in the Arkansas Federal court, but appellant was not a party to that suit and was not bound by the proceedings thereunder. His rights could not be affected by a suit to which he was not made a party. If he had acquired possession of the land from the United States during the pendency of the suit, he would be affected by the disposition of it; but, having acquired possession before he applied to the United States for a preemption right, he was not in any wise affected by the holding in that case.

The result of our views is that the circuit court erred in directing a verdict for the appellant and for that error the judgment must be reversed, and the cause remanded for a new trial.

HALEY NEELEY COMPANY *v.* DUNLAP.

Opinion delivered December 20, 1926.

1. CONTINUANCE—SURPRISE.—Where the transcript of a judgment in a foreign court was objected to as not properly authenticated, it was error to refuse a continuance to defendant on the ground of surprise, where opposing counsel had agreed that the sufficiency of the transcript would not be questioned, though a continuance had been granted on defendant's motion at a former term to afford opportunity to perfect the transcript.
2. STIPULATIONS—WAIVER OF DEFECT IN TRANSCRIPT OF JUDGMENT.—In a suit on a foreign judgment, a defect in the authentication thereof *held* waived by an agreement of counsel that the sufficiency of the authentication would not be questioned.

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

W. Irvine Whitty, for appellant.

SMITH, J. Appellant brought suit on what it alleged was a judgment which it had recovered in a court of record in the State of Iowa against appellee. The answer denied that appellant had recovered a judgment, and, by way of counterclaim, alleged that appellee had shipped to appellant a car of sweet potatoes, for which appellant had agreed to pay the sum of $509.12; that the car of potatoes was delivered to and accepted by appellant, who failed to pay for them. Judgment was prayed for the value of the car of potatoes. The trial resulted in a verdict for appellee for the amount of his counterclaim, and from the judgment pronounced thereon is this appeal.

When the transcript of the judgment of the Iowa court was offered in evidence, appellee objected to its introduction upon the ground that it was not properly authenticated, and this objection was sustained. The validity of this objection is conceded, but, when the objection was made, counsel for appellant asked for a continuance upon the ground of surprise, the surprise being that he had an agreement with counsel for appellee that the sufficiency of the transcript would not be questioned, and that the only question that would be controverted with reference thereto would be the authority under which appellee's appearance had been entered in the original suit in Iowa. Appellant's attorney supported this statement by an affidavit, which appears in the record. No denial of this agreement appears to have been made, and the motion for continuance was overruled upon the ground that a continuance had been had at the former term of the court and an opportunity had been thus afforded to perfect the transcript of the judgment. It was stated, and not questioned, that the continuance was granted on the motion of appellee.

The judgment should, of course, have been properly authenticated, but this was a defect which might have been waived, and which, according to the undenied affidavit of appellant's counsel, was waived.

The deposition of an attorney in Iowa was taken, and this attorney testified that he had entered appellee's

appearance in the court there, and had litigated there the question of the car of potatoes for which judgment was asked in the cross-complaint filed in the court below. This deposition was excluded upon the ground that it was immaterial, in the absence of a showing that a judgment had been recovered.

In the absence of any denial that there was an agreement that no question would be raised touching the sufficiency of the authentication of the judgment sued on, we must accept that statement as true, and, if it is true, the continuance should have been granted on the ground of surprise, and, for the error in refusing to grant the continuance, the judgment of the court below must be reversed, and it is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY v. GREEN.

Opinion delivered December 20, 1926.

1. RAILROADS—LIABILITY FOR KILLING UNASSESSED DOG.—The owner of a dog which had not been assessed for taxation may recover for its killing by a railroad train, since the failure to assess does not prove that the dog was of no value.
2. TRIAL—INSTRUCTION SINGLING OUT CIRCUMSTANCE.—An instruction that a failure to assess a dog which was struck by defendant's train was a circumstance to be considered in determining its value, was properly refused as singling out a circumstance for the jury's consideration for a particular purpose.
3. RAILROADS—LOOKOUT FOR DOGS.—A railroad company is under a duty to keep a lookout for dogs on its tracks.
4. RAILROADS—PRESUMPTION FROM FINDING DEAD DOG ON TRACK.—There is no presumption that a dog was killed by a train because it was found dead on the track.
5. RAILROADS—KILLING OF DOG—EVIDENCE.—Evidence *held* to warrant finding that a dog found dead on a railroad track was killed when struck by a train.
6. RAILROADS—KILLING OF DOG—BURDEN OF PROOF.—Proof that a dog found dead upon a railroad track was killed by the train *held* to cast upon the railroad the burden of showing that the animal was not negligently killed.

7. TRIAL—ABSTRACT INSTRUCTION.—An instruction that a railroad company was not liable for the killing of a dog coming on the track at a time when those in charge could not discover its presence in time to avoid striking it was properly refused where there was neither pleading nor evidence on which to predicate it.
8. EVIDENCE—MARKET VALUE.—Testimony as to the market value of similar dogs in a nearby town is competent to aid the jury to determine the market value of a dog killed by a train.

Appeal from Hot Spring Circuit Court; *Thomas E. Toler*, Judge; affirmed.

Richard M. Ryan and *E. B. Kinsworthy*, for appellant.

SMITH, J. Appellee recovered judgment against the appellant railroad company for $25 damages for killing a dog owned by him, and the railroad company has appealed.

For the reversal of the judgment it is insisted that there was no testimony showing that the dog was killed by the railroad company, and that the court erred in giving certain instructions and in refusing others, and in the admission of certain testimony.

On behalf of appellee a section-hand employed by the railroad testified that he lived near the railroad track, and that, during the night, he heard a dog howling on the track. The next morning appellee's dog was found dead between the rails of the track. The dog did not appear to be mutilated, but blood had run out of its mouth or nose, and appellee testified that he examined the place where the dog was found, and discovered some blood and hair on the track.

An instruction was asked by the railroad company to the effect that appellee could not recover anything for the dog unless he had assessed it for taxation, and, in another instruction, the court was asked to tell the jury that the failure to assess the dog was a circumstance to be considered in determining whether the dog was valuable or worthless.

The first of these instructions was properly refused, because, as was said in the case of *El Dorado & Bastrop*

Ry. Co. v. *Knox,* 90 Ark. 1, 117 S. W. 779, "the fact that the dog was not assessed did not prove that the dog was of no value, especially when the undisputed evidence shows that the dog was valuable."

The other instruction was properly refused because it singled out a circumstance which the jury was told to consider for a particular purpose. Such instructions are always objectionable and should never be given.

An instruction was asked to the effect that the railroad company was under no duty to keep a lookout for dogs on the track. We have held otherwise. *Holloman* v. *Mo. Pac. Rd. Co.,* 170 Ark. 573, 280 S. W. 22.

Other instructions requested by the railroad company which were refused were to the effect that, even though the dog was found dead on the track, it must also be shown that the dog was struck by a train, and that the striking and death of the dog was due entirely to the negligence of the railroad company; and that, if the dog went upon the track at a time and place when and where those in charge of the train could not and did not discover its presence in time to avoid striking it, the verdict should be for the railroad company, even though the dog was killed by a train.

The appellant railroad company asked an instruction numbered 6, and excepted to the refusal of the court to give it. This instruction reads as follows: "You are instructed that the fact that a dog was found upon defendant's tracks raises no presumption of negligence against the defendant, and the burden is upon the plaintiff to prove by a fair preponderance of the proof that said dog was struck by defendant's train or engine."

The court gave, over the objection of appellant, an instruction numbered 2, which reads as follows: "You are instructed that, when an animal is found on the railroad track, dead, and the circumstances of the killing are sufficient to show that said animal was killed by the operation of a train, the burden is upon the railroad company to show that such animal was not negligently killed, and,

if it fails to do this by a fair preponderance of the evidence, it would be liable for such killing.''

We think it will sufficiently appear from the discussion of instruction numbered 6, which was refused, and instruction numbered 2, which was given, that no error was committed in refusing to give the other instructions just referred to.

There was no presumption that the dog was killed by a train because it was found dead on the track, and instruction numbered 2 does not state that there was any such presumption. The burden was upon appellee to show that the dog was killed by a train. It was not essential, however, that this fact be established by an eye-witness. This was a fact which might have been established as a reasonable and probable inference from other facts disclosed by the testimony. Here a dog was heard howling during the night on the railroad track. It is true the witness who testified to that fact did not testify that he heard a passing train at the time, but he did testify that trains ran by his house that night. The dog was found dead between the rails, and, while not mutilated, blood had run from the mouth or nose of the dog. Near the same place where the dog was found, blood and hair were also found. We think these circumstances warranted a finding by the jury that a train struck the dog. Instruction 2 left the question to the jury whether the circumstances were sufficient to show that the dog was killed by a train. That fact being found affirmatively, the instruction declared the burden was then cast upon the railroad company to show that such animal was not negligently killed, and, if it failed to do so, it would be liable for killing the dog. The law has been so declared in numerous decisions of this court.

Having proved facts and circumstances from which the jury found that a train had killed the dog, the plaintiff had made a *prima facie* case, and was not required to show that this had been negligently done. The court was correct therefore in refusing to charge that appellee was required to show that the death of the dog was due

to the negligence of the railroad company. If a train killed the dog, no explanation of the killing was made. The court was correct therefore in refusing to charge the jury that, if the dog came upon the track at a time and place when those in charge of the train could not and did not discover its presence in time to avoid striking it, to find for the defendant railroad company. No such defense was made, and there was no testimony upon which to predicate the instruction.

The instruction on the measure of damages told the jury that, "if you find from a fair preponderance of the evidence in this case that the defendant company negligently killed the plaintiff's dog by the operation of one of its trains, your verdict should be for the plaintiff," and the jury was directed, upon making that finding, to assess the damages at the market value of the dog.

A fair interpretation of the instruction given is, we think, that the jury was required to find that a train killed the dog, but that, if this fact were found from the circumstances in proof, the burden then devolved upon the railroad company to show that it was not negligent in striking the dog, and no attempt was made to show how the dog was struck. This being true, there was no error in refusing to give instruction numbered 6, set out above.

Several witnesses testified as to the market value of the dog, and no one placed it at less than $25. One witness testified that similar dogs sold in a nearby town for $50. This testimony was not improper in aiding the jury to determine what the market value of the dog was at the time and place it was killed.

No error appears, so the judgment is affirmed.

COLEMAN v. GULF REFINING COMPANY OF LOUISIANA.

Opinion delivered December 20, 1926.

1. TORTS—CONCURRENT NEGLIGENCE—RECOVERY.—Where one is injured by the concurring negligence of two or more persons, he may sue them all jointly, or he may sue any one alone, but he can have only one satisfaction for his injury.
2. RELEASE—CONCURRENT NEGLIGENCE.—Where the concurrent negligence of two persons was responsible for an injury to a third person, a settlement by the latter of an action for such injury will bar an action against the other, although the defendants in the respective actions were not joint tort-feasors.
3. RELEASE—FRAUD AS DEFENSE.—Where one, injured in a collision between his employer's truck and a train, signed a release of his injuries in an action against the railroad, and there is no contention that any fraud was practiced on him by the railroad company in securing the release, he will not be heard to say, in an action against his employer, that there was a mental reservation on his part that the release should not have the effect which the law imputes to it.

Appeal from Union Circuit Court; *W. A. Spear*, Judge; affirmed.

Jeff Davis, for appellant.

Patterson & Rector, for appellee.

SMITH, J. Appellant alleged and offered testimony tending to show that, on October 26, 1923, while immediately engaged in the discharge of his duties as an employee of the Gulf Refining Company of Louisiana, hereinafter referred to as the company, he was being driven in an automobile belonging to the company by another employee of the company, who negligently drove the automobile across the tracks of the Missouri Pacific Railroad in front of an approaching train, which struck the automobile and very seriously injured appellant. He brought this suit to recover damages to compensate, in part, this injury.

In its answer the company denied liability, and, by way of affirmative defense, alleged that appellant had first sued the railroad company, and had settled that suit by accepting $1,500 from the railroad company, and, as an evidence thereof, had executed the following release:

"In full release, discharge and satisfaction for all damages and personal injuries (including both known and unknown injuries and future developments thereof), growing out of or in any way resulting from the following described accident, to-wit: Account of automobile being struck at Norphlet, Arkansas, October 26, 1923, in which P. M. Coleman was riding, while a traveler, by passenger train 824, engine 2315.

"It is also hereby stipulated and agreed by the plaintiff, P. M. Coleman, and his attorneys, Patterson & Rector, that the above entitled case now pending in the Union County Circuit Court, Arkansas, be dismissed with prejudice on the payment of costs by the defendant, the Missouri Pacific Railway Company. The within settlement also includes every claim of every class or character, past, present and future, arising from or growing out of the above mentioned accident; consideration $1,500.

"Received of Missouri Pacific Railroad Company one thousand five hundred no-100 dollars in full payment for the above account, and in full release, discharge and satisfaction as written and [or printed above], which release I have read (or had read to me), the terms of which I understand and to which I agree.

"In testimony whereof I have hereunto set my hand this 22d day of July, 1924."

After appellant's injury he was confined in a hospital for some weeks, and his bill there, including the services of the surgeons who attended him, amounted to over a thousand dollars. This bill was paid by the company.

Appellant testified that one King, who was the claim agent of the company, advised him to consult the law firm of Patterson & Rector in regard to bringing suit against the railroad company, and, upon the advice of King, he retained these attorneys to represent him.

At that time Patterson & Rector were the regularly retained attorneys of the Gulf Company, a fact then unknown to appellant. A written contract of employ-

ment was executed between appellant and his attorneys, and inserted therein was the following clause:

"We further authorize you to pay to the Gulf Refining Company of Louisiana, out of any funds recovered from the above named defendant, an amount sufficient to reimburse said Gulf Refining Company of Louisiana, for doctors', hospital and dentists' bills and other expenses incurred by us as a result of said injuries and paid by the said Gulf Refining Company of Louisiana."

Appellant testified that he did not authorize this to be done, but, as he had been advised by his attorneys that the Gulf company was not liable to him for his hospital bill, he made no objection to this clause, and signed the contract with knowledge that it had been inserted in his contract with the attorneys. It appears that, after receiving the sum of $1,500 from the railroad company, and after paying his attorneys the fee agreed upon, the claim of the company against appellant for hospital fees was settled for the sum of $575, which was paid the company out of the proceeds of the settlement with the railroad.

Appellant detailed, as a witness in the trial below, the manner in which he was injured, and it is not questioned that his testimony made a case for the jury as to the liability of the Gulf company, except for the release to the railroad company. He further testified that he had been led to believe by his attorneys that the defendant Gulf company was not responsible for his hospital fees, and the attorneys did not at any time tell him that he had a cause of action against that company.

Pursuant to their contract, the attorneys representing appellant brought suit against the railroad company, and this suit was later compromised by the payment of the sum of $1,500. Appellant admitted signing the release set out above, and also admitted that, when it was executed, he had learned that his attorneys were also the attorneys for the Gulf company. He admitted that he knew the purpose and effect of the release executed to the

railroad company was to acquit the railroad company of any further liability to him on account of his injury, but he offered to testify that, in executing this release, it was not his intention or purpose to extinguish his claim against the Gulf company, as he did not feel that the sum paid him by the railroad company fully compensated him for his injury. An objection to his testimony was sustained, and this ruling is assigned as error.

Appellant admits that, if the railroad company and the Gulf company had been joint tort-feasors in injuring him, the release would bar this action; but he insists that, as there was no purpose on the part of either to injure him, their liability to him is several, and not joint, although he had the right to sue them together, and that the court should therefore have permitted him to show that he had not received full and complete compensation for his injury and he should have been allowed to proceed with his action against the Gulf company to obtain full and adequate redress.

It was the view of the court below that the release barred the present action, and, upon that theory, a verdict was directed in favor of the Gulf company at the conclusion of the introduction of the testimony in appellant's behalf.

We concur in the view of the court below. Where one is injured by the concurring negligence of two or more persons, he may sue them all jointly, or he may sue any one alone, but he can have only one satisfaction for his injury.

In the case of *Spears & Purifoy* v. *McKinnon,* 168 Ark. 357, the plaintiff was injured through the joint negligence of two surgeons, and he recovered a judgment for damages. The verdict in the case was for the total sum of $7,000, but it was recited in this verdict that one-half thereof, or $3,500, should be recovered against each of the defendants. In modifying the judgment pronounced thereon so that the total sum recovered should be limited to $3,500, we said that the defendants were joint tort-feasors and liable as such, if at all, but, as there was only

one tort and one damage, there could be only one recovery, and, as the jury had fixed the liability of each tort-feasor at $3,500, there could be no greater recovery against either of them, or both of them, than that sum. The theory of the case was that one could have only a single compensation for his injury.

In the case of *St. Louis Southwestern Ry. Co. and St. Louis, Iron Mountain & Southern Ry. Co.* v. *Kendall,* 114 Ark. 224, the plaintiff was injured through the concurring negligence of the employees of both railroads, and both were sued in a single action. It was there said: "Both of the railroad companies were negligent, and, but for the negligence of each, the collision would not have occurred, and the concurring negligence of both produced the injury for which both are liable. Cyc. lays down the following general rule: '* * * Where an injury is sustained by reason of the joint or concurrent negligence of two railroad companies, * * * plaintiff may sue both jointly, and it is not necessary that there should be a breach of a joint duty or any concerted action on the part of the defendants, but it is sufficient if their several acts of negligence concur and unite in producing the injury complained of; nor is it material that one of the defendants owed the plaintiff a higher degree of care than the other.' 33 Cyc. 726."

Appellant's argument is that the Gulf company and the railroad company were not joint tort-feasors, for the reason that they were not acting pursuant to a common wrongful purpose, but that, on the contrary, neither intended to injure him, and he would not have been injured but for the concurring negligence of the two companies. The driver of the automobile in which appellant was riding negligently drove upon the track of the railroad, and the employees of the railroad in charge of the engine failed to maintain a lookout. Appellant insists therefore that, not having obtained a full satisfaction from the railroad company, he may require the Gulf company to complete his compensation.

The fallacy of this argument is that appellant received only one injury, and is entitled to but one compensation. He might have obtained this by suing either or both of the tort-feasors, but, when he accepts what is intended as full satisfaction of the liability of one, the other is released, the applicable legal principle being that one is entitled to only a single satisfaction.

In 38 Cyc., pages 490 and 491, chapter "Torts," upon the subject of "Electing the Wrongdoer" (to sue), under the subhead of "Joint and Several Liability," it is said: "Separate actions may be brought either simultaneously or successively, judgment may be recovered in each, and plaintiff may elect which judgment he will enforce. But the satisfaction of one of the judgments will operate as a satisfaction of all."

In the case of *State of Maryland, to the use of Cox,* v. *Maryland Electric Railway Co.,* 126 Md. 300, 95 A. 43, L. R. A. 1917A, page 270, a syllabus reads as follows: "A settlement of an action against one person for an injury causing death will bar an action against another for the same death, although the defendants in the respective actions were not joint tort-feasors."

To this case there is an extensive annotator's note on the "release of one of two or more persons severally, but not jointly, liable for a tort, as affecting liability of others," and upon this subject the annotator says: "The majority of the cases warrants the following conclusion: A release to one liable with another or others for the same injury releases the other or others where each of the tort-feasors is liable for the entire damages suffered by the injured party; it is immaterial whether they are jointly liable. But, where a person liable with others for an injury is liable only for the part contributed by him, a release to him does not release the others. The distinction is between a divisible and an indivisible cause of action. In the latter case, *i. e.,* where a person liable with others for an injury is liable only for the part contributed by him, it may be shown, as a matter of fact, that the release to the first of the tort-feasors was given

upon a consideration which was intended to compensate the injured party for the entire injury; upon such a showing the release does operate as a release of the others, since the injured party has been compensated for the entire injury, and it is the theory of the law to allow only one recovery for the same injury."

In the case of *McCoy* v. *L. & N. R. Co.* 146 Ala. 333, 40 So. 160, the plaintiff's intestate was killed in a collision between a railroad locomotive and a streetcar. Plaintiff sued the streetcar company and recovered judgment for $1,500, which was paid, and she thereafter brought suit against the railroad company. In holding that the satisfaction of the judgment against the streetcar company was a bar to the suit against the railroad company, the Supreme Court of Alabama said: "Reading the complaint and the plea together, it clearly appears that, whether there was the ligament of common purpose binding the acts of the two companies together or not, their acts of negligence united in causing the single injury to the plaintiff. A rational rule deduced from the authorities *supra* would seem to be that, 'where one has received an injury at the hands of two or more persons acting in concert, or acting independently of each other, if their acts unite in causing a single injury, all of the wrongdoers are liable for damages occasioned by the injury. It is also manifest that this single injury, in itself or of itself indivisible, constitutes an indivisible cause of action. This is true, notwithstanding the fact that the party injured could maintain separate suits on this cause of action against the tort-feasors at the same time, and could have sued them jointly, and the mere pendency of suit or judgment, without satisfaction, could not be set up in defense of either tort-feasor. So, in the case at bar, two companies were tort-feasors, and, whether jointly liable or not, the plaintiff had a cause of action against them separately; but she had only one cause of action, and it was an indivisible one. Upon this cause of action she could have maintained a suit against each of the tort-feasors simultaneously, and the

mere pendency of suit, or judgment against one without satisfaction, would have been no answer to the other. But, when she successfully prosecuted her single cause of action against one of the tort-feasors and received satisfaction in full of the judgment, that was satisfaction for the entire injury for the single cause of action, and, after satisfaction, although it moved from only one of the tort-feasors, no foundation remained for a suit against any one. Her cause of action was extinguished. Furthermore, the presumption would be that, in the suit in which the judgment was obtained and satisfaction accepted, full damages were accorded."

It was there further said: "In the case of *Cleveland* v. *City of Bangor,* 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326, with respect of satisfaction by a tort-feasor not jointly liable with another, it was said: 'But, with regard to the point under consideration, no sound reason has been given, and it is believed none can be assigned, for such a distinction between the case of wrongdoers who are jointly and severally liable and of those who are only severally liable for the same injury. In either case the sufferer is entitled to but one compensation for the same injury, and full satisfaction from one will operate as a discharge of the other.' *Brown* v. *Cambridge,* 3 Allen 474; *Abb* v. *N. P. R. Co.* (Wash.) 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Re. 864. In *Lovejoy* v. *Murray,* 3 Wall. (U. S.) 1, 18 L. ed. 129, Justice Miller, for the court, said: 'But, when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages.' "

We have quoted extensively from this case because the reasoning thereof is directly applicable here.

Upon the question that the court should have admitted testimony tending to show that the release had been obtained by fraud, in that appellant had not been advised by his attorneys, who were also the attorneys for the Gulf company, that he had a cause of action

against the Gulf company, and had not been advised by them that a settlement in favor of one would release the other, and that he did not intend the release to the railroad company to operate to release the Gulf company, it suffices to say that, if this testimony were competent, it would profit appellant nothing. This is true because he does not question the binding effect of the release so far as the railroad company was concerned. He knew, when he executed this release, that his attorneys also represented the Gulf company. He knew this release was executed for the purpose of discharging the railroad company from any and all liability to him, and that such was its effect. There is no contention that this writing was in the nature of a covenant not to sue, which we have held does not amount to a release. *Hadley* v. *Bryan,* 70 Ark. 197, 66 S. W. 921; *Pettigrew Machine Co.* v. *Harmon,* 45 Ark. 290; *Dardanelle & R. R. R. Co.* v. *Brigham,* 98 Ark. 169, 135 S. W. 869; *Texarkana Telephone Co.* v. *Pemberton,* 86 Ark. 329, 111 S. W. 257.

Appellant had sued the railroad company, and, in this action, he had the right to demand full satisfaction for his injury. He accepted a sum which, he admits, was paid him in full satisfaction of his demand against the railroad company, and this demand is the identical one which he here seeks to enforce. There is no contention that any fraud was practiced upon him by the railroad company, and he will not therefore be heard to say that there was a mental reservation on his part that the release should not have the effect which the law imputes to it. *Kansas City Sou. Ry. Co.* v. *Armstrong,* 115 Ark. 123, 171 S. W. 123.

It follows therefore that the court was correct in holding that the release to the railroad company barred this suit and in directing a verdict in appellee's favor upon that theory, and that judgment will therefore be affirmed.

CYPERT v. MCEUEN.

Opinion delivered December 20, 1926.

1. CONTRACTS—IGNORANCE OF LAW.—Ignorance of the law is not sufficient to relieve one from his obligations, where there was no duress or fraud.
2. WILLS—ELECTION OF WIDOW TO TAKE UNDER WILL.—Where a widow, with knowledge of the amount of her husband's property, accepted a part payment of her distributive share under her husband's will and gave a receipt in which she agreed to abide by its terms, she will be held to have elected to take under the will.
3. WILLS—EFFECT OF ELECTING TO TAKE UNDER WILL.—A widow who has elected to take under her husband's will is nevertheless entitled to the statutory allowances of $450 out of his personal estate, as provided by Crawford & Moses' Dig., §§ 80 and 86.

Appeal from White Circuit Court; *E. D. Robertson,* Judge; reversed.

John E. Miller and *Culbert L. Pearce,* for appellant.

W. D. Davenport, for appellee.

HUMPHREYS, J. Appellee, widow of R. G. McEuen, filed a petition in the probate court on April 13, 1925, praying for an order allowing her dower and homestead rights in all of the estate of her deceased husband. In aid of her petition she tendered into court a quitclaim deed, duly acknowledged and recorded, releasing and quitclaiming all her rights in the real estate under said will but not under the law; and also $112.50, with interest, which the executor of the will of her deceased husband had theretofore paid her.

Eugene Cypert, executor of the will, and Arch McEuen, Mattie McEuen Tigue, Charles McEuen and Rufus McEuen, heirs and legatees of R. G. McEuen, filed a response to said petition on May 2, 1925, alleging that appellee, with the full knowledge of her rights and for the purpose of making an election to take under said will, did on April 14, 1924, accept $25, and on June 5, 1924, accept $87.50 from said executor as part payment of her distributive share in said estate under the will.

On June 15, 1925, the cause was submitted to the court upon the pleadings and the documentary and oral testimony of the witnesses adduced by the respective parties, which resulted in a judgment denying the petition of appellee to take an interest in said estate under the law, and ordering the executor to proceed to distribute the estate under the will, from which judgment and order an appeal was duly prosecuted to the circuit court of said county.

The cause proceeded to a trial *de novo* in the circuit court on July 23, 1924, before the court, sitting as a jury, which resulted in granting the petition of appellee and an order directing the executor to pay the petitioner one-third of the personal property belonging to said estate, and awarding to her dower and homestead rights in the southwest quarter of the southeast quarter of section 22, and the west half of the northwest quarter and the northeast quarter of section 27, township 7 north, range 8 west, containing sixty acres, more or less, from which judgment and order and award an appeal has been duly prosecuted to this court.

The record reflects, according to the undisputed facts, that Rufus G. McEuen and the appellee were married in April, 1919, he being eighty and she sixty years of age; that, at the time, he had a home, some personal property and money, and was drawing a pension of $50 a month; that he executed his last will and testament on March 21, 1923, in which he devised to his widow, the appellee herein, and to his only children, who are appellants herein, in equal parts, all of his personal property, and to said widow all his household goods, wearing apparel, and the use of said homestead during her natural life; that the will was drawn by Esq. Davenport, a justice of the peace, in the presence of R. G. McEuen, one of his brothers, the appellee and some of their neighbors; and that the terms of the will were gone over in the presence of all of the parties, and that each of the devisees knew what he or she was to receive; that said testator died on March 28, 1924, and the will was pro-

bated on April 12, 1924, at which time Eugene Cypert, one of the appellants herein, qualified as executor under the will; that, on the day of his qualification, he paid the appellee $25 as part payment of her distributive share under the terms of the will, and noted that fact on the check for said sum, which she indorsed and cashed; that, on the 5th day of June thereafter, he paid her $87.50, and received the following receipt:

"87.50 Searcy, Ark., June 5, 1924.

"Received of Eugene Cypert, executor of the estate of R. G. McEuen, the sum of eighty-seven and 50/100 dollars ($87.50), in part payment of my distributive share in said estate under the will of said R. G. McEuen, and in consideration of this sum as an advancement under said will, I hereby agree that I will abide by the terms of said will, and will accept one-seventh (1/7) of the proceeds of the personal property of said estate. M. F. McEuen."

That at the time she signed the receipt she knew that her husband had over $4,000 in the banks, and that he owed no debts; that, although nearly seventy years of age and hard of hearing, she could read and write and was reasonably intelligent; that, upon the death of her husband, she took charge of the household goods, the little personal property on the place, and rented out the homestead.

The record reflects a dispute in the testimony as to whether she knew her rights in the estate under the law when she accepted payments from the executor in lieu of dower.

Eugene Cypert testified that, although he did not go into details concerning the amount appellee would get if she renounced the will and took under the law, yet he informed her of her legal rights in the premises, and that she would get much more under the law than under the provisions made for her in the will.

R. C. and R. F. McEuen testified that they were present when Mr. Cypert explained her rights to her and

heard her say to him that she would take under the will, as she was perfectly satisfied with it.

T. B. Ellis, a merchant in Searcy, who had known appellee and her husband for many years, testified that appellee told him that she had decided to accept the will and to settle the estate according to its terms.

Appellee denied the testimony of each of the witnesses aforesaid, and stated that she did not know that she had a right to renounce under the will and take under the law until a few days before she filed her petition in the probate court renouncing her rights under the will and praying for her dower and homestead rights under the law.

Appellants contend for a reversal of the judgment upon the ground that, according to the undisputed evidence, appellee elected to take under the will, and is bound by the election; whereas appellee contends for an affirmance of the judgment upon the ground that she signed the receipt in ignorance of her rights, and is not bound by same to an election under the will.

The receipt executed by appellee to the executor on June 5, 1924, a little over two months after her husband's death, contains an express election to take under the will. The language used therein is unambiguous and commits her unequivocally to an acceptance of a child's part, or one-seventh of the personal estate, in full settlement of her distributive share therein. She does not dispute signing the receipt, but attempts to avoid its effect by saying she was ignorant of her rights under the law.

Ignorance of the law is not sufficient to relieve one from his obligations, but, in order to avoid them, he must also show that he did not have capacity to make them, or that they were made under duress, or that they were induced by some kind of deception or fraud practiced upon him. In other words, when one is put to an election, the election, when made, is as binding and effective as any other agreement made by him. This court laid down the following rule relative to elections of widows under wills in the case of *Goodrum* v. *Goodrum,* 56 Ark. 504

(quoting syllabus 1): "Acceptance by a widow of a bequest of money under her husband's will, with knowledge that it was intended in lieu of dower, will be presumed to be an election to take under the will, notwithstanding she gave no receipt for the money and expressed no intention, in words or in writing, to make such an election."

It is true that, at the time appellee elected to take under the will, an inventory of the estate had not been filed by the executor, but she is charged with knowledge of the amount of money her husband had when he died, for she had possession of the deposit slips, and delivered them to the executor. She also had ample opportunity to inquire and obtain advice as to her rights under the law. There is not an intimation in the record that she was misled or deceived as to her rights, or that any undue influence was brought to bear upon her in order to induce her to abide by the will. She was a woman of reasonable intelligence, and voluntarily made an election to take under the will. Mr. Pomeroy says, in his work on Equity Jurisprudence, vol. 1, § 514, 4th edition, that "an express election is made by a single unequivocal act of a party, accompanied by language showing his intention to elect," and in § 516 of the same work says that one is bound by such an election.

In view of the fact that the undisputed evidence reflects that appellee estopped herself from claiming under the law, the judgment of the circuit court must be reversed, and the cause remanded with directions to the court to enter a judgment denying the petition of appellee, and directing the executor to administer the estate in accordance with the terms of the will.

The attention of the trial court is called, however, to the fact that the widow is entitled, under the circumstances of this case, to her statutory allowances of $450 out of the personal estate before same is divided among the devisees, notwithstanding the fact that she elected to take under the will. There is no expression in the will indicating that it was the intention of the testator to

deprive appellee of her statutory allowances under §§ 80 and 86 of Crawford & Moses' Digest, by devising her a child's part in lieu of dower. *Costen* v. *Fricke,* 169 Ark. 572, 276 S. W. 579.

On account of the errors indicated the judgment is reversed, with directions to the trial court to enter a judgment dismissing the petition of appellee, and ordering the executor to administer the estate in accordance with the terms of the will, after paying appellee $450 in satisfaction of her statutory allowances.

COVINGTON v. JOHNSON COUNTY.

DIXIE CULVERT & METAL COMPANY v. JOHNSON COUNTY.

Opinion delivered December 6, 1926.

1. COUNTIES—ORDERS CALLING IN COUNTY WARRANTS.—Orders with reference to calling in county warrants, under Crawford & Moses' Dig., §§ 1994-1998, must be made by the county court, and not by the county judge, and must be spread upon the record of such court.
2. COUNTIES—PROCEEDINGS OF COUNTY COURT.—The county court is a court of record, and its proceedings as such must be entered upon its record.
3. COUNTIES—ORDER CALLING IN COUNTY WARRANTS—APPEAL.—An order of the county court rejecting and canceling warrants as fraudulent or for any other purpose is a judgment from which the holder of such warrants adversely affected has a right to appeal.
4. COUNTIES—CANCELLATION OF WARRANTS.—An indorsement on county warrants, "canceled as fraudulent, August 11, 1917, C. H. Baskins, County Judge," *held* not to show that the county court adjudicated and ordered the warrants canceled.
5. COUNTIES—CALLING IN WARRANTS—EFFECT OF FAILURE TO ACT.—The effect of the failure of the county court to take action on warrants called in for reissue or cancellation is to toll the statute of limitations as to the reissue and redemption of such warrants.

Appeal from Johnson Circuit Court; *J. T. Bullock,* Judge; reversed.

Webb Covington, pro se; Rogers, Barber & Henry, and *Gannaway & Gannaway,* for Dixie Culvert & Metal Company, appellant.

G. O. Patterson and *Hugh Basham,* for appellee.

WOOD, J. The facts in these cases are substantially as follows: In 1916 the Dixie Culvert & Metal Company, hereafter called metal company, sold and delivered to Johnson County, Arkansas, certain road materials aggregating the sum of $4,167.25. In payment for the materials the county court issued to the metal company road warrants for the above sum. This was during the term of office of Judge J. J. Montgomery, county judge of Johnson County. In 1917 J. J. Montgomery was succeeded by C. H. Baskins, who had been elected county judge of Johnson County, and in the summer of that year the county court issued an order calling in all county warrants for cancellation and reissue. The metal company inquired of the county clerk to know if its warrants were included in the call, and was advised by him that such was the case. The metal company then sent in its warrants to the county clerk. On the face of each of these warrants was written in red ink the following: "Canceled as fraudulent, August 11, 1917, C. H. Baskins, County Judge." The signature was identified as that of Judge Baskins. The warrants were placed in a locked box, and the box then placed in the vault in the office of the county clerk. The metal company knew that the warrants had been thus marked canceled. Bartlett, the county clerk at the time this action was taken, notified its representatives of the action. Likewise, the clerk who succeeded Bartlett allowed the agents or attorneys of the metal company to look at the warrants. These warrants were kept by the successive county clerks in a lock-box separate from other warrants. No record was made on the records of the county court of Johnson County showing that the warrants were canceled as fraudulent, and that, for that reason, they were disallowed and not reissued. The material sold by the metal company to the county was received by the county

before the term of Judge Montgomery, who was county judge at the time of the purchase, expired. When his successor, Judge Baskins, went into office, the culverts were used on the roads and highways of the county, and some of them were used on the streets of Clarksville. Soon after the election of Judge Baskins, he employed Judge Basham and G. O. Patterson, attorneys, of Clarksville, Arkansas, to resist the payment of the warrants in controversy. Judge Baskins talked to Judge Basham, one of the attorneys employed by him, in regard to these warrants, and Judge Basham advised Judge Baskins not to bother anything about it until the time for the appeal was up, and that the order canceling the warrants was within the court's jurisdiction.

In February, 1924, the metal company, through its attorneys, Rogers, Barber & Henry, of Little Rock, filed with the county court its petition for the issuance, or reissuance and redelivery, of the warrants covering the amount claimed to be due the metal company in the sum of $4,167.25. This petition was afterwards presented to the court by Webb Covington, representing the metal company, at the request of Barber, one of the attorneys for the metal company. Judge Montgomery was the county judge at that time. The county court granted the prayer of the petition, and issued an order directing the reissuance of the warrants covering the amount due the metal company. The county clerk issued the warrant and placed the same in the hands of Webb Covington, who presented the same to the treasurer of the county for registration, and the treasurer, after registering the warrant, advised Webb Covington that funds for the payment of such warrant were on deposit in the Bank of Clarksville. Covington presented the warrant to the bank for payment, and the same accepted and paid. The bank issued a deposit slip to Covington, who passed the amount to his checking account. That occurred on Friday. On Monday thereafter, to-wit, on November 18, 1924, the prosecuting attorney for the judicial district including the county of Johnson filed a complaint

in the Johnson County Circuit Court, in which Johnson County, on relation of the prosecuting attorney, is designated as plaintiff, and the metal company, Bank of Clarksville, Ralph Walton, sheriff of Johnson County, and A. W. Covington, are named as defendants. After setting up substantially the facts as above set forth, the complaint alleged that the warrants were wrongfully, unlawfully, and fraudulently allowed and reissued, and unlawfully registered by the treasurer of the county, and that the payment of same would result in great and irreparable loss and damage to the plaintiff. He prayed that the treasurer of Johnson County be enjoined from paying said warrants. The order of the circuit judge recites that the petition was presented to him in his chambers at Russellville, on November 17, 1924, and, upon the hearing of the same, he directed the clerk of Johnson County Circuit Court to issue a restraining order restraining the defendants in the petition from doing anything whatever toward the payment or settlement of the pretended claim of the metal company against Johnson County, pending the appeal, and until the suit was determined or until further orders of the court.

Webb Covington, as attorney for the defendants, filed in the circuit court of Johnson County a motion to dissolve the injunction, setting up that the same was issued without notice to the defendants named in the petition and alleging that the court was without jurisdiction, under the facts stated in the petition, to issue the restraining order, and that the facts stated were not sufficient to state a cause of action against the defendants. In a separate answer or motion Webb Covington, for himself, set up substantially the facts as above set forth, and denied specifically all the allegations of the petition for injunction that were not specifically admitted, and prayed that the injunction be dismissed and that he have judgment for costs. After this, the prosecuting attorney and Webb Covington agreed in open court that, upon the filing of a bond by Covington with sufficient surety to protect the county, the injunction might be dissolved. Webb

Covington filed the bond with J. H. Brock as security, and the injunction was dissolved and the bank directed to pay over the funds in its hands to Webb Covington. The trial court, upon the above issues and facts, entered a judgment reversing the judgment of the county court of Johnson County allowing the claim of the metal company against the county, and disallowed such claim, and also rendered a judgment in favor of Johnson County against the metal company and Covington and Brock in the sum of $4,167.60, the amount found to be due under the terms of the bond filed by Covington and Brock.

On the 18th day of June, 1925, the metal company filed its motion to modify the judgment of May 14, 1925, by *nunc pro tunc* entry, so as to eliminate from such judgment the judgment rendered by the court in favor of Johnson County against the metal company on the bond in the sum of $4,167.60 given and signed by Covington as principal and Brock as surety. From the judgment in favor of Johnson County against Covington on the bond and also in favor of Johnson County against the metal company on the bond, both the company and Covington prosecute their appeals.

The procedure (c. 40, C. & M. Digest) for calling in county warrants in order to redeem, cancel, reissue, or classify the same, or for any lawful purpose whatever (§§ 1994-1998, inclusive), contemplates that all orders the court makes with reference to such warrants so called in shall be spread upon the record of the county court, because the orders pertaining to such called-in warrants are all orders to be made by the county court and not by the county judge. The warrants, when presented in obedience to such call, are presented to the court for its action, and not to the county judge. They are to be presented at the time required by the order of the court, not the judge, and when, in obedience to the order of the court calling in the warrants, they are presented to the court, it is the duty of the court, not the judge, to thoroughly examine the same and to reject all such evidences of indebtedness as, in its judgment, the county

is not justly and legally bound to pay, subject to appeal to the circuit court. The county court is a court of record, and its proceedings as a court must be entered upon its record. An order of the county court rejecting and canceling warrants as fraudulent, or for any other purpose, is a judgment of the county court, from which the party holding the warrant adversely affected by the order has the right to appeal. Section 2009 of C. & M. Digest provides: "If, upon adjudication of any warrant by the county court, it shall be found to have been fraudulently or wrongfully issued, without due authority from said court, *the court* shall indorse such fact thereon, and cause it to be deposited, without renewal, in the office of the clerk of said court."

There was no formal plea of the statute of limitations nor of *res judicata* set up in the case, and, if such pleas had been entered, they could not avail under the undisputed evidence, which shows that no order of the court was ever made canceling the warrants of the metal company. The order of the county court calling in the county warrants for reissue gave the county court of Johnson County jurisdiction to cancel these warrants. See *Johnson County* v. *Patterson,* 167 Ark. 296. But there is nothing in this record to show that the county court, as such, adjudicated and canceled the warrants in controversy. The mere indorsement on the face of the warrants, "Canceled as fraudulent, August 11, 1917, C. H. Baskins, County Judge," does not show that the county court adjudicated and ordered the warrants canceled, pursuant to §§ 1998 and 2009 of C. & M. Digest *supra.* Such indorsement by the *county judge* was not tantamount to a judgment of the *county court* canceling these warrants for fraud. Hence these warrants, so far as this record discloses, were outstanding and valid warrants at the time the petition was presented to the county court in 1924 for their reissue. The undisputed evidence in this record is to the effect that these warrants originally were issued in payment of a valid claim against the county. The metal company presented its warrants, in compli-

ance with the order of the county court calling in warrants for redemption, cancellation, reissue, or classification. The failure of the county court to take any action on these warrants, either to cancel and reissue same if found to be valid, or to reject and cancel the same if, for fraud or any other reason, found invalid, and to enter judgment on its record showing what was done by the court in the premises, had the effect of tolling the statute of limitations as to the reissue and redemption of the warrants.

The case of *Johnson County* v. *Patterson, supra,* does not dispose of the issues here at all. The theory of counsel for appellee that the issues here presented were settled by that case cannot be sustained. True, that was a suit against the county by attorneys on a contract entered into by them with the county to resist this particular claim and to prevent, if possible, the reissuance and payment of the warrants in controversy. On the facts there presented we held that the county was liable on its contract. The parties were different from the parties now before the court, and the issues were entirely different, and that case has no application to the facts in this record.

It is unnecessary for us to enter upon a determination of the question as to whether or not the circuit court had jurisdiction to render a judgment awarding the injunction, and thereafter a judgment on the bond growing out of that proceeding. For, if we treat the proceeding here as an appeal from the judgment of the county court allowing the claim and directing the reissuance of the warrants, which we have done, the undisputed facts of this record show that the judgment of the trial court was erroneous. The judgment is erroneous in any view of the case, and it is therefore reversed, and the cause is remanded with directions to the trial court to enter a judgment affirming the judgment of the county court in directing the issuance of a warrant to the metal company for the payment of its judgment against Johnson County.

FOX v. PINSON.

Opinion delivered December 6, 1926.

1. MORTGAGES—SALE OF LAND NOT INCLUDED.—A decree of foreclosure ordering a sale of 80 feet on which a hotel stood to satisfy a mortgage which covered only 75 feet thereof was erroneous.
2. MORTGAGES—COVENANT AGAINST INCUMBRANCES.—A vendor who conveyed land by deed with warranty against incumbrances cannot foreclose his mortgage taken to secure the purchase money before paying off and clearing the record of all incumbrances.
3. MORTGAGES—FORECLOSURE—UNMATURED INSTALLMENTS.—In the absence of an accelerating clause in purchase-money notes or mortgage, a mortgagor cannot enforce his lien for the total indebtedness on default in payment of a part thereof.
4. GARNISHMENT—NECESSITY OF ANSWER.—A purchaser of land who gave purchase-money notes should, on being served with a writ of garnishment by the vendor's creditor, tender the money due to the vendor into court and request that same be applied to her notes before being paid to such creditor.
5. MORTGAGES—ASCERTAINMENT OF PRIORITIES.—A valid foreclosure decree must be obtained before there can be any basis for ascertainment and declaration of priorities between claimants.

Appeal from Union Chancery Court, Second Division; *E. G. Hammock,* Chancellor on exchange; reversed.

Coulter & Coulter, for appellant.

Marsh, McKay & Marlin, for appellee.

HUMPHREYS, J. This suit was commenced in the chancery court of Union County, Arkansas, by W. J. Pinson, one of the appellees, against Yetta C. Fox, one of the appellants, to foreclose two mortgages in the total sum of $50,000 and accumulated interest, upon the east 80 feet of lot 4, in block 17, in the city of El Dorado, known as the States Hotel property. It was alleged in the complaint that, on January 1, 1924, said appellant executed two mortgages to said appellee upon said property to secure the balance of the purchase money for same, amounting to $50,000, one for $20,000 to secure the payment of twenty-five promissory notes in the sum of $800 each, the first being due on the 1st day of January, 1929, and one on the first day of each month thereafter, bearing interest at the rate of 8 per cent. per annum,

interest payable annually; and the other for $30,000, to secure the payment of sixty promissory notes in the sum of $500 each, falling due consecutively on the 1st day of each month thereafter, and each bearing interest from date until paid at the rate of 8 per cent. per annum; that said appellant had defaulted in the payment of interest in the sum of $1,600 on the first series of notes, and on the payment of four notes in the second series, with accumulated interest thereon, and that she had failed to pay the taxes on said property and insure the hotel.

Said appellant filed an answer, admitting the purchase of the property and execution of the first and second mortgages to secure the first and second series of notes, but denied that she had failed to keep up the payments or comply with the terms of the mortgages until a writ of garnishment was served upon her for a claim of $2,000, issued in a suit pending in the first division of the chancery court, wherein F. M. Dielman was plaintiff, and said appellee and J. T. Finn, an owner of an equitable interest in said property, were defendants, the suit being for an alleged balance due to Dielman as a real estate commission from them for selling said property to her. She interposed the further defenses that said appellee conveyed the property to her under a warranty that same was free from incumbrances, whereas appellee, as well as J. T. Finn, who owned an equitable interest therein, had executed separate mortgages upon said property to various parties, which were placed on record prior to said appellee's deed to her, and prayed that said appellee be required to clear the property of all incumbrances prior to said deed; and that there was no accelerating clause in the mortgages or notes which she executed to said appellee, and that he was not entitled to foreclose upon the unmatured indebtedness secured by said mortgages.

The Globe Petroleum Company and the First National Bank of El Dorado, two of the appellees herein, the First State Bank of Paris, Texas, one of the appellants herein, and a number of other parties, filed separate

interventions, claiming interests in the property prior and paramount to W. J. Pinson or Yetta C. Fox, under mortgages antedating the deed from W. J. Pinson to Yetta C. Fox, and interests prior and paramount to W. J. Pinson as holders by assignment of certain of the series of notes executed by Yetta C. Fox to W. J. Pinson.

The intervention of the First National Bank of El Dorado was based upon the mortgage executed to it upon the east 75 feet of lot 4, block 17, in the town of El Dorado, by W. J. Pinson, on the 10th day of January, 1923, to secure the payment of a note in the sum of $20,000, in which it was alleged that there was a balance due upon said mortgage of $4,500.

The suit of F. M. Dielman for his commissions was consolidated with this suit and the interventions filed therein, and the consolidated cause proceeded to a hearing upon the pleadings and the oral and documentary testimony adduced by the several parties, resulting in a decree declaring that the mortgage executed by Pinson to the First National Bank of El Dorado was prior and paramount to all other claims against the entire property, and adjudging a foreclosure of the east 80 feet of said lot and block to satisfy the amount due upon said mortgage. The court then proceeded to determine the priorities between the several claimants who had intervened, and ascertained the amount due each on their several claims just as if the unmatured notes were due, and adjudged the amounts due the several claimants thus ascertained liens upon the proceeds to be derived from the sale of the property, after first paying the mortgage and interest due the First National Bank of El Dorado. The court also ascertained that F. M. Dielman was entitled to a balance of $650 upon his claim as commissions for making the sale, and rendered judgment in his favor against J. T. Finn, and ordered that same be paid out of the proceeds of the sale in the order of priorities theretofore determined. The court appointed a commissioner to make the sale and report his proceedings to the

court at its next regular term after the sale should be made.

An appeal from the decree has been duly prosecuted to this court by Yetta C. Fox, F. M. Dielman and the First State Bank of Paris, Texas.

The effect of the decree, as we interpret it, was to treat all notes and accounts as matured claims against the whole property, and to foreclose the liens and sell the property to create a fund out of which to pay the said claims in order of adjudged priorities.

It is conceded by all the parties that the mortgage in favor of the First National Bank of El Dorado is prior and paramount to all other claims against the east 75 feet of said lot in said block, but the appellants contend that the court erred in decreeing a foreclosure of the east 80 feet of said lot to satisfy the balance due upon said mortgage. Just how this error crept into the finding and decree of the court we are at a loss to understand, as, by reference to the mortgage, we find that it only covered the east 75 feet of said lot. The property was valuable, and the sale of the extra five feet in connection with the east 75 feet as a whole necessarily prejudiced the rights of Yetta C. Fox, who purchased the 80 feet of said lot upon which the hotel stood, as well as other subsequent lienholders.

Appellants' next contention for a reversal of the decree is that the court erred in ordering a sale of the east 80 feet of said lot to create a fund to pay the lien of W. J. Pinson and his assignees, under both the first and second mortgages executed by Yetta C. Fox to him. They are correct in their contention for two reasons.

First, that W. J. Pinson was in no position to foreclose either of his mortgages before paying off and clearing the record of all incumbrances placed by him and J. T. Finn upon the east 80 feet of said lot. He and Finn owned the property jointly, subject to certain mortgages each had placed upon it, at the time he conveyed it by warranty deed to Yetta C. Fox. He held the legal

title, and conveyed it under a warranty that it was unincumbered.

Second, only a part of his debt was due, and, there being no accelerating clause in the notes or mortgages, he was powerless to enforce a lien against the property for his total indebtedness. The statutes of our State do not provide for a foreclosure of an entire mortgage indebtedness upon default in the payment of an installment thereof which has become due, nor the foreclosure of two mortgages upon the same property by the same mortgagee upon default in the payment of the due mortgage before the maturity of the other. In the first instance, the mortgagee can foreclose upon installments only which have matured, subject to the continuation of the lien upon the property to secure the unmatured installments; and, in the second instance, can only foreclose the mortgage which has matured and not the undue mortgage. If the law were otherwise, there would be no necessity for an accelerating clause in mortgages, and it is almost a universal custom in this State to embrace accelerating clauses in mortgages. Even the printed forms of mortgages contain such clauses. There is much authority in support of a contrary rule, and also in support of a rule allowing the situation in each case to be taken care of by provisions in the decree, but we think the rule announced is the most wholesome and the fairest to both mortgagor and mortgagee. Any other rule would create inequalities between owners of notes falling due at different times which are embraced in the same mortgage. This court stated, in the case of *Land* v. *May*, 73 Ark. 415, in dealing with a number of notes secured by mortgage, some of which were due and some not, that the mortgagee "was entitled to have foreclosure for such as were due." This was tantamount to saying that he was not entitled to foreclose for such as were not due. The case was reversed, and remanded with permission to amend and ask for foreclosure of such as were due. In the instant case appellee should be granted such permission only in case he first does equity by pay-

ing the mortgage he executed to the First National Bank of El Dorado upon the east 75 feet of said lot prior to his sale of same to Yetta C. Fox, and clearing the record of other liens placed upon the property by J. T. Finn and himself.

Appellant also contends for a reversal of the judgment because a writ of garnishment was served upon her in the Dielman suit. Her position is not tenable in this respect. She should have filed an answer in the garnishment proceeding and tendered the money to the court, requesting that same be applied to the satisfaction of her notes before being paid over to either of the contestants.

It is unnecessary to consider the correctness of the priorities of the different claimants, as they were prematurely ascertained and declared by the court. There can be no ascertainment and declaration of priorities between claimants to a fund unlawfully created. A valid foreclosure decree must be obtained before there can be any basis for an ascertainment and declaration of priorities between the several lien claimants.

On account of the errors indicated the decree is reversed, and the cause is remanded for further proceedings not inconsistent with this decree.

SANDERS v. FLENNIKEN.

Opinion delivered December 20, 1926.

1. HOMESTEAD—NONJOINDER OF WIFE—CURATIVE ACT.—A mortgage of a homestead executed in 1903, invalid under Crawford & Moses' Dig., § 5542, because the grantors' wives did not join therein, was cured by Acts 1923, p. 43.
2. PLEADING—CONCLUSION OF LAW.—An allegation that the foreclosure of a mortgage was not "in the manner and form required by law" is a statement of a conclusion, and does not disclose facts sufficient to render the foreclosure void.
3. QUIETING TITLE—CONSTRUCTION OF COMPLAINT.—A complaint in an action to quiet title which alleges that two of six heirs executed a

mortgage, under foreclosure of which defendants claimed title, *held* to show an interest in the land in the four heirs who are complainants.

4. LIMITATION OF ACTIONS—PLEADING.—The defenses of limitation and laches should be raised by answer, and not by demurrer, where the facts stated in the complaint do not show that the action is barred.

5. PLEADING—INDEFINITE ALLEGATIONS.—Where allegations of a complaint are not definite, a motion to make it more definite and certain should be made, and the objection cannot be raised by demurrer.

6. DEEDS—EFFECT OF REPEAL OF CURATIVE STATUTE.—The subsequent repeal of a curative statute will not invalidate a defective deed which had been cured by the prior act.

7. HOMESTEAD—DEFECTIVE CONVEYANCE—REPEAL OF CURATIVE ACT.—Acts 1923, No. 80, curing conveyances of homestead defective by reason of a nonjoinder of the wife of the grantor, was not repealed by Acts 1923, No. 185, curing the same defect.

8. HOMESTEAD—EFFECT OF CURATIVE ACT.—The fact that the grantor in a mortgage died, and his widow's dower became vested before the enactment of Acts 1923, p. 43, curing a defect in the execution of the mortgage, does not prevent the operation of such act.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor; reversed in part.

Hutchins, Abbott, Allday & Murphy, for appellant.

McNally & Sellers and *Marsh, McKay & Marlin,* for appellee.

McCULLOCH, C. J. Appellants instituted this action against appellees in the chancery court of Union County, claiming title to a tract of oil land containing forty acres, and seeking to cancel, as clouds on their title, certain conveyances under which appellees assert title. The court sustained a demurrer to the complaint, and, upon refusal of appellants to plead further, there was a final decree dismissing the action.

It appears from the allegations of the complaint that Edmund Norris was the original owner, as patentee of the United States Government, and that he died in the year 1894, leaving surviving his wife, Silvia Norris, who inherited the land in the absence of other heirs; that Silvia Norris died in the year 1899, leaving surviving

her five children, Riley Sanders, Neil Sanders, Mary Burns, Lou Cotton, and Mellie Miller, and her grandchild, Elisha Wilson, who were her heirs at law and inherited the land. Riley Sanders and Neil Sanders executed a deed of trust on March 7, 1903, to secure a debt owing to Young and Anderson, and the deed was foreclosed under power of sale by the trustee in 1907. N. C. Marsh and Aylmer Flenniken were the purchasers at the trustee's sale, and received a deed. Subsequently Marsh conveyed his interest to Flenniken, and the latter conveyed to his wife, Mary Flenniken, one of the appellees. Mrs. Flenniken executed an oil lease on June 12, 1922, to Humble Oil & Refining Company, and another lease has been executed by Mrs. Flenniken to Tidal Osage Oil Company. Neil Sanders died in the year 1916, and left surviving his wife, Rena, who was plaintiff below and is one of the appellants here. All of the heirs mentioned above, together with Rena, the widow of Neil Sanders, joined in the complaint, and appealed.

It is alleged in the complaint that the wives of the two mortgagors, Riley Sanders and Neil Sanders, did not join in the execution of the deed of trust; that the property was, at the time of the execution of the deed, the homestead of the mortgagors, and that the conveyance was absolutely void by reason of the failure of the wives to join therein. The prayer of the complaint is that the mortage and all subsequent conveyances be declared void as clouds on the title of appellants, and that the present occupants be held to be mortgagees in possession and required to account for the rents and profits.

The statute (Crawford & Moses' Digest, § 5542) provides, in substance, that a conveyance by a married man of his homestead is void unless his wife joins therein, but there was a statute enacted by the General Assembly of 1923 (act No. 80) which rendered valid conveyances otherwise void on account of failure to comply with the other statute. Effect must be given to this statute, and the deed executed by Riley Sanders and Neil Sanders

is thereby rendered valid. *Flanigan* v. *Beavers, ante* p. 28. This disposes of the appeal of Riley Sanders and Rena, the widow of Neil Sanders, for the relief which they seek is dependent upon the invalidity of the deed of trust, which was rendered valid by the curative statute *supra.*

It is also alleged in the complaint, in general terms, that the foreclosure of the deed of trust was not "in the manner and form required by law," but that is a mere statement of a conclusion and does not disclose facts sufficient which would render the foreclosure void. However, the complaint shows on its face that the appellants other than Riley Sanders and Rena Sanders are the owners of an undivided four-sixths of the land as tenants in common with Riley and Neil Sanders, and that their interests are unaffected by the mortgage executed by the two last named. The other appellants are entitled, according to the allegations of the complaint, to recover their several interests in the land.

It is contended by counsel for appellees that a demurrer was properly sustained on the ground that the complaint shows on its face that appellants were barred by the statute of limitations, and also that they are guilty of laches which bars recovery of the land. We do not think that the facts stated in the complaint show that the action was barred either by limitation or by laches, but those defenses must be presented by answer and not by demurrer to the complaint. It is alleged in the complaint that Edmund Norris occupied the land as his homestead up to the time of his death in 1894; that it was so occupied by Silvia Norris as her homestead from 1894 to 1899; that it was also occupied as a homestead by Eliza Sanders, wife of Seaborn Sanders (the latter being the son of Silvia), from 1894 to 1899, and that "since 1909 said property has been in the actual possession of no one except for one year a man by the name of Bilyeu, about the year 1909, made one crop, and never occupied said land any more." It is further alleged that Eliza Sanders moved off the land in 1909, and died in 1920. It also appears from the complaint

that Seaborn Sanders was the only child of Silvia, and died in the year 1892 and left his widow, Eliza, and his children, who are appellants in this case. Seaborn having died before the death of his mother, the title passed by inheritance to his children, and his wife, Eliza, acquired no interest in the property, for the reason that her husband, Seaborn, was never the owner. It nowhere appears in the complaint that there was any adverse occupancy of the land so as to bar the rights of appellants by limitation, nor are there any facts alleged upon which the doctrine of laches can be invoked. The deed of trust executed by Riley and Neil Sanders purported to convey the whole of the land—not merely undivided interests—and the subsequent deeds were to the same effect. According to these allegations, appellees had color of title to the whole of the tract, but it is not shown on the face of the complaint that appellees have occupied the place for any particular length of time or that they have ever paid the taxes on the land, or that there has been any such change in the relation of the parties as to call for an application of the doctrine of laches. The allegations of the complaint are not altogether definite, but this objection should have been taken advantage of by motion to make the complaint more definite and certain.

The decree is therefore affirmed as to the interests of Riley Sanders and Neil Sanders, conveyed under the deed of trust, but reversed as to the other appellants, Mary Burns, Mellie Miller, Lou Cotton and Elisha Wilson, with directions to overrule the demurrer to their complaint, so far as relates to their interest in the land inherited from their ancestor, Silvia Norris. It is so ordered.

McCULLOCH, C. J., (on rehearing). Counsel for appellant make the contention that act No. 80 of the General Assembly of 1923 was repealed by a later act (No. 185) of the same session.

Act No. 80 was approved on February 9, 1923, and act No. 185 was approved February 23, 1923, each con-

taining the form of emergency clause then in vogue, and it is contended that, as the emergency clause was not attached in the manner and form required by the constitutional amendment of the year 1920, neither of the statutes went into effect until ninety days after the adjournment of the Legislature. At any rate, it is contended that, whether the statutes went into effect from the respective dates of approval by the Governor or on the same date (90 days after the adjournment of the Legislature), the first act was repealed by the last one.

Act No. 80 relates solely to conveyances rendered ineffectual for non-observance of the requirements of the statute approved March 18, 1887, in regard to conveyances of homesteads; whereas act 185 relates to defects of conveyances in this regard, and also with regard to those conveyances which were defective by reason of the acknowledgments not being in conformity with the statute.

It is unnecessary to decide the question whether or not the operation of the statutes was postponed, for the reason that, if act No. 80 was in operation from the time of its approval by the Governor until the approval of the later statute, defects in all deeds cured by its operation were validated and a repeal of the statute would not invalidate them. Where a deed is once validated, a repeal of the statute would not disturb the vested right. On the other hand, if it be held that the two statutes went into effect on the same date, there was no implied substitution of the last act for the first one. Act No. 80 is one which dealt with a specific subject, and, there being no express repeal, the presumption cannot be indulged that the Legislature intended to repeal it by another statute more general in its terms.

It it further insisted that the curative statute is not applicable for this reason, that one of the grantors in the mortgage died before the enactment of the statute, that the dower of his widow became vested, and that such vested right could not be disturbed by the statute. The fact that the widow had become endowed does not pro-

vent the statute from operating to cure the defect in the mortgage. The statute was as effective against the widow as against the husband, so far as it concerned the conveyance of the title and relinquished the homestead right. There was no vested right of the widow which averted the effect of the statute to that effect. The dower right of the widow was not affected by this statute, and the question of dower is not involved in this case.

Petition for rehearing denied.

FARELLY LAKE LEVEE DISTRICT v. MCGEORGE.

Opinion delivered December 20, 1926.

1. LEVEES—LIQUIDATED DAMAGES—WAIVER.—Provision of a contract for construction of floodgates that an extension of time for completion "shall waive no other obligation of the contractor or of the sureties" did not prevent such extension from operating as a waiver of a claim for liquidated damages on account of delays before the end of the extension period.
2. LEVEES—EXTENSION OF TIME—WAIVER OF LIQUIDATED DAMAGES.—Provision of a contract for construction of floodgates that mere permission to continue and finish the work after the time fixed for its completion should not operate as a waiver of the right to liquidate damages for delay *held* not to prevent an extension of time for completion from amounting to a waiver of a claim for such damages, as the extension constituted a new contract, into which the requirements of the original contract were merged.
3. LEVEES—EXTENSION OF TIME—LIQUIDATED DAMAGES.—Where the original contract for construction of floodgates provided that charges for liquidated damages should be made for such only as accrued after the expiration of periods of extension, a resolution of the levee board extending the time for completion and reciting that the board does not waive any claim of liquidated damages due up to this date *held* not a new contract for payment of damages, and there could be no claim for damages under the original contract.
4. LEVEES—EXTENSION OF TIME—WAIVER OF DAMAGES.—Extension of the time to complete floodgates released the contractor and his sureties from common-law liability for actual damages sustained on account of prior delay.

5. LEVEES—FLOODGATES—LIABILITY FOR UNEXPECTED EMERGENCIES.—Where a contract for construction of floodgates provided that the contractor should provide against unusual conditions in order to protect the public from loss or damage, *held* that the expense of removing water and mud in the basin flooded by order of the engineer to protect the levee and work of construction from an unexpected rise of water was imposed on the contractor, and not on the district.

6. LEVEES—FLOODGATES—RIGHT TO USE OF EQUIPMENT.—A contract giving floodgate contractors use of the district's equipment for the life of the job entitled them to use for the whole time of the construction, including periods of extension granted, without payment of additional rent, unless the delays were caused by their fault and were not waived by extension agreements.

7. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A finding of the chancellor on conflicting testimony will not be disturbed on appeal where not against the preponderance of the evidence.

Appeal from Jefferson Chancery Court; *Harvey R. Lucas,* Chancellor; modified and affirmed.

Rose, Hemingway, Cantrell & Loughborough and *Allen Hughes*, for appellant.

Buzbee, Pugh & Harrison and *Coleman & Gantt,* for appellee.

MCCULLOCH, C. J. Appellant district was created as a local improvement district for the purpose of constructing through Jefferson and Arkansas counties a levee along the bank of the Arkansas River, and also to construct necessary ditches, spillways and floodgates. It was deemed necessary to construct two floodgates, one across the mouth of the stream known as Little Bayou Meto. The levee had been built across the mouth of the bayou, and it was considered necessary to put in the floodgate so that the water would be prevented from flowing into the bayou from the Arkansas River in times of overflow and to permit the water to flow out of the bayou in times of normal stages of water in the river. The work was to be done by cutting a gap through the levee fifty feet wide and constructing concrete walls, wings and flooring and two heavy steel gates reaching to the height

of the levee and the two walls on each side, thus closing the aperture when necessary.

Appellees entered into a written contract with the district to furnish the material and construct the floodgates for the schedule of prices on the unit basis. The contract was executed on April 22, 1921, and provided that the work should be completed within six months from that date. There was long delay in completing the work, and it was not formally accepted by the engineers as complete until October 1, 1924.

The sum of $112,413.28 was paid to appellees by the district during the progress of the work, and there is a conceded balance due in the sum of $17,817.60 according to the schedule of prices in the contract. There are, however, numerous other items claimed by appellees, but disputed by the district, and the latter also brings forward a claim against appellees for liquidated damages on account of delay in completion of the work according to the terms of the contract. Appellant also claims other items as credits on the balance due appellees for work under the contract. The total amount of balance claimed by appellees is about $32,000, and this action was commenced against appellant to recover that amount. Appellant filed a cross-complaint asking for recovery of liquidated damages in the sum of $25,342.79 and other credits claimed, running the amount up to $33,834.27, and, after conceding liability to appellees in the sum of $18,865.60, prayed for judgment over against appellees for the difference between the two claims, $14,968.67. The cause was tried in the chancery court of Jefferson County, without objection, and, after hearing the evidence, the court rendered a decree in favor of appellees against appellant for the recovery of $25,698.21, made up of the following items (less a credit of $17.23, unpaid on rental):

(1)	Amount of final estimate	$17,817.60
(2)	Item 15: Preparing sub-base, north end	227.52
(3)	Item 18: Preparing sub-base, L. L. section	6.43
(4)	Item 20: Removing old concrete S. W. corner	76.41
(5)	Item 24: High water Feb., 1923	76.41
(6)	Item 25: Creosoted seal timbers	512.29
(7)	Item 26: High water, May and June, 1923	662.96
(8)	Shortage and gravel	5,286.75
(9)	Riprap stone	948.00
(10)	Rent of concrete mixer	100.00
		$25,715.44

The most important part of the controversy relates to appellant's claim against appellees for recovery of liquidated damages on account of the delay in completion of the work. The contract between the parties contained a clause providing for liquidated damages, which reads as follows:

"In case of default in completing the whole work to be done under this contract within the time specified, including such extensions as may have been granted, the contractor hereby agrees to pay to the party of the first part as liquidated damages for such default: First, a sum sufficient to compensate said first party for the cost and expense of employing engineers, inspectors and employees to the extent that their services are reasonably required during the period of default by the work of this contract; and, second, a sum equal to one per cent. on all moneys that have been paid the contractor under this contract for each calendar month or part thereof that the completion of the whole work under this contract is delayed. The party of the first part shall have the right to deduct such liquidated damages from any moneys due or to become due the contractor, and the amount, if any, still owing after such deduction shall be

paid on demand by the contractor or his surety. Payment of such liquidated damages shall not relieve the contractor or his sureties from any other obligations under this contract."

According to the contract, appellees were to begin work on June 15, 1921, and the testimony shows that they began work a few days before that time. The work was to be completed, as we have already seen, on December 15, 1921, but it was not so completed, and in February, 1922, the commissioners of the district, by resolution duly passed, granted an extension to appellees to complete the work on or before November 15, 1922; and on March 15, 1924, the work not having been accepted, another extension to September 21, 1924, was granted by the commissioners, and, as before stated, there was a formal acceptance on October 1, 1924.

Testimony adduced by appellees tends to show that the gates were completed and swung in October, 1923, and were complete, except the painting and a slight defect about their working smoothly when being raised or lowered, and were used by the district from that time on, though there was no formal acceptance until October, 1924. There was a short delay in the early part of the work on account of high water, and there was a delay also during the summer and fall of 1921 on account of the inability of the district to make payments for the work as it was done. The district sold bonds in the sum of $1,100,000, the money to be advanced by the bond purchaser in installments, and there was a default in these advancements, which caused considerable delay in the work. Appellees also introduced testimony to the effect that there were numerous other delays resulting from causes beyond their control, and, in most instances, the delays were caused by the officers and agents of the district itself. In other words, there was testimony adduced by appellees tending to excuse themselves from fault with respect to the delay in completion of the work, but there is a conflict in the testimony, and, under the view we take of the case, it becomes unnecessary to settle

this conflict. The clauses of the contract which are material to the decision of this point in the case are as follows:

"3. Time and Order of Completion.—The contractor agrees that the work shall be commenced and carried on at such points and in such order or precedence and at such times and seasons as may be directed by the engineers, in accordance with § 10 of the specifications. The engineers shall have the right to have the work discontinued for such time as may be necessary, in whole or in part, should the condition of the weather or of flood or other contingency make it desirable so to do, in order that the work shall be well and properly executed. Extension of time may be granted the contractor for discontinuance of work so required, as provided in § 4 of the specifications entitled 'Extension of Time.' * * * The board shall have the right, at its discretion, to extend the time for the completion of the work beyond the time stated in this contract, for reasons set forth in § 4, entitled, 'Extension of Time,' but such extension, if granted, shall waive no other obligation of the contractor or of the sureties, and, if the time for the completion of the work be extended by the board, then in such case the district shall be fully authorized and empowered to make such deductions from the final estimate of the amount due the contractor as are stipulated in the agreement for each calendar day that the contractor shall be in default for the completion of the work beyond the date to which the time of completion shall have been extended by the board. The contractor may be permitted or required to continue and finish the work or any part thereof after the time fixed by the contract for completion, or as it may have been extended, but such action shall in no wise operate as a waiver on the part of the district of its right to collect the liquidated damages agreed upon in case of such delay or of its rights under this contract.

"4. Extension of Time.—Delays due to cause beyond the control of the contractor, other than such as reasonably would be expected to occur in connection with or during the performance of the work, may entitle the

contractor to an extension of time for completing the work sufficient to compensate for such delay. No extension of time shall be granted, however, unless the contractor shall immediately, but in any case within 15 days from the initiation of the delay, notify the engineers in writing of such delay, and of the time of beginning and the cause of same, and unless he shall, within 15 days after the expiration of such delay, notify the engineers in writing of the extension of time claimed on account thereof, then only to the extent, if any, allowed by the engineers. To allow or to require completion after the time specified will not constitute an extension of time. No extension of time shall operate to release the surety from any of its obligations. The contractor declares that he has familiarized himself with weather, river and local conditions and other circumstances which may or likely to affect the performance and completion of the work, and that he has carefully examined the data and information pertinent thereto collected by the engineers and on file in their office, and agrees that, taking these conditions and circumstances into account, he will provide adequate equipment to prosecute the work in such manner and with such diligence that the same will be completed within the time specified herein, or as the same may be extended, even though the most adverse conditions which reasonably could be expected to occur during the period of construction do prevail during the performance of the work."

It will be noticed that § 3 of the contract, quoted above, provides that an extension granted by the board beyond the date of completion "shall waive no other obligation of the contractor or of the sureties." It is the contention of learned counsel for appellant that this provision eliminates all question of waiver of the clause in the contract with respect to liquidated damages on account of delay. Conceding that this contention is correct, so far as it prevents waiver of claims for liquidated damages on account of delay occurring after the end of the extension period, it does not prevent the extension

from operating as a waiver of claim for liquidated damages on account of prior delays. A further provision in the same section prescribing a method of computing damages for delay after the end of the extension shows very clearly that it was intended, in case of an extension of time, only to liquidate the damages which occurred after the end of the extension. It provides that, "if the time for the completion of the work be extended by the board, then in such case the district shall be fully authorized and empowered to make such deductions from the final estimate of the amount due the contractor as are stipulated in the agreement for each calendar day that the contractor shall be in default for the completion of the work beyond the date to which the time of completion shall have been extended by the board." There is still a further provision that mere permission to the contractor or a requirement to continue and finish the work after the time fixed for completion shall not operate as a waiver on the part of the district of its right to collect liquidated damages. But there is a difference in this respect between mere permission to complete the work or a requirement to complete it, and an agreement to extend the time for completion. The extension constituted a new contract concerning the time for completion, and all of the requirements of the original contract which related to that point and the liabilities resulting from a delay become merged into the new contract. The case in this respect comes clearly within former decisions of this court. *Ozark & Cherokee Central Ry. Co.* v. *Ferguson,* 92 Ark. 254, 122 S. W. 624; *Murray* v. *Miller,* 112 Ark. 227, 166 S. W. 536; *Morris* v. *Southwestern Supply Co.,* 136 Ark. 507, 206 S. W. 894; *Hunt* v. *Woods,* 168 Ark. 407, 270 S. W. 505. If appellant desired to hold appellees liable under the contract for liquidated damages on account of prior delays, it should have been so stated in the contract of extension, and the agreement for the work to be completed within the additional specified time released appellees, by necessary implication, from any liability on account of failure to complete the work before

that time. The resolution of the board granting the extension from March 21, 1924, contained a recital that "the board does not waive any claim of one per cent. liquidated damages due up to this date," but this did not constitute a contract to pay damages. The original contract provided that charge for damages should be made for such as accrued only after the expiration of periods of extensions, and this provision could not be abrogated except by express contract to that effect. The resolution granting the extensions did not constitute a new contract for the payment of damages. It was merely a stipulation against waiver of whatever claim the board might have under the original contract, and there could be no such claim, for, as already shown, the contract itself covered damages only after the expiration of the extensions. For the same reason appellees were released by the new agreement in regard to time of completion from common-law liability for actual damages sustained on account of prior delay. As we have already seen, the last extension ran up to September 21, 1924, which was nine days before the work was formally accepted by the engineers as complete. There is no contention that there was any actual damage during that period of time, and it is practically undisputed that the work was actually completed before the expiration of the last extension, hence the claim for either liquidated or actual damages cannot be sustained, and the chancery court was correct in so deciding.

Appellant concedes liability for the balance of estimate and the item of $948 for the price of riprap stone, and the sum of $100 rent on concrete mixer, and it does not challenge the correctness of any items contained in the court's finding in favor of appellees except the two items of price of work in removing water and mud after the high waters in February and June, 1923, and also the item of $5,286.75 shortage in gravel. The two items concerning the expense on account of high water aggregate the sum of $1,175.25. There was an unexpected rise of water in the Arkansas River, and at those times the

concrete walls on each side of the aperture through the levee had not been constructed. There had been partial excavation of the levee, which weakened it, and there was a hole or basin where the concrete floor was to be laid. In order to protect the levee from outside pressure of water, the engineers ordered the contractors to fill the hole or basin behind the levee full of water in order to provide counter-protection against such pressure. When the overflow from the river subsided it was necessary to pump the water out of the basin, and the mud that was left hindered the work of laying the concrete, and it required extra labor to obviate this trouble. The work, according to the testimony adduced by appellees, cost the sums of money claimed by them, and the chancery court allowed the claim. The contract contains the following provisions:

"11. To Provide for Emergencies.—It is understood by all parties to this contract that unusual conditions may arise on the work which will require that immediate and unusual provisions be made to protect the public from danger of loss or damage due directly or indirectly to the prosecution of the work, and that it is part of the service required of the contractor to make such provisions. * * *"

"37. Hindrances and Delays.—The risk and uncertainties in connection with the work are assumed by the contractor as a part of this contract, and are compensated for in the contract price for the work. The contractor, except as otherwise definitely specified in this contract, shall bear all loss or damage for hindrances or delays from any cause during the progress of any portion of the work embraced in this contract, and also all loss or damage arising out of the nature of the work to be done, or from the action of the elements, inclement weather and floods, or from any unforeseen and unexpected conditions or circumstances encountered in connection with the work, or from any other causes whatever; and, except as otherwise definitely specified in this contract, no charge other than that included in the con-

tract price for the work shall be made by the contractor against the district for such loss or damage. * * *"

Now, it appears from the testimony that the flooding of the basis behind the levee was necessary in order to protect the levee as well as the work then in progress of constructing the floodgates. It is true that appellees were not responsible for the condition that then existed and that it was an unexpected emergency, so that it relieved appellees of any responsibility for delay caused by the high water, yet the expense of restoration was one which, under the contract, was imposed upon appellees, and we think that they are not entitled to recover for the expense.

There is a conflict in the testimony as to the other item for shortage in gravel. The district had let the contract for this work to another concern, Trainer & Williams by name, who abandoned the work, and, when the contract was let to appellees, the district sold to appellees a quantity of gravel, estimated to be 2,200 yards, but, according to the testimony adduced by appellees, it turned out that there were only 1,087 yards. The estimates made by the respective parties were made under different circumstances, but we think that the state of the proof is such that we are not justified in overturning the finding of the chancellor on that item.

Appellant claims credit for two additional items which the court refused to allow—one in the sum of $6,827 for additional rent on equipment and an item of $1,647.25 for repairs on equipment. It is undisputed that the equipment owned by the district was rented to the contractors for use in constructing the improvement, and there is a conflict in the testimony as to the terms of the agreement. At the time the equipment was rented to appellees the period of time for the completion of the work fixed in the contract had not expired, and the agreed rent was to be $3,413.50, but appellant claims additional rent on account of the delay in construction of the work and consequent use of the equipment. The solution of this part of the controversy turns upon the question as to what period of time was to be covered by

the agreed amount of rent. The testimony adduced by appellees shows that they were to have the equipment for "the life of the job," and their contention is that this meant the whole time of the progress of the work, including the extension, regardless of any delays. Our conclusion is that appellees are correct in their interpretation of the contract. It meant that they were to have the use of the equipment for the stipulated rent, regardless of delays, unless the delays were caused by the fault of appellees and were not waived by extension agreements. The court was correct in rejecting that item, and also in rejecting the item for repairs on equipment, for there was a conflict in the testimony as to whether or not the equipment was returned in good shape, and we cannot say that the finding of the chancellor is against the preponderance of the evidence.

Appellees have cross-appealed and claim additional items which were not allowed by the trial court, but, after consideration, we are of the opinion that the findings of the court were as liberal to appellees as the evidence justified.

The decree is modified by allowing the additional credit of $1,175.25 stated above, thus reducing the amount of recovery by appellees to the sum of $24,522.96, and judgment will be entered here for the balance thus found. It is so ordered.

TRULOCK v. PAUL.

Opinion delivered December 20, 1926.

1. CONTRACTS—WAIVER—BURDEN OF PROOF.—In a suit for damages for breach of a contract, the defendant, alleging a waiver of such breach, has the burden of proving same.
2. CONTRACTS—WAIVER OF BREACH.—A contract of a lessor of a sawmill to build certain new tenant houses was waived where the lessee operated the mill for six months, and agreed to accept and use vacant houses in lieu of the new houses to be built.
3. LANDLORD AND TENANT—BREACH OF CONTRACT—RIGHT TO RESCIND. —Though a lessor failed to construct certain tenant houses for use

at a leased sawmill as agreed, the lessee was not justified in rescinding the entire contract, where the expense of erecting the houses was comparatively small, but should have made the improvements and deducted the cost thereof from the amount to to paid to the lessor.

Appeal from Jefferson Chancery Court; *Harvey R. Lucas,* Chancellor; reversed.

Danaher & Danaher, for appellant.

J. M. Shaw and *W. B. Sorrels,* for appellee.

WOOD, J. On the first day of October, 1923, H. E. Trulock and E. L. Paul entered into a written contract by which Trulock agreed to sell and Paul agreed to buy all the merchantable timber on certain lands described in the contract. Under the terms of the contract Trulock leased to Paul a sawmill plant to be used by Paul in the cutting of the timber on the lands described in the contract. Among other provisions the contract contained the following: "The said Paul agrees to furnish sufficient rough lumber to build five houses suitable for residences for his employees. Said Trulock shall furnish all dressed flooring, windows and doors, and all hardware necessary to complete said houses, and shall pay for the labor of building the said houses. The said houses are to be on sites to be selected by the said Trulock, near said mill, promptly, upon the furnishing of the rough lumber by the said Paul, and may be used by the said Paul for his employees at the mill during the continuance of this lease, free of rent, but, upon the expiration of this lease, said houses shall be turned over by him to the said Trulock in as good condition as when same are received by him, reasonable wear and tear excepted."

The contract provided that Paul should enter upon the land and cut the timber promptly and continuously, except when too wet to operate profitably. The contract was to expire within five years from its date.

This action was instituted by Paul against Trulock. Paul set up the contract in his complaint, and alleged that, under the terms of the contract, he took possession

of the mill, organized a labor force and began the performance of the contract; that, after he had cut several thousand feet and after two of the houses specified had been built, he demanded that Trulock build the other three houses specified, which Trulock refused to do, and thereby breached the contract, to Paul's damage in the sum of $11,500, for which he prayed judgment.

Trulock answered, admitting that the contract was executed by him, but alleged that it did not reflect the real agreement between the parties, which was that five houses suitable for residences for Paul's employees should be furnished by Trulock; that these houses might be the houses already on the place or new houses, and, if new houses, Trulock was to furnish the dressed flooring, windows, doors and hardware necessary to complete the houses; Paul would furnish the rough lumber, and Trulock would pay for the labor for building the houses; that the scrivener failed to draw the contract as the parties had agreed to, and it was signed by them through a mutual mistake of fact. Trulock further alleged that, after the contract was entered into, Paul went upon Trulock's place, and Trulock pointed out to him the houses which his hands might occupy, and Paul accepted said houses as being in compliance with the contract, and occupied the same with his laborers; that it was then found that Paul needed more than five houses, and Trulock allowed him the use of nine houses on the place, including two new houses which were constructed by Trulock; that it was agreed between them that the use of these houses was in full compliance with the contract. Trulock denied all other allegations of the complaint, except as admitted, and set up, by way of cross-complaint, that Paul, without just cause, abandoned the performance of the contract, and notified Trulock that he would not perform it; that, at the time of the breach of the contract by Paul, he left in the woods cut logs worth $56.40, which were spoiled and worthless; that he had used wood worth $238.50; that the abandonment of the contract by Paul caused Trulock a loss of $3 a thou-

sand on two million feet of timber left standing on the land. Trulock prayed that he have judgment for damages against Paul in the sum of $6,294.90. He also prayed that the cause be transferred to equity. The cause, without objection, was transferred to the chancery court.

Paul testified, and identified and introduced the contract, the material provisions of which are above set forth. He testified that he proceeded right away to carry out the terms of the contract. He moved his family on the place, hired men, and overhauled the mill and proceeded to cut the timber under the contract, until he had cut about 93,000 feet of lumber. He got everything in shape for the operation of the mill under the terms of the contract. Trulock built only two of the houses called for by the contract. Witness got out the lumber for the other houses, and demanded of Trulock that he build the same, and he refused to do so, saying that he wouldn't build any more. There were no houses on the place suitable for witness' laborers. The houses already on the place were defective. They were negro cabins. Witness' laborers were white, and they refused to live in the houses. The scrivener made no mistake in drawing the contract. The witness demanded of Mr. Trulock that he build the houses two or three times, and he refused to do so. The witness entered into detail, explaining the terms of the contract, and the prices of the various kinds of lumber, and the profit he would have realized thereon if Trulock had complied with the terms of the contract, which would have amounted in the aggregate to more than $13,000. Witness stated that he was anxious to carry out the contract. Witness told Trulock that if he didn't build the houses witness could not finish his contract with him. Witness complied fully with the contract on his part. He stated that Trulock built two houses. Witness did not consent to the use of any of the other houses. He asked Trulock's consent to use them until he got the other houses built. Witness' tenants only occupied them temporarily. None of witness' tenants

moved out before Trulock breached his contract. Witness' tenants refused to live in the shacks, and witness could not operate the mill under those conditions.

On cross-examination of this witness, it was developed that he had occupied as many as six houses on the place while he was engaged in the performance of the contract, but stated that his occupancy, except in the two houses built by Trulock, was temporary. Some of them were shacks and not suitable to live in, and his tenants would not remain. Witness' crew consisted of seven men; four of them lived in the houses mentioned and the other three lived at the boarding-house. The boarding-house man left, and the witness then quit. While witness was running the mill, Trulock told witness that he could occupy other houses until the five houses were built. The two houses were built by Trulock in about two months after witness moved on the place. The testimony of the witness further was to the effect that he occupied the premises in the performance of his contract six months. During that time he cut 93,000 feet of timber; that the reason it took witness this length of time to cut that quantity was because he had to overhaul the mill.

Paul's son and two other witnesses corroborated the testimony of witness Paul.

Trulock testified, in substance, that, after the contract was made, Paul and his son came on the place and batched two or three weeks, and then the ladies came down, and refused to live in the houses that Paul had before accepted for his own use, and Paul informed witness of that fact. When the contract was originally made, Paul agreed, on account of labor conditions, which were bad, and the number of vacant houses witness had on the place, that he would use these houses. At different times Paul and his employees occupied eleven different houses. They had as many as nine at one time, and part of the time had a full crew. Witness kept his tenant houses in good repair. They were better than the average tenant houses. Witness agreed to build

two new houses in order to satisfy the women folks of two of Paul's employees. The testimony to the effect that the houses were not fit to live in was not true. When the houses were assigned to Paul's laborers, they took them without complaint and lived in them until Paul quit running the mill. Witness had a talk with Mr. Hibbetts, one of Paul's employees. Hibbetts had testified that he left the place, after staying two weeks, because the houses were not fit to live in. Trulock testified that Paul asked him to build another house for Hibbetts. At that time the boarding-house was vacant, and witness asked why not give him that, and Paul replied that it was not good enough for him to live in. Witness then stated that the agreement was they would build houses only as they were needed, and witness told Paul it was not good business to build more houses when there were plenty of good vacant houses on the place. The next time witness met Paul he informed witness that he was going to leave because witness had made it impossible for him to operate. Paul informed witness that he was going to shut down the mill, but expected to hold the timber and the two houses, and that he would log the stuff and ship it off that way. Witness wrote Paul, two or three days after that, to ask him what he intended to do about the timber. Paul didn't reply, and in four or five days he sent witness the keys to the office, and witness did not hear anything more until this suit was filed. Witness further stated that, two or three days after the contract was signed, Paul and witness agreed that witness should build one house for Paul and his family to live in and one for Vanyard Paul and his family, and that Paul then agreed to use the other houses already on the place, and he did accept those houses, and that there was no further objection until the Hibbetts matter came up, about the first of March.

Four witnesses corroborated the testimony of Trulock in regard to the condition of the houses on the place. Their testimony tended to prove that the houses were in better condition than the average plantation

houses. One of these witnesses stated that, while Paul was on the place running the mill, he and his hands at one time occupied nine houses. One of them stated that the houses that Paul lived in and the one that Robinson lived in were better than the average. These houses were built near the mill.

Another witness testified that, after the trade was made, Paul and Vanyard Paul and their wives came down to look over the situation and pick out the place to live. After expressing some dissatisfaction with the houses, they came back and made arrangements with Trulock to build a house for Paul and one for Vanyard Paul. Paul was to furnish the lumber and Trulock the smooth lumber, doors, windows, and labor. Two or three days after witness went to Paul's office and told him that the next house would be built near the mill grounds. Paul said, "There is no use in that. Harry and I have agreed not to build any more houses. There are plenty of them here good enough for this labor."

In rebuttal, Paul testified that he had not entered into an oral agreement with Trulock, after the written contract, by which Trulock was not to build more houses. Witness had never agreed with Trulock to use the houses already there, except according to the contract. Witness occupied the houses six months temporarily. He had no conversation with Davis or anybody else waiving witness' right to have houses built.

The court found that Trulock had refused to carry out the contract; that Paul would have received a profit of $3,852.14 if Trulock had complied with his contract, and entered a decree in favor of Paul for that sum, from which is this appeal.

1. We have not set out the testimony in regard to the alleged damages because we have concluded that, if there was a breach of the written contract on the part of the appellant in failing to furnish dressed flooring, windows and doors and all hardware necessary to complete three houses, and in failing to pay for the labor of building said houses, as provided in the written contract and

as alleged in the complaint, then a preponderance of the evidence proves that such breach of contract was waived by the appellee. We are convinced that the appellee agreed to accept and use for his laborers the vacant houses already on the premises, in lieu of the three new houses that the appellant contracted to build. The fact that appellee remained six months on the premises in the performance of his contract, after he knew the condition of the houses on the premises, and operated the mill plant in the manufacture of timber into lumber until he had produced 93,000 feet of lumber, tends strongly to prove that he had waived the breach of contract on the part of the appellant in not performing his part of the contract. The appellant contends that the appellant and the appellee, after the written contract was entered into, entered into an oral contract with reference to the three houses that had not been built, under the terms of which the parties agreed that the appellant should build two new houses; and the appellee agreed, if appellant would do so, appellee would use the other vacant houses already on the place. One of the witnesses testified that Paul said that he and Trulock had agreed not to build any more houses. True, Paul himself denied that he had any conversation with any one waiving his right to have the houses built, but the appellant and another witness testified that he did enter into such an agreement. The positive testimony therefore preponderates in favor of the appellant on the above proposition. The length of time that appellee operated under the contract and the amount and character of work done, and other circumstances, it occurs to us, likewise corroborate the appellant's testimony and sustain his contention that the appellee waived any breach of the contract on his part. This issue is purely one of fact, and the burden is upon the appellant to prove the waiver. This he has done.

2. It will be observed that the contract requires that the appellant should furnish the "dressed flooring, windows and doors and all hardware necessary to complete said houses, and shall pay for the labor of build-

ing said houses." The appellee had entered into possession of the premises, and appellant had built the two houses, and the appellee was proceeding to perform the contract and had continued such performance for a period of six months, producing 93,000 feet of lumber. Such being the situation, the appellee would not be justified in abandoning the further performance of his contract and maintaining an action for damages against the appellant as for a breach of the entire contract on the part of the appellant because of the latter's failure to further perform the contract in the furnishing of material and the paying for labor prescribed therein. This was a contract that involved the sale of 2,000,000 feet of timber. Appellee had already cut 93,000 feet of the timber, and he alleges, and his testimony tends to prove, that, if the contract had been fully performed by both parties, he would have realized more than $13,000 profit. In a contract of this magnitude, the failure of the appellant to build three houses, which, according to his testimony, would have cost from fifteen to eighteen hundred dollars, including the cost of the rough material, which appellee did not have to pay, would not be such a substantial part of the contract as would justify the appellee, upon the failure of appellant to perform it on his part, to treat the contract as breached in its entirety by the appellant and to warrant a recovery of damages by the appellee. The consideration involved in the cost of these houses does not bear such a relation to the consideration of the entire contract as to warrant the appellee in claiming damages for breach of the contract after having abandoned the performance of the contract on his own part. Such, we conceive, would not be a reasonable construction of the contract, considering the same from the viewpoint of the parties when the contract was made. The appellee himself, by the abandonment of the contract on his part, under the circumstances disclosed by this record, must be held to have waived the breach of the contract, if any, on the part of the appellant.

In *Youngs* v. *Berman,* 96 Ark. 78, 131 S. W. 62, we held, quoting syllabus: "Where there has been a breach of agreement on the part of a landlord to make repairs, if the repairs are extensive and the cost excessive in comparison with the rent, the measure of the tenant's damages is the diminution in the rental value of the property by reason of such non-repair; but, where the repairs are inexpensive as compared with the rent, the measure of the tenant's damages is the cost of making the repairs." See also *Johnson* v. *Ingram,* 134 Ark. 345, 203 S. W. 836. That principle, by analogy, is applicable here. If the appellant failed to perform the contract on his part, as contended, the appellee, instead of abandoning the contract, should have made the improvements himself and deducted the cost thereof from the amount to be paid appellant. Appellee should have continued in the performance of his contract. Then he would have been in an attitude to maintain an action for damages against the appellant growing out of appellant's failure to perform the contract on his part. Since the appellee did not do this, but himself abandoned the contract, he must be held thereby to have waived the alleged breach on the part of appellant in the particulars alleged.

The decree of the trial court is therefore reversed, and the appellee's complaint will be dismissed for want of equity.

HUMPHREYS, J., not participating.

STATE v. BAIN.

Opinion delivered December 20, 1926.

1. ANIMALS—TRESPASSING ON UNINCLOSED LAND.—Though the common-law doctrine that an owner who permits his stock to run at large is a trespasser if they enter upon the uninclosed land of another is inapplicable to conditions in this State, the Legislature may enact such law and make it the statute law.
2. STATUTES—IMPLIED REPEAL.—Where two acts relating to the same subject are necessarily repugnant to or in conflict with each other,

the later act must control, and, to the extent of such repugnancy or conflict, operates as a repeal of the prior act, whether so expressly declared or not.

3. ANIMALS—STOCK RUNNING AT LARGE.—Special Acts of 1921, p. 219, §§ 5, 6, prohibiting the running at large of stock in a certain district in Lonoke County, though not inclosed by a lawful fence, *held* to repeal inconsistent provisions in Crawford & Moses' Digest, §§ 4655-4692, rquiring a lawful fence before conviction can be had for allowing stock to run at large.

4. CONSTITUTIONAL LAW—POWER OF LEGISLATURE.—As the action of the Legislature within its province is supreme, its reasons for legislation cannot be inquired into by the courts.

5. ANIMALS—PERMITTING STOCK TO RUN AT LARGE.—If cattle run at large with the knowledge and consent of their owner, he is guilty of permitting them to run at large.

6. CRIMINAL LAW—REVERSAL—NEW TRIAL.—Where the court erred in directing the jury to find the defendant not guilty, since the punishment is a fine only, the judgment will be reversed and the cause remanded for a new trial.

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

STATEMENT BY THE COURT.

Upon information filed by the deputy prosecuting attorney, D. Bain was arrested and convicted before a justice of the peace for unlawfully permitting his stock to run at large within a stock-law district in Lonoke County, Arkansas.

Bain appealed to the circuit court. In that court the evidence for the State shows that D. Bain lived about five miles from the boundaries of fencing district B-3, Lonoke County, Arkansas, and that he had lots of horses, cattle, sows and mules running in said fencing district during the year 1925. Frequently his stock was impounded for running at large in the district, and Bain paid damages. He would be notified to come and get his stock, and they would be back in thirty minutes. One witness, who lived about a mile within the limits of the fencing district, said that he had frequently turned back the cattle of the defendant from his place, and had several times notified Mr. Bain that his cattle were running at large within the fencing district. At one time he

turned back twenty-eight head of cattle which were destroying his corn.

The fence around the district had been cut at different places, and it was found to be impossible to keep the gates up. The fencing district was not surrounded by a legal fence at the time the defendant permitted his cattle to run within the limits of the district.

The circuit court directed a verdict for the defendant, and from the judgment of acquittal the State has duly prosecuted an appeal to this court.

H. W. Applegate, Attorney General, *John L. Carter,* Assistant, *W. J. Waggoner,* prosecuting attorney, and *Chas. A. Walls,* for appellant.

W. A. Leach, for appellee.

HART, J., (after stating the facts). This court has held that the doctrine of the common law, that, if the owner permits his stock to run at large and they enter upon the land of another, though uninclosed, he becomes a trespasser, is inapplicable to the condition and circumstances of our people, and has never been recognized in this State. *L. R. & F. S. Ry. Co.* v. *Finley,* 37 Ark. 562; and *St. Louis I. M. & S. R. Co.* v. *Newman,* 94 Ark. 458, 127 S. W. 735.

While this is true, it does not follow that the Legislature may not re-enact the common law, in whole or in part, or make that law the statute law of the State. As said by the Supreme Court of North Carolina in *State* v. *Mathis,* 149 N. C. 546, 63 S. E. 99: "If the condition in respect to the agricultural system of the people so changes as to make it conducive to their interest to require all stock to be 'fenced in,' and relieve the landowner of the of the duty to 'fence it out,' we can see no good reason why the Legislature may not, by appropriate legislation, do so, either in respect to the whole State or political divisions thereof."

Such is the effect of our own decisions. In *DeQueen* v. *Fenton,* 100 Ark. 504, 140 S. W. 716, 18 A. L. R. 63, it was held that one who resides outside a municipality is guilty of an infraction of an ordinance against permitting

his stock to run at large within the city limits, if the stock are driven by him within the municipal limits, or if they run at large therein with his knowledge. Again, in *Howell* v. *Daughet*, 148 Ark. 450, 230 S. W. 559, it was held that statutes authorizing the impounding and sale of stock found running at large in violation of law are valid as police regulations. This principle of law seems to have been recognized as sound by counsel for both parties in the case at bar.

The ruling of the circuit court in directing a verdict of acquittal was predicated upon the theory that there could be no conviction under the statute where there was no lawful fence around the fencing district. The fencing district was organized under the provisions of § § 4655-4692 of Crawford & Moses' Digest. Under the provisions of the statute, the district must be surrounded by a lawful fence before there can be a conviction for allowing stock to run at large within its limits. The Legislature of 1921 passed an act to provide for the regulation of certain fencing districts in Lonoke County, to provide for the enforcement thereof, and to define the powers and duties of the fencing board. Special Acts of 1921, p. 215.

Sections 5 and 6 of said special act read as follows:

"5. That in any criminal or civil proceeding for the violation of this act or the general fencing district act, it shall be no defense to any person residing in and owning live stock in that part of Lonoke County, south of the Chicago, Rock Island & Pacific Railroad, affected by § 1 of this act, that any fence has been destroyed, gate removed, or that any part of the said area or district is not inclosed by a lawful fence.

"6. It shall be unlawful for any person residing in that part of Lonoke County south of the Chicago, Rock Island & Pacific Railroad affected by § 1 of this act, to drive out of said area, for the purpose of grazing or pasturing, unless said live stock is grazed or pastured upon land owned by them, and likewise it shall be unlawful for any person residing on the outside of said territory to ride, or drive into, or to permit to run at large,

in the restricted area any of the live stock enumerated in § 3 of this act, and all persons violating the provisions hereof shall be fined not less than $10 or more than $50."

The special act just referred to does not, in express terms, repeal any of the provisions of the general act relating to the formation of fencing districts. When two legislative acts relating to the same subject are necessarily repugnant to or in conflict with each other, the later act must control, and, to the extent of such repugnancy or conflict, it operates as a repeal of the first act, whether it is so expressly declared or not in the later act. *DeQueen* v. *Fenton,* 100 Ark. 504, 140 S. W. 716. In the application of this rule of statutory construction, we are of the opinion that the special act of 1921 repealed the provisions of the prior general act in so far as the requirements of a lawful fence around District B-3 in Lonoke County, Arkansas, is concerned.

While it is true that § 5 above quoted seems to apply to those living within the district, it does allow the district to exist without a lawful fence. As we have already seen, this the Legislature had the power to do. It might change or modify the law with regard to building fences and permitting stock to run at large in cultivated lands in any way it deemed proper.

Section 6 makes it unlawful for any person residing on the outside of the fencing district to permit to run at large in the district any of the live stock enumerated in § 3 of the act. Section 6 specifically defines the ways the act may be violated, and it expressly prohibits people on the outside of the district from permitting their live stock to run at large within the district, and this indicates a purpose on the part of the Legislature to make such acts unlawful, regardless of the fact of whether the district was inclosed by a lawful fence or not. No useful purpose could have been served in passing the act if its provisions in this regard were only to apply to persons living within the limits of the fencing district.

It is insisted by counsel for the defendant that such a construction is inconsistent with the provisions of the

statute requiring that Fencing District B-4, which was not at that time inclosed by a lawful fence, to be inclosed. In answer to this, it need only be said that the Legislature had the power to enact such legislation as it deemed proper in the premises. Its action being supreme, its reason cannot be inquired into by the courts, and it is sufficient to say that the legislative will is a valid reason for its action.

If cattle run at large with the knowledge and consent of their owner, he is guilty of permitting them to run at large. *Beattie* v. *State,* 77 Ark. 247, 95 S. W. 163. Under this rule the evidence stated is legally sufficient to warrant a conviction.

The result of our views is that the court erred in directing the jury to find the defendant not guilty. Inasmuch as the punishment by the statute is a fine only, under our practice, the judgment will be reversed, and the cause remanded for a new trial.

WEST *v.* MEILLMIER.

Opinion delivered December 20, 1926.

1. CORPORATIONS—REFUND OF INCOME TAX—RIGHT OF STOCKHOLDER.—Where stockholders in a corporation advanced the money to pay the corporation's income tax, and were not repaid, the refund of such tax was payable to such stockholders, and one who subsequently purchased the interest of one of the stockholders was not entitled to share in the refund, though the sale included debts and demands due the company, and the buyer assumed all debts chargeable against the seller's interest.
2. ATTORNEY AND CLIENT—AGREEMENT AS TO FEE.—An agreement by two of the three stockholders in a corporation to pay 50 per cent. of the income tax refund as attorney's fee is not binding on the third stockholder, against whom only a reasonable fee can be charged.
3. ATTORNEY AND CLIENT—REASONABLE FEE.—Fifty per cent. of an income tax refund to a corporation *held* a reasonable attorney's fee for recovery thereof, in view of the amount involved and the nature, character and extent of services.

4. APPEAL AND ERROR—CONFLICT BETWEEN DECREE AND BILL OF EXCEPTIONS.—There is no conflict between a decree reciting that oral testimony was introduced and a bill of exceptions reciting that there was an agreed statement of facts, since it will be considered that such agreed statement is the oral testimony referred to in the decree.

5. STIPULATIONS—CONCLUSIVENESS.—No amount of oral testimony can overturn facts which are undisputed, and which the parties have agreed to be the facts in the case.

Appeal from Sebastian Chancery Court, Greenwood District; *J. V. Bourland*, Chancellor; reversed.

STATEMENT BY THE COURT.

W. H. Meillmier and the widow and heirs at law of John W. White, deceased, brought this suit in equity against W. E. West to recover their distributive share of $1,773.01 as assets of the Roughley Coal Company. West filed an answer, in which he admitted the receipt of the money as a refund by the United States of income taxes of the Roughley Coal Company, but avers that the money belongs to the original stockholders of said corporation, and asks that the money be distributed to them.

Abe Roughley, an original stockholder of said corporation, was allowed to intervene and claim his proportionate share of said fund.

The case was submitted to the court upon an agreed statement of facts as follows:

"The Roughley Coal Company, a corporation, was organized during the summer of 1917. Abe Roughley, John W. White and W. E. West were the corporators, each holding a one-third share in the corporation. The capital stock of said corporation was only $400, and the company operated a small mine near Hartford, Sebastian County, Arkansas, each stockholder performing some part in its operation, for which they respectively drew a salary which practically exhausted the funds of the corporation as they were earned.

"In the year 1918 the United States Internal Revenue Department, in checking up the Roughley Coal Company, made demand upon it for additional income

taxes for the year 1917, and, the company having no funds with which to pay such demands, each of said stockholders advanced out of his own private funds one-third of such demand, and paid the taxes demanded. Nothing further was done by the stockholders of the company with reference to this amount of income tax so paid. The stockholders never made demand upon the corporation to be reimbursed for such sums so paid, and the corporation never at any time repaid to them the amounts so paid.

"On January 27, 1920, intervener, Abe Roughley, sold his interest in said corporation to W. E. West, who in turn sold the same interest to W. H. Meillmier, either on the same day or shortly thereafter. In selling his interest to West, Roughley executed a bill of sale which provided that it 'shall include all debts, demands or other credits due the said Roughly Coal Company, whether liquidated or otherwise, and it is understood the purchaser shall assume all debts and other demands against said Roughley Coal Company.' Nothing was said by West or Roughley at the time concerning the income taxes which had been previously paid by such corporation, nor was there any mention made of it by either West or Meillmier when West sold the interest to Meillmier. It was agreed at the trial that neither of them knew at that time that any excessive taxes had been paid by the corporation or by the stockholders for the corporation.

"After this sale of stock, the stockholders of the corporation were W. H. Meillmier, W. E. West and John W. White, who immediately began to liquidate, selling its tangible property, paying its debts, and this same year (1920) the corporation was dissolved in accordance with the statutes. After the dissolution of the corporation, John W. White died, and his wife and children became his heirs, and are plaintiffs in this action as such.

"In March, 1923, W. E. West and Abe Roughley were informed by Mr. John W. Philbeck, who was at the time preparing an income tax return for West, that, during the first few years that the income tax was in force, gross

errors had been committed in calculating the amount of taxes due, and that they could probably obtain a repayment of some of the past paid taxes of the Roughley Coal Company by making application. He offered his services for the purpose of making demand for a refund, making a charge of $25 and his expenses per day for getting up the data and presenting it to the department. This was not satisfactory to Mr. West. He finally agreed to let Philbeck take the matter in hand and work it out and present the claim on a fifty-fifty basis. This agreement was finally made, and Philbeck took a contract, a copy of which is filed as Exhibit A to intervener's petition.

"Philbeck, on March 9, 1923, prepared a demand on the United States Treasury Department for such refund, and appended his argument to same. He demanded $1,800, and, during the following year, 1924, received a refund of $1,773.01. This money came to West as trustee for the Roughley Coal Company, and Philbeck was paid the sum of $704.16, leaving a balance of $182.34 claimed by Philbeck and unpaid. The plaintiff in this action had no knowledge of the action of West and Roughley until after the money was received and turned over to West."

The chancellor found that the amount of the income tax refunded by the United States to the Roughley Coal Company amounted to $1,773.01; that twenty per cent. of this amount should be paid to John W. Philbeck as a reasonable fee for his legal services in recovering said fund; that Abe Roughley was not entitled to any part of said fund; that the twenty per cent. attorney's fees allowed Philbeck was a proper charge against the fund, and that, after deducting the same, West should pay one-third of the balance to W. H. Meillmier and one-third thereof to the widow and heirs-at-law of John W. White, deceased, as the distributees of his estate. A decree was entered of record in accordance with the findings of the chancellor. To reverse that decree W. E.

West and Abe Roughley have duly prosecuted an appeal to this court.

Hays, Priddy & Hays and *John W. Goolsby,* for appellant.

A. M. Dobbs, for appellee.

HART, J., (after stating the facts). It is the contention of counsel for appellants, West and Roughley, that W. H. Meillmier had no interest in the fund involved in this lawsuit; that Philbeck is entitled to one-half of it, and that the balance should be distributed equally between W. E. West, Abe Roughley and the widow and heirs of John W. White, deceased, as the distributees of his estate.

The undisputed facts show that these parties originally advanced to the Roughley Coal Company the amount of its income tax, which is the basis of the refund to that corporation by the United States of the $1,773.01 involved in this case. In this contention we think counsel are correct.

Counsel for appellee, Meillmier, bases his right to a distributive share of the funds under his contract whereby he acquired the one-third interest of Abe Roughley in the Roughley Coal Company.

The record shows that Roughley sold his stock to West, and West at once transferred the same to Meillmier. The bill of sale provides that it "shall include all debts, demands or other credits due the said Roughley Coal Company, whether liquidated or otherwise, and it is understood the purchaser shall assume all debts and other demands against said Roughley Coal Company."

Counsel for appellee seeks to uphold the decree upon the principles of law decided in *Delano* v. *Butler,* 118 U. S. 634, and *Bidwell* v. *P. O. & E. L. Pass. Ry. Co.* 114 Pa. 535, 6 A. 729.

In the case first cited, a national bank became insolvent, and the Comptroller of the Currency authorized an increase of the capital stock of the bank in order to enable it to resume business. The stockholders voluntarily paid an assessment for this purpose. The capital stock was

increased to an amount equal to the aggregate sum of the voluntary assessments, and the money so obtained was used by the bank in the regular course of business. Under these facts the court held that the assessment was a voluntary one, made by the stockholders themselves under authority of law, to increase the capital stock to enable the bank to resume business, and therefore was not a loan of money to the bank.

In the second case cited, the affairs of the corporation were in bad condition. A large part of the track of the company needed repairing, and new station houses were needed. New equipments of cars and horses were also needed. The treasury was empty. To meet the emergency the three persons who owned all the corporate stock voluntarily assessed their stock and applied the money thus raised to the improvement and repairing of the company's property. This resulted in the enhancement of the value of the corporate property and in the betterment of their stock. It was held that, as a matter of fact, the transaction amounted to a voluntary assessment of their stock, and was not a loan of money by the stockholders to the corporation.

The facts are materially different in the case at bar. The transaction did not result in the increase in value of the property of the corporation or in the betterment of its stock. No new assets accrued to the corporation. The money advanced was not placed in the general assets of the corporation and used by it in due course of business. The money was paid in by the stockholders for a specific purpose, and used for that purpose alone. While the proof is not definite and specific, it is fairly inferable, from the agreed statement of facts, that the three stockholders intended to advance what money was actually needed to pay the income tax of the corporation for the year 1917. They evidently thought that the amount demanded was the amount due the United States. They only intended to advance the amount due to the United States, and there is nothing to show that it was intended that any excess payment should be returned to the cor-

poration and constitute a part of its assets. Rather, the equity of the case is that, if the amount advanced by the stockholders was in excess of the income tax due by the corporation for the year 1917, the payment of the excess was made either under a sort of compulsion or under mistake of fact. The excess should be returned ratably to the persons who contributed it, and not to the corporation for whose benefit it was paid.

In this connection, it may be stated that neither of the parties to this suit knew of the excess payment of taxes at the time West sold to Meillmier. The equity of the case upon the merits is with the persons who advanced the money with which to pay the income tax of the corporation for the year 1917, and we hold that they are entitled to the excess thereof in equal shares as a loan of money to the corporation.

If it be conceded that the $1,773.01 returned by the United States to the Roughley Coal Company is a debt or demand due said corporation and that Meillmier acquired an undivided one-third interest therein under the terms of the bill of sale, this does not help his case any. The bill of sale likewise makes him liable for all debts and other demands against the Roughley Coal Company. Now the undisputed facts show that the income tax of the Roughley Coal Company was not paid out of its assets, but was paid by West, White and Roughley out of their individual funds. They each owned one-third of the stock of the corporation, and contributed an equal amount in the payment of the income tax of the corporation. The amount of money so advanced by them was never repaid by the corporation. Hence it is a debt due them by the corporation. The corporation has dissolved and has no other distributive assets than the amount refunded to it by the United States. This fund constitutes its sole assets for the payment of its debts. No other debts are shown to have been owed by the corporation. Hence this sum of money should have been distributed to West, Roughley, and the widow and heirs of the estate of John W. White, deceased,

in equal proportion, after deducting the amount which should have been allowed and paid to John Philbeck for recovering the same.

This brings us to a consideration of the proper amount to be allowed Philbeck for his legal services in recovering the fund in question. West and Roughley made a contract with him whereby he was to receive as a contingent fee fifty per cent. of the amount recovered. They had no authority from the corporation or from the remaining stockholder to make such a contract. Hence White could not be bound by the contract, and his proportionate part of the fund could only be charged with a reasonable attorney's fee.

There is no testimony in the record to show what would be a reasonable fee. West and Roughley were entitled to two-thirds of the amount recovered, and the fact that they made a contract with Philbeck to give him fifty per cent. of the amount recovered indicates that they thought this to be a reasonable fee. Then, too, the fact that the corporation had been dissolved, the uncertainty of the recovery, the complex nature of the claim, and the fact that the attorney's services might be extended over a long period of time, are all elements to be considered in determining whether or not the contract fee of fifty per cent. of the amount recovered was reasonable. The corporation had its domicile at a great distance from Washington, and the fund was recovered by the exertions of Philbeck. In the absence of any direct and positive evidence as to whether the fee was reasonable, considering the amount involved, the nature, character and extent of the services required, we are of the opinion that a contingent fee of fifty per cent. of the amount to be recovered was not unreasonable, and that such fee should be a charge against the whole fund. It follows that the court erred in the rendition of its decree as set forth in our statement of facts.

Finally, it is insisted that the decree must be affirmed because the record does not contain all the evidence. In making this contention, counsel for appellees rely upon

the principles of law in *Weaver-Dowdy Co.* v. *Brewer,* 129 Ark. 193, 195 S. W. 367, to the effect that, where there is a conflict between the recitals of the decree and the bill of exceptions, the record entry must prevail. The decree, after reciting the appearance of all the parties, contains the following:

"And all the parties announcing ready for trial, the trial proceeds upon the pleadings filed by the parties, exhibits, oral testimony introduced and the agreements of the parties." The bill of exceptions at the commencement contains the following:

"Thereupon the pleadings in the case, the complaint of plaintiff, the answer of defendant, and interplea of the intervener, were by the respective parties presented to the court, and the cause was submitted to the court on an agreed statement of facts, as follows."

At the conclusion of the bill of exceptions there is an agreement between the attorneys of the respective parties that it is a true and correct statement of the facts as agreed to in the trial of the case. In the first place, it may be said that, when the recitals of the decree and of the bill of exceptions copied above are considered together, there is no inconsistency between them. Inferentially, at least, it should be considered that the agreed statement of facts is the oral testimony referred to in the decree. This is especially true when we consider that the chancellor filed a written opinion in which the facts are set out substantially as stated in the agreed statement of facts. Then, too, the facts agreed to are undisputed, and no amount of oral testimony could overturn facts which are undisputed and which the parties, by their agreement, have alleged to be true and to be the facts in the case. Then, too, the facts agreed to settle all the issues raised by the pleadings.

It follows that the decree will be reversed, and the cause will be remanded with directions to the chancellor to enter a decree in accordance with this opinion.

ROBINSON v. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Opinion delivered December 20, 1926.

1. APPEAL AND ERROR—REVIEW OF DIRECTED VERDICT.—In reviewing an order directing a verdict for defendant, the evidence is to be viewed most favorably for plaintiff.
2. TRIAL—DIRECTION OF VERDICT.—Where, in viewing the evidence most favorably for the plaintiff, he is entitled on any theory to recover, it is error to direct a verdict for defendant.
3. NEGLIGENCE—ATTRACTIVE NUISANCE DOCTRINE.—Evidence in an action by an eight-year-old child for injuries from falling in a pile of burning coal, that the coal was crusted over, and was situated near a path which the public had used for years, and where children had been accustomed to play, *held* to make a case for the jury under the attractive nuisance doctrine.

Appeal from Little River Circuit Court; *B. E. Isbell*, Judge; reversed.

Shaver, Shaver & Williams, for appellant.

A. P. Steele and *A. D. DuLaney* and *King, Mahaffey & Wheeler*, for appellee.

HUMPHREYS, J. This is an appeal from an instructed verdict against appellant, and a consequent judgment dismissing her complaint.

The suit was instituted by her father, as next friend, in the circuit court of Little River County, against appellee, to recover damages for burns received by her while walking over a pile of slack coal and cinders on its right-of-way near a pathway used by the public in crossing its railroad tracks. The gist of the complaint is that appellee's employees negligently set fire to the interior of the pile of slack coal, which continued to burn and create a cavity therein, leaving a crust on the outside so thin that the appellant, an eight-year-old child, stepped through it into the fire, and burned her right foot and leg, resulting in temporary injuries and considerable pain and suffering.

In reviewing the testimony in this case to ascertain whether the trial court erred in peremptorily instructing a verdict in favor of appellee and dismissing appellant's complaint, the governing rule is to view it in the most

favorable light to appellant, and, when viewed in that light, if appellant was entitled to recover, upon any theory under the law, the judgment should be reversed, and the cause remanded for a new trial. *Williams* v. *St. Louis & S. F. Rd. Co.*, 103 Ark. 401, 147 S. W. 93; *Brown* v. *Halliday*, 160 Ark. 560, 254 S. W. 1057.

The undisputed testimony shows that there was a pile of slack coal on the right-of-way near a pathway used by the public in crossing the railroad track in going from one part of Ashdown to another; that the employees of appellee wrecked some old buildings, and piled the unusable lumber therefrom on the coal pile and set fire to it; that it burned for several days, and, during that time, entered the interior of said bed or deposit of coal and continued to burn within, creating a cavity, and leaving a crust on the outside thereof so thin that it was unsafe to walk upon; that appellant, who was eight years old, left the pathway, and, in walking over the pile of slack coal fell through the crust or hull into the burning cavity and burned her foot and leg; that, on account of the burn, she was confined to her bed for about two weeks, and suffered considerable pain.

There is evidence in the record tending to show that, although the pathway across the railroad right-of-way was not intended for the use of the public, the public had used it for many years with the knowledge of appellee, and without any objection on its part other than the posting of two signs, one about 90 feet east and one about 90 feet west of a bridge over a pond in the line of the pathway. The signs read, "Private Property, Keep off." There is also testimony in the record tending to show that children had been playing in the vicinity of the bridge, pathway and slack-coal pile for a long time.

We think the testimony showing that the public had been passing at this place and that children had been playing in this vicinity for years was sufficient to warrant the submission of the issue to the jury of whether appellant was a licensee at the time she received the injury, and, if a licensee, whether the coal pile was a dangerous

object, so attractive to children that one of ordinary prudence might expect that a child of the intelligence of appellant might be attracted thereto and injured. In other words, that there is sufficient substantial evidence in the record to support the verdict under the attractive nuisance doctrine, and that the evidence in the case brings it within the rule announced in *Brinkley Car Co.* v. *Cooper*, 70 Ark. 331, 67 S. W. 752, 57 L. R. A. 724. This is the only theory upon which a verdict might be sustained, so the judgment is reversed, and the cause is remanded for a new trial upon this theory and no other.

LEWELLYN v. STREET IMPROVEMENT DISTRICT OF RUSSELLVILLE.

Opinion delivered January 10, 1927.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—ASSESSMENT OF ANNEXED TERRITORY.—A general statute applicable to the method of assessments in original districts is applicable to assessment proceedings in annexed territory, under Crawford & Moses' Dig., § 5733.
2. MUNICIPAL CORPORATIONS—ASSESSMENT OF BENEFITS—COLLATERAL ATTACK.—An action instituted by property owners attacking an assessment of benefits in a street improvement district is collateral where it is instituted more than 30 days after approval of assessments at the hearing on notice pursuant to Crawford & Moses' Dig., § 5658.
3. MUNICIPAL CORPORATIONS—VALIDITY OF ASSESSMENT ON FRONT FOOT BASIS.—An assessment of benefits in an improvement district on a front foot basis is not erroneous on its face, on collateral attack.
4. MUNICIPAL CORPORATIONS—ASSESSMENT OF BENEFITS.—In a collateral attack upon the assessment of benefits in an improvement district, it will be presumed that the assessors considered all the elements of enhancement of value or detriment which might result from the improvement.

Appeal from Pope Chancery Court; *W. E. Atkinson*, Chancellor; affirmed.

Ward & Caudle, for appellant.

Hays, Priddy & Rorex, for appellee.

McCULLOCH, C. J. Appellants are the owners of real property constituting a part of the territory annexed to Street Improvement District No. 5 of Russellville, and they instituted this action against the commissioners of the district, attacking the assessment of benefits. They also challenged the legality of the annexation proceedings, but have abandoned that portion of the controversy and confine themselves to an attack on the assessments.

Street Improvement District No. 5 was organized as a municipal improvement district under general statutes (Crawford & Moses' Digest, § 5656 *et seq.*), and the territory involved in this litigation was also annexed under the general statute (Crawford & Moses' Digest, § 5733), which provides that, after the passage of the ordinance annexing the territory, the commissioners of the original district "shall make the assessment for said improvement on the territory annexed under the provisions of this act on the same basis as if said territory was included in the original district."

We have held that the general statute applicable to the method of assessments in original districts is applicable to assessment proceedings concerning annexed territory. *Poe* v. *Street Improvement District,* 159 Ark. 569, 252 S. W. 616. The assessment of benefits in the annexed territory was duly made and notice of the date of hearing given, pursuant to statute. Crawford & Moses' Digest, § 5658. This action was instituted by appellants more than thirty days after the approval of the assessments, therefore the attack upon the validity of the assessments is collateral.

The contention of appellants is that the assessments are void because made on front-foot basis. This does not necessarily condemn the assessments, even on a direct attack, for such a basis of assessments may coincide with the actual benefits. In a direct attack upon the validity of assessments, it becomes a question of proof whether or not the assessments are correct, but in a collateral attack we must indulge the presumption that the asses-

sors considered all the elements of enhancement of value or detriment which might result from the improvement, and the court is not at liberty to disturb the finding of the assessors unless the assessment is demonstrably erroneous on its face.

Decree affirmed.

PRESLEY v. ACTUS COAL COMPANY.

Opinion delivered January 10, 1927.

1. MASTER AND SERVANT—PERSONAL INJURIES—JURY QUESTIONS.—In an action for death of an employee, the issues of negligence, contributory negligence and assumption of risk *held*, under the evidence, to be issues for the jury.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The verdict of a jury on the issue of fact, on which there was conflicting evidence, is conclusive on appeal.
3. TRIAL—INSTRUCTION IGNORING ISSUES.—In an action for the death of an employee, an instruction authorizing the jury to find for the plaintiff if the defendant was negligent, was properly refused where it ignored the defenses of assumed risk and contributory negligence.
4. TRIAL—INSTRUCTION SUBMITTING STATUTE.—In an action against a mining company for negligence causing the death of an employee by electrocution, an instruction giving in charge § § 7145, 7146, of Crawford & Moses' Digest, without setting out such sections or explaining them in connection with the facts, was properly refused.
5. MASTER AND SERVANT—INSTRUCTION AS TO ASSUMED RISK.—In an action against a coal mining company for the negligently caused death of an employee, an instruction that deceased assumed the risk if he departed from the line of duty to fix an electric light globe or wire, *held* proper, in view of the evidence.
6. APPEAL AND ERROR—NECESSITY OF MOTION FOR NEW TRIAL.—Refusal of requested instruction will not be considered on appeal where it was not made a ground of the motion for new trial.
7. MASTER AND SERVANT—NEGLIGENCE—INSTRUCTION.—In an action for the death of an employee, an instruction that, if the death could have been due to either of two causes, only one of which involved negligence on defendant's part, the jury should return a verdict for defendant, was not open to a general objection.

8. MASTER AND SERVANT—NEGLIGENCE—INSTRUCTION.—In an action for the death of an employee, an instruction that defendant can not be held liable for the result if deceased came to his death in a manner that could not have been reasonably anticipated or foreseen, was not erroneous.

9. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.—In an action for alleged negligence of a mining company causing electrocution of a miner, it was not error to exclude a question whether more than 110 voltage was necessary for ordinary lighting purposes, where it was not alleged that the light wire carried an excessive and dangerous current.

Appeal from Sebastian Circuit Court, Greenwood District; *John E. Tatum,* Judge; affirmed.

I. S. Simmons, U. C. May and *O. R. Smith,* for appellant.

Pryor, Miles & Pryor, for appellee; *Geo. W. Johnson* and *T. D. Wynne,* of counsel.

WOOD, J. This is an action by the administrator of the estate of F. S. Bratcher, deceased, against the Actus Coal Company, to recover damages for the benefit of the estate and next of kin of F. C. Bratcher. For his cause of action the plaintiff alleged that the defendant is an Arkansas corporation engaged in the mining of coal; that Bratcher was an employee of the defendant; that, acting under the orders and directions of its agents and servants, Bratcher was driving a mule pulling coal from the rooms in the mine out to the parting, where the cars were picked up and carried to the top of the mine by electric power; "that the defendant, its agents and servants in authority, negligently and carelessly failed to furnish Bratcher a reasonably safe place in which to work, in that it negligently and carelessly failed to furnish and keep in repair a suitable and proper transformer to reduce the current of electricity to proper voltage on light wire and to keep a switch at or near said parting in a known and convenient place, so that electric power could be turned off; that the defendant negligently and carelessly failed to keep said wire on said parting, which wire furnished electricity for said light on said parting, properly insulated and the current

properly reduced; that, on the second day of December, 1924, without fault or carelessness on the part of Bratcher, he, while in the discharge of his duty, came in contact with a live wire on said parting, which wire was made alive by reason of insufficient insulation, and which wire carried a very heavy and excessive and unnecessary voltage of electricity, transferring same to the body of Bratcher, seriously and painfully torturing and burning him, from which effect he died, to plaintiff's damage for the benefit of the estate in the sum of $25,000, and to plaintiff's damage for the benefit of Bratcher's wife and minor child in the sum of $34,500. Plaintiff therefore prayed judgment in the aggregate sum of $59,500.

The plaintiff alleged that Bratcher died intestate, leaving a widow and minor son, and that plaintiff was the duly appointed administrator of Bratcher's estate.

In the answer of the defendant all the material allegations of the complaint are denied, and, for affirmative defenses, the defendant sets up that Bratcher had assumed the risk and was guilty of contributory negligence. The answer admits that the defendant is a corporation and that plaintiff was the duly appointed and acting administrator of the estate of Bratcher, deceased.

The undisputed testimony shows that Bratcher was killed while working in a coal mine operated by the defendant on December 2, 1924. He was killed by coming in contact with a live electric-light wire which carried two hundred and fifty volts of electricity.

John Elliott, one of the witnesses for the plaintiff, testified in substance that he assisted in putting up the wire, which was new when installed, and which had been in use three months at the time of Bratcher's injury. At the time it was installed it was properly insulated. He had not recently inspected it. He did not see Bratcher until he was dead. He had to go 600 feet from the place where Bratcher was killed to turn off the current. The current could have been turned off instantly if a switch

had been at the No. 3 parting, the accident occurring on the main slope. Bratcher must have had his fingers a-hold of the light socket, as the globe was broken in some manner. There was no switch on the main wire where the light wire turned off from it. Bratcher was lying on the track, both hands and the light bulb under him. The light bulb was in the socket that morning, but was burned out.

Gene Newman was with Bratcher when witness took Bratcher loose from the wire. The wire came from the main wire around Bratcher's back and under him. Witness was about five minutes getting to him after he received information that he was injured. Bratcher was about five or six feet high. He might have touched the wire. It was away from the track he had crossed to pull the coal from the parting. Bratcher and Gene Newman worked together. Bratcher had to pull past the place to get to the parting, but did not have to go under it. Bratcher was supposed to be at the parting at 7:30 A. M., and he was killed at 2 P. M., after he had made more than a dozen trips back and forth from the parting. The mules turned in about five feet of the light or near, at times. On other occasions they turned about ten feet away. In the morning Bratcher would have to go under the light with the mules. Witness did not know how the wire happened to be down. The globe was in the socket that morning. Witness found the socket with the outside gone and the inside intact.

Gene Newman was the only eye witness to the injury. He testified that Bratcher hollered out, saying, "Knock me loose." Witness looked, and Bratcher's hands were up a-hold of the wire two feet from the light globe. Witness knocked the wire down, and Bratcher fell with both hands under him, across the track, with the wire wrapped around his body. The closest switch was 200 feet away. Elliott turned off the current from five to eight minutes after Bratcher was struck. Miners had to pass under this light and wire in a stooped position.

Sam Settles testified that he was an electrician. A wire properly insulated, according to his testimony, carrying 250 volts, would not electrocute a person coming in contact with it. If Bratcher came in contact with the wire and was electrocuted, the insulation was not proper. The power could be cut off instantly with a switch. If Bratcher was electrocuted, he stuck to the wire because the insulation was not proper. Two hundred and fifty volts passing over a properly insulated wire would not electrocute a person and would not fasten a person taking hold of a light bulb. Witness could not crush with his fingers a bulb of the kind exhibited if it were properly screwed into the socket. If a party broke the globe and got his hands against the small wires, he could not get loose. One hundred and ten volts might kill—had been known to kill.

Roberts testified that it was customary for the miners to work along under the light. They were right there together any time the empties were on the track. The drivers, in order to get loads out, had to go right under the wire. The workers went back under the wire to get water to drink. They could stoop around the other way and not go under the wire, but it was the usual thing for them to go under the wire. The company had not given Bratcher any orders not to pass under the wire. They had given no instructions that there was any danger lurking around the wire or light bulbs. The ground under the lamp was damp. The light globe had been out a week. Witness saw nothing in Bratcher's hand. If witness had not known the wire to be there, he would not have seen it in passing under it.

One of the witnesses testified that the men working in the mine turned off from the main entry a short distance from the light. They passed on into the entry under the wire across the parting, the only way they could go. There was testimony tending to show that the light was put where it was for the engine at the hoist and for the convenience of the drivers.

One of the witnesses for the defendant testified that he saw the burns on Bratcher's hands, and it looked as if he had caught hold of something. The globe was broken off in the socket at the time the witness saw Bratcher. There were four or five cuts on Bratcher's hand. Little jagged edges of glass remained in the socket, and witness thought the glass made the cuts. The wire carrying the light jet had burned out. The little wires would be charged with electricity. Both of Bratcher's fingers, his thumbs, and a spot about his navel, were burned when witness knocked the wire down. Bratcher had hold of it with both fingers. There was a drop about six inches from the wire, the light bulb being four feet and eight inches from the ground. Witness never saw the wires in contact with Bratcher or in his hands. If one came in contact with the little wires in the socket he would be shocked.

The mine foreman of the defendant testified to the effect that he saw Bratcher immediately after he was killed. Witness was not an electrician, but had worked all over the country where they had electricity. Bratcher was lying on his back, dead, when witness saw him. The light bulb hung down six or seven inches below the timber. The wire had been up about three months. Witness saw it every day, and had instructed one of the workmen to put it there. There are wires in the mine which had been there four years, and the insulation was still good. The globe was in the socket about 11 A. M., and the accident occurred between one and two P. M. When they got the wire down, the globe was gone. Witness saw the burns on Bratcher's fingers and body. Witness knew positively that the wires were properly insulated and dry. The only way Bratcher could have been killed was that he took hold of the globe, trying to screw it in the socket, and caught hold of the wire, broke the glass, burned and cut himself. He was standing on props, and got off and swung this way, throwing the wire under there, and fell on the wire. It made a short circuit with

his body, and killed him. That is all witness could see that would have killed him. The driver's duty is to pull coal, and not to handle wires or lights. The wire was safe, dry, properly insulated, and, if Bratcher had attended to his own business, he would not have been hurt.

The plaintiff asked witness Sam Settles, an electrician, the following question: "Is it necessary, for ordinary lighting purposes, to have a lamp with more than 110 voltage?" The defendant objected to the question, and the court sustained the objection.

Among other instructions, the plaintiff asked the court to instruct the jury as follows:

"No. 2. You are instructed that, if you find from the evidence in this case that defendant had notice of the defective condition of the light bulb and wire in question and failed to use reasonable and ordinary care to repair same, and the deceased came in contact with same and was electrocuted, and plaintiff suffered damages thereby, then your verdict shall be for the plaintiff."

"No. 6. The court gives you in charge § 7145, Crawford & Moses' Digest of the Laws of the State of Arkansas, and § 7146, Crawford & Moses' Digest of the Statutes of Arkansas."

In instructions Nos. 8 and 9, granted at the request of the defendant, the court told the jury, in effect, that if Bratcher, while working in the mine as driver for the defendant, for some unknown reason took hold of the incandescent light globe which was not burning, and that the lighting of said mine or the handling of said globe was not in the line of his employment, and that in so doing Bratcher acted without direction from the officers or agents of the defendant, then Bratcher assumed the risk of handling such light globe, and, if such act caused his death, he could not recover, and the verdict of the jury should be in favor of the defendant.

The appellee's prayers for instructions numbered 13 and 14 are as follows:

"No. 13. The court instructs the jury that, if you find from the evidence that the death of the deceased was due to one of two causes, one of which could involve negligence on the part of defendant, the other only an incident for which the defendant is not liable, then, under the law, it would be your duty to adopt the theory which would relieve the defendant from any charge of negligence, and therefore it would be your duty to return a verdict for the defendant.

"No. 14. You are instructed that the defendant company cannot be held liable for the result of any act or omission the results of which could not have been reasonably foreseen or anticipated. And in this case, if you find that the deceased came to his death in such a manner as could not have been reasonably anticipated or foreseen by the defendant company, you will find for the defendant."

The jury returned a verdict in favor of the defendant. Judgment was rendered in defendant's favor, from which the plaintiff duly prosecutes this appeal.

1. The issues of negligence, contributory negligence and assumption of risk were, under the evidence, issues of fact for the jury. There was testimony to warrant the jury in finding that the appellee had exercised ordinary care to furnish Bratcher a safe place to work. The testimony does not tend to prove that the particular place where Bratcher was required to "pull" the cars was at all unsafe. Bratcher had gone from the place where he was required to do his work, and could do the same in safety, to the place where there was an electric light globe and wire. It was not his duty to fix the electric light and wires. That was the duty of the electrician. The testimony tended to prove that the workers in the mine, including the drivers of the mules pulling the cars, had carbide lamps on their caps to give them light. The testimony tends to prove that Bratcher was killed by attempting to fix the electric light globe. He had departed from his regular work and his duty to do this.

There was testimony to warrant the jury in finding that the electric light wire was properly insulated, and that Bratcher came in contact with the little wires in the socket holding the electric light bulb or globe, when he broke the same in attempting to screw it up or to fix it in some manner, and that his fingers were caught; that this caused his electrocution. The voltage was sufficient to kill him, as the proof tends to show. The jury might have found that the wire outside of the socket was properly insulated, or they might have found that the wire was not properly insulated. This testimony made it a question of fact as to whether the appellee was negligent in not properly insulating the electric wires, but the verdict of the jury on this issue of fact is conclusive here in favor of the appellee.

2. The court did not err in refusing appellant's prayer for instruction No. 2. The instruction ignored the affirmative defenses of assumption of risk and contributory negligence, and authorized the jury to find for the plaintiff if they found that the appellee was negligent.

There was no error in refusing appellant's prayer for instruction No. 6. This instruction does not set out the sections of the statute mentioned in it and does not request an explanation of these statutes making the same applicable to the facts adduced in evidence. This court has held that it is error for the trial court to give statutes without an explanation thereof in connection with the facts, where an explanation was necessary. An explanation would have been necessary here. *Kansas City, etc., Ry. Co.* v. *Becker*, 63 Ark. 477, 39 S. W. 358.

The court did not err in granting appellee's prayer for instructions Nos. 8 and 9. These instructions, in effect, told the jury that Bratcher assumed the risk if he departed from his line of duty in order to fix the electric light globe or wire, and correctly declared the law applicable to the facts which the testimony tended to prove.

We have not set out and do not comment upon prayers for instructions numbered 10 and 12, of which the

appellant complains in his brief, for the reason that the granting of these prayers is not made a ground of the motion for a new trial.

Instruction No. 13 was in substantial compliance with the law as announced by this court in *Fort Smith Light & Traction Co.* v. *Cooper,* 170 Ark. 286, 280 S. W. 990, and *Denton* v. *Mammoth Spring Electric Light & Power Co.,* 105 Ark. 161, 150 S. W. 572. No specific objection was made to the instruction, and it was not inherently erroneous.

Appellee's prayer for instruction No. 14 declared the law applicable to the facts in substantial conformity with the rule announced by this court in *Pekin Stave Co.* v. *Ramey,* 108 Ark. 488, 158 S. W. 156. The instruction was, in effect, the same as instruction No. 4, which was refused by the trial court in that case and which was by this court, on appeal, approved as a correct declaration of law. Only a general objection was made to the instruction.

3. The court did not err in refusing to permit the witness Sam C. Settles to testify that the amount of electricity carried and conducted to the light bulb was excessive and dangerous. This assignment of error in the motion for a new trial is not in conformity to the record as to the question which was asked the witness in his examination. The question was, "Is it necessary, for ordinary lighting purposes, to have a lamp with more than 110 voltage?" That issue was not presented by the pleadings and was not involved.

The issues were correctly submitted to the jury under the instructions of the court, and there was testimony to support the verdict. We find no error in the record, and the judgment is therefore affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY v. ROGERS.

Opinion delivered January 10, 1927.

1. MASTER AND SERVANT—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.—In an action by an employee for injuries received in falling from the raised apron of a locomotive engine, where the testimony showed that there was no negligence in propping up the apron and that a safe place was furnished for his work, it was error to refuse to direct a verdict for defendant.
2. MASTER AND SERVANT—SAFE PLACE TO WORK.—It is the master's duty to exercise ordinary care to furnish to servants a safe place to work.
3. MASTER AND SERVANT—NEGLIGENCE—BURDEN OF PROOF.—In an action by an employee for injuries received in the course of his employment, the burden is on the plaintiff to show that the employer was guilty of actionable negligence.
4. MASTER AND SERVANT—NEGLIGENCE—WHAT LAW GOVERNS.—In an action by an employee for personal injuries received in another State, the law of that State governs as to the negligence of the employer and the contributory negligence of the employee.
5. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—An employee was guilty of contributory negligence as matter of law where he stepped on the apron of a locomotive engine when it was so insecurely propped that any prudent employee, in exercise of ordinary care, was bound to know and appreciate the danger of doing so.

Appeal from Randolph Circuit Court; *John C. Ashley,* Judge; reversed.

E. T. Miller and *W. J. Orr,* for appellant. *Schoonover & Jackson,* of counsel.

Booth & Higginbotham and *Pope & Bowers,* for appellee.

WOOD, J. The appellee instituted this action against the appellant for damages for personal injuries. The facts, stated most strongly in appellee's favor, are substantially as follows: Appellee was an employee of the appellant in its shops at Chaffee, Missouri, on February 11, 1925. He had been working inside the shops or roundhouse about four or five days before his injury. Appellee was working under Fred Williams, a mechanic, as his helper. The locomotive on which he was working at the time of his injury had been in the roundhouse sev-

eral days for repairs. These repairs consisted of work on the engine, and also repairs on the tank. To make the repairs on the tank it was necessary to uncouple it from the engine and move it away from same. Williams was testing the superheater of the engine, and, not getting the expected pressure, he sent the appellee into the cab to see if the throttle was open. There are three routes one may take from the front end of a locomotive to the cab: one along the running-board to the engineer's front window, one along the running-board to the fireman's window, and the third along the ground to the rear of the engine and thence into the cab. If the engine and tank are coupled together, one entering the cab uses the steps on the tank. If the tank is separated from the engine, as it was in this case, one has to climb into the cab by means of iron hand-hold and rods that extend down the side of the cab. The appellee was on the running-board that runs along the side of the boiler. He went to the door or window of the cab on the right side of the engine, and it was locked from the inside. He then descended from the engine to the ground, and went back to the cab and caught hold of the iron rods that extended down the side of the cab and pulled himself up into the cab. The appellee had been on engines before that time, two or three times, but had never been on an engine from which the tender was disconnected. They had been working on the engine about thirty minutes at the time of the injury. The appellee had performed this work that he was called upon to do once or twice before, and in the same manner that he performed it at the time he was injured. In order to test the superheater, the throttle to the engine must be opened. The throttle is located in the cab of the engine, alongside the engineer's seat. It is an appliance which the engineer uses to apply the steam when he is operating the engine. The engineer works it with his left hand while seated in his seat. It is easily operated. The throttle was about as high from the lower deck of the cab as a man's head. There is a piece of steel, called an apron, attached to the engine by

hinges, which covers the space between the engine and the tank when the engine and tank are coupled together. When the tank is separated from the engine, the apron drops down in a vertical position. When the tank and engine are coupled together, the loose side of the apron rests on the floor of the tank, which allows it to move when the engine and tank are in motion. When it is necessary to couple the tank to the engine, the apron must be elevated so as to allow the floor of the tank to run under it. The apron makes the floor between the engine and tank continuous when they are connected. The usual and proper method of elevating the apron so that the tank may run under it when coupled to the engine was to support the apron with a square oak stick about 22 inches long, having a blunt end and a sharpened end, the blunt end resting on an iron projecting from the engine and the sharpened end fitting into one of the indentations on the under side of the apron. The apron, at the time of the injury, was elevated by this prop in the usual and proper manner. The space between the inner edge of the apron and the fire-box of the engine was twenty-four inches in width. When the appellee reached the cab on the engineer's side he found the throttle standing nearly open and extending back over the engineer's seat. The appellee reached up and took hold of the throttle to see if it was entirely open, and, in doing so, placed himself in a pulling position, putting his left foot back on the apron and his right foot up on a step leading to the engineer's seat. The apron gave way, and precipitated the appellee into the pit, causing the injuries of which he here complains. The mechanic, Fred Williams, under whom the appellee was working, had been upon the cab a few minutes before the injury, and had pulled open the throttle himself. He went upon the cab from the same point the appellee went upon it. He noticed that the apron had been propped up for thirty minutes or an hour. He didn't notice when it was first propped up. The apron had been propped up for the purpose of connecting the coal tender. To raise the apron required only about a min-

ute. It is done merely by raising the apron with the left hand and placing the stick under it, as above indicated. When appellee came from the front of the engine to the cab, he was facing the tender or tank, some thirty or forty feet away from the engine. No one was then on the tender or tank, and it was not being brought up to the engine. Appellee did not climb into the engineer's seat before he moved the throttle. In moving the throttle it was not necessary for the appellee to place either foot on the apron.

The appellee alleged that it was his custom, in the performance of his duty, and a necessary part of his duty, to step back with one foot on the apron which connected the cab or engine with the tender or tank attached to the cab or engine; that, at this particular time, he adopted the usual and customary course in performing his duty; that another one of appellant's employees had disconnected the tender or tank from the cab or engine, and such employee, in the usual course of his employment, had placed a stick under the apron which is used to connect the engine and tender, and left the apron temporarily propped in a horizontal position, easily thrown down; that the act of raising said apron and propping it took only a very few seconds of time; that the fellow employee propped up the apron, and negligently and carelessly left it so propped for a long and unnecessary period of time; that the appellee did not know that the apron was temporarily propped, and believed that it was in its usual safe condition; that, in performing his duty as an employee of the appellant, in closing the throttle he braced himself and placed his left foot on said apron, and, in doing so, the apron fell, precipitating the appellee into the pit, four or five feet deep. At the time of his injury appellee was 29 years old.

The appellant, in its answer, denied specifically the above allegations of negligence, and set up the affirmative defenses of contributory negligence and assumed risk on the part of the appellee, and also set up that the appellee had voluntarily executed to the appellant a release of

all liability, if any, for the injury which he had sustained. In the view we have taken it becomes unnecessary to set forth this alleged release and the testimony concerning its execution. It also becomes unnecessary, in view of the conclusion reached by us, to set out the allegations of the pleadings and the testimony concerning the nature of the appellee's injuries and the prayers for instructions granted and refused on the issue of the release. At the conclusion of the testimony the appellant moved the court to direct the jury to return a verdict in its favor, which instruction the court refused, to which ruling the appellant duly excepted. From our conclusion on the undisputed facts of the case, it becomes unnecessary to set out the prayers for instructions granted and refused on the issues of negligence, contributory negligence, and assumed risk.

The jury returned a verdict in favor of the appellee in the sum of $2,500. Judgment was rendered in his favor for that sum, from which is this appeal.

1. The court erred in refusing appellant's prayer for an instruction directing the jury to return a verdict in its favor. The undisputed testimony proves that the appellant was not negligent in having the apron to the engine propped up in the manner disclosed by such testimony. It is shown by the uncontroverted testimony that, when the engine and tender have been uncoupled and separated and it becomes necessary to again couple them, the apron attached to the engine must be elevated and propped up so as to allow the tender or tank to slip under the same and couple to the engine. The apron, at the time of the appellee's injury, was elevated in order to enable the tender to be coupled thereto, and it was propped up and supported by a stick in the usual and proper manner. There was therefore no negligence on the part of the appellant in the method used by it in raising the supporting apron. The method used was the proper and usual one. Indeed, the appellee does not allege that the method used by the appellant in elevating and supporting the apron was negligent. The only neg-

ligence alleged is that the employee of the appellant left the apron propped up for a long and unnecessary period of time. But this was not negligence on the part of the appellant, for the reason that the appellant owed appellee no duty to leave the apron down or in its vertical position while the engine and tank were uncoupled. While the undisputed testimony shows that it was only necessary to elevate the apron in order to allow the tank to slip under the same to make the coupling, and that this could be done in a minute of time, nevertheless it was not negligence on the part of the appellant to elevate the apron as soon as the engine and tank were uncoupled and to prop the same in the usual and proper manner and to leave the same in that position in order that the tank and engine might be recoupled when it became necessary. The leaving of the apron elevated in this manner, while the engine and tank were undergoing repairs, was not an act of negligence on the part of the appellant. It was the duty of the appellant to exercise ordinary care to furnish the appellee a safe place to work. The leaving of the apron elevated in the manner indicated did not render the appellee's place of work, in opening the throttle for the purpose of testing the superheater, unsafe. The apron was designed as a walkway and covering for the coupling or space over the coupling between the tank and the engine. It was not designed as a place whereon the appellee and the mechanic working about the engine were to stand or walk. There is no testimony in the record tending to prove that this apron had ever been used, with the knowledge of appellant, by any of the employees of the appellant as a place on which to stand or to place their feet when it became necessary to open the throttle or to do any repair work about the engine. The undisputed evidence shows that it was unnecessary for the appellee to place his foot upon the apron while he was opening or attempting to open the throttle. The place for him to stand or for him to occupy while opening the throttle, which was furnished by the appellant for that purpose, was perfectly safe. The appellee's own testi-

mony shows that the space between the fire-box and the point where the apron was connected with the cab was about two feet, and his own testimony, and the other undisputed testimony in the record, shows that, in opening or operating the throttle, it was wholly unnecessary for the appellee to place his foot and rest his weight upon the apron. The apron was not elevated and left in the position for that purpose, and the place for appellee to do his work in the proper manner was perfectly safe. If the appellee, in the exercise of ordinary care for his own protection in the performance of his duty, had occupied the place and used the instrumentalities the master had furnished in the manner they were intended to be used, he could not have been injured. The burden was upon the appellee to show that the appellant was guilty of actionable negligence. This he has wholly failed to do.

The case is ruled by the doctrine announced by the Supreme Court of Missouri in *Manche* v. *St. Louis Basket & Box Co.*, 262 S. W. 1021, as follows: "It is sufficient that defendant was guilty of no actionable negligence, because plaintiff made use of the platform for a purpose for which it was not furnished or intended by defendant and for a purpose not shown to have been customarily made of it with knowledge on the part of defendant." See also *Grattis* v. *K. C. P. & G. Ry. Co.*, 153 Mo. 380, 55 S. W. 108, where it is said: "The master cannot be adjudged guilty of a failure of duty where he furnishes a servant machinery and appliances which are reasonably safe when used in the manner they are intended to be used, but which may become dangerous if their use is perverted by the servant." See also *Royal* v. *White Oil Corporation*, 160 Ark. 467, 254 S. W. 819.

The undisputed testimony, as we view this record, shows that there was no actionable negligence on the part of the appellant, because, as we have stated, the appellant owed the appellee no duty to keep the apron in a vertical position while the engine and tender were separated, and owed the appellee no duty not to elevate

such apron and to keep it propped in the usual and proper manner for the recoupling of the engine and tender after same had been separated. Appellee's own testimony and the other undisputed testimony in this record proves conclusively that the proximate cause of appellee's injury was his own negligence in placing his foot and resting his weight upon the apron when the cars were uncoupled.

2. But if we be mistaken, and if it could be said that there is testimony to justify the inference that appellant was guilty of negligence in not leaving the apron down, in a vertical position, until such time as was necessary to elevate and prop the same for the purpose of immediate recoupling of the tender and engine, nevertheless the appellee, in such case, is not entitled to recover, because the undisputed evidence shows that he was guilty of contributory negligence. As the injury occurred in Missouri, the law of that State governs as to the negligence of the master and the contributory negligence of the servant. *St. Louis-San Francisco Ry. Co.* v. *Bates,* 163 Ark. 335, 258 S. W. 992.

In *Mathis* v. *Stockyards Co.,* 185 Mo. 434, 447, it is said: "But, if the appliance is obviously so dangerous that it cannot be safely used even with care or caution, or, as it is sometimes said, if the danger of using it is patent or such as to threaten immediate injury, then the servant is guilty of contributory negligence if he uses it, and the master is not liable, notwithstanding his prior failure of duty. Mere knowledge of the danger in working with the defective instrumentality will not defeat the action unless the danger was so glaring as to threaten immediate injury."

Now, the undisputed testimony shows that the mechanic and his helper, the appellee, had been working about the engine for thirty minutes. The apron had been elevated and propped up between a half hour and an hour in the manner indicated by the testimony and the photographs adduced in evidence. While the appellee testified that the position of the apron was the same, as near as he could tell, as when he operated it before,

nevertheless the undisputed testimony shows that the tank was disconnected from the engine, and the appellee knew this fact. In the exercise of ordinary care for his own protection in the performance of his duties about the engine, he was bound to know that the apron was not supported by the tank which made it secure as a floor on which to walk, but that it was only supported by a stick in the center of the apron. The apron was six feet long and two feet wide. The supporting stick was blunt at one end and sharpened at the other, and was loose at both ends, resting temporarily on the iron of the engine at the blunt end and supporting the apron at the sharpened end. The danger or risk of stepping with one foot and resting one's weight, wholly or partially, upon the apron, thus so insecurely supported, was so obvious and imminent that any prudent employee, in the exercise of ordinary care for his own protection in the performance of his duties, was bound in law to have known and appreciated it. The risk was so glaring that no prudent man would be willing to subject himself to the hazard of doing the work in the manner it was being done by the appellee. See *St. L. I. M. & S. Ry. Co.* v. *Holman,* 90 Ark. 555-567. Such being the fact, under the law of Missouri, as above mentioned, he was guilty of contributory negligence which bars his recovery.

After carefully considering the testimony in this record, it occurs to us that the above are the conclusions, and the only conclusions, from the testimony to which all reasonable minds must come. Therefore it is our duty to declare as a matter of law that the appellant is not liable. The judgment is therefore reversed, and, inasmuch as it appears that the cause has been fully developed, the same will be dismissed. It is so ordered.

FENTON v. HALLIDAY.

Opinion delivered January 10, 1927.

1. FRAUDULENT CONVEYANCES—VOLUNTARY CONVEYANCES.—Conveyances made to members of the household and to near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; when voluntary, they are *prima facie* fraudulent; and when the embarrassment proceeds to financial wreck, they are presumed to be fraudulent as to existing creditors.
2. FRAUDULENT CONVEYANCES—EVIDENCE.—Evidence *held* not to show that a debtor was insolvent at the time he made a conveyance to his wife, or that his financial embarrassment was such as led to insolvency, so as to justify setting a conveyance by him aside at the suit of creditors.
3. FRAUDULENT CONVEYANCES—INSOLVENCY—EVIDENCE.—In a suit to set aside a conveyance of a debtor to his wife in January, 1923, when the conveyance was made, was not shown by a *nulla bona* return of the sheriff in October, 1924.
4. EQUITY—REMEDY AT LAW.—The general rule is that equity will not interfere in aid of the collection of a debt while the remedy at law exists.

Appeal from Sevier Chancery Court; *C. E. Johnson*, Chancellor; reversed.

STATEMENT BY THE COURT.

On the 23rd day of August, 1924, appellees brought suit in equity against appellants to set aside a conveyance of three town lots executed by appellant, W. O. Fenton, to his wife, E. A. Fenton, the other appellant.

The record shows that, on the 27th day of May, 1922, appellees instituted an action in the circuit court against appellant, W. O. Fenton, to recover the sum of $559.37. Fenton filed an answer, denying liability, and asking for judgment, on his cross-complaint, against appellees, who were the plaintiffs in that suit. On August 19, 1924, appellees recovered judgment in the case against W. O. Fenton in the sum of $437.90, with six per cent. interest per annum from July 1, 1921.

At the time that the suit was filed W. O. Fenton was the owner of lots 2, 3 and 4, block 1, in DeQueen, Sevier County, Arkansas. On November 22, 1922, W. O. Fenton and E. A. Fenton, his wife, gave a mortgage on these lots

to H. C. Pride to secure an indebtedness of $1,663.90, evidenced by note of even date. On the 10th day of January, 1923, W. O. Fenton conveyed said lots to E. A. Fenton, his wife. The consideration recited in the deed was $750. The deed also expressly recites that it is executed subject to a mortgage on the lots to H. C. Pride. On the 20th day of May, 1924, the said W. O. Fenton and E. A. Fenton conveyed said lots to D. C. Goff. A part of the purchase price owed by Goff for the lots, sufficient to satisfy the claim of appellees, has been impounded in this suit.

Appellees also caused an execution to be issued by the circuit court on the 30th day of August, 1924, in the case of S. R. Halliday and J. R. Knox, who are the appellees herein, against W. O. Fenton, who is one of the appellants. The sheriff made a return of *nulla bona* on this execution on October 26, 1924. The proof shows that the three lots in question have, at all times, been worth $8,000, and that they were rented for $80 per month.

The chancellor found that the conveyance made by W. O. Fenton to E. A. Fenton, his wife, was in fraud of the rights of appellees as his existing creditors, and it was decreed that appellees recover of E. A. Fenton the sum of $437.90, with interest at the rate of six per cent. per annum from July 1, 1921, and that she be restrained from disposing of the notes given by D. C. Goff for the purchase price of said lots until the decree against her was satisfied in full. The case is here on appeal.

Abe Collins, for appellant.

Lake, Lake & Carlton, for appellee.

HART, J., (after stating the facts). The principle of law applicable to cases of this sort is stated in *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913, as follows: "Conveyances made to members of the household and to near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; when voluntary, they are *prima facie* fraudulent; and, when the embarrassment of the debtor proceeds to financial wreck, they are

presumed conclusively fraudulent as to existing creditors."

The rule as thus stated has been repeatedly quoted and applied by this court according to the particular facts in each case. All of these decisions are cited and many of them reviewed in the opinions and dissenting opinions in *Home Life & Accident Co.* v. *Schichtl, ante,* p. 31; and *Gavin* v. *Scott, ante,* p. 234.

Counsel for appellees concede that the principles of law above quoted are settled by the uniform current of our own decisions, but they contend that the facts of this case are, in all essential respects, similar to those in *Brady* v. *Irby,* 101 Ark. 573, 142 S. W. 1124, Ann. Cas. 1913E, 1054, and that this case should be ruled by it. We do not agree with counsel in this contention. In that case, the court found the facts to be that, when the voluntary conveyance was made by the husband to his wife, he owed a large amount of existing indebtedness and did not own property sufficient to pay it. Such was the finding of the chancellor, and this court held that his finding was sustained by a preponderance of the evidence. The court further said that the facts presented a case where a husband, engaged in business and involved in debt resulting in insolvency, made a voluntary transfer of property to his wife. From the testimony, the result of such transfer was to reduce the assets of the husband to such an extent as to delay and hinder his creditors in the collection of their debt, and, under the rule above stated, the conveyance was held to be fraudulent.

There is nothing in the facts as shown in the case at bar to establish that W. O. Fenton, while heavily in debt and in embarrassed financial condition, made a voluntary conveyance to his wife. It is not a case where the assets of the husband did not greatly exceed the amount of his indebtedness. It was not shown that Fenton was engaged in any speculative venture at the time that the conveyance to his wife was made, and it is not shown that the result of the transfer was to reduce his assets

to such an extent as to delay and hinder appellees in the collection of their debt.

The transfer from Fenton to his wife was made on the 10th day of January, 1923. It is true that he was indebted to appellees at that time, but the amount claimed by appellees in their suit against him was only $559.37, and they only recovered judgment against him in the sum of $437.90, with six per cent. interest per annum from July 1, 1921. The undisputed evidence shows that the property in question was worth $8,000, and rented for $80 per month. The only other indebtedness shown by the record to have been owed by Fenton at that time was his debt to H. C. Pride, which amounted to $1,663.90, and which was secured by a mortgage on the lots in question. For aught that appears to the contrary, at the time the conveyance from Fenton to his wife was made he might have had other property amply sufficient to pay any judgment which appellees might have secured against him in their pending suit. As above stated, the amount claimed by the plaintiffs in that suit was only a little over $500, and it is not shown that Fenton owed any other debt. When these facts are considered, together with the fact that the property greatly exceeded in value the amount of his debt, we do not think that it has been established that Fenton was insolvent at the time he made the conveyance to his wife, or that his financial embarrassment was such that it led to his insolvency.

Again, it is insisted by counsed for appellees that the insolvency of Fenton was shown by the *nulla bona* return of the sheriff. In making this contention reliance is had upon the case of *Tidwell* v. *J. H. Askew & Co.*, 165 Ark. 57, 262 S. W. 988. We do not think that case supports the contention of appellees. The general rule is that equity will not interfere in aid of the collection of a debt while a remedy at law exists.

In the Tidwell case the return of *nulla bona* was held to make out a *prima facie* case of insolvency sufficient to give a court of equity jurisdiction to set aside the fraudulent conveyance. The *nulla bona* return showed that the

debtor, at that time, had no property, real or personal, upon which a levy might be made. Hence a recourse to equity might be had to cancel any fraudulent incumbrance or transfer of his property which might obstruct the legal remedy by preventing a sale of such property for its full price under execution. In that case, the court said that the facts developed by appellees in the proof showed that appellant, Tidwell, rendered himself insolvent by stripping himself of substantially all of his property except that which was exempt.

No such state of facts is shown by the record in the present case. In order to bring this case within the facts of the Tidwell case, appellees should have shown that Fenton had no other property subject to execution at the time he made the conveyance to his wife. The conveyance to his wife was made on the 10th day of January, 1923. The return of *nulla bona* was made on the 26th day of October, 1924. Thus it will be seen that the return of *nulla bona* was made a year and nine months after the conveyance. Proof that Fenton had no property subject to execution on the 26th day of October, 1924, falls short of showing that he did not have property subject to execution on the 10th day of January, 1923.

The result of our views is that appellees failed to prove facts sufficient to bring the case within the well-established rule of this court above announced. It follows that the decree must be reversed, with directions to dismiss their cause of action.

RAINWATER *v.* WILDMAN.

Opinion delivered January 10, 1927.

1. TRUSTS—RIGHT TO TRACE TRUST FUNDS.—A *cestui que trust* who can trace trust funds to particular property may assert a right to that property and its proceeds, if they are traceable and are found in the hands of those who can assert no better right thereto.
2. TRUSTS—RIGHT TO FOLLOW TRUST FUND.—The mere fact that an insolvent bank owes one for trust funds does not entitle such

creditor to a preference, to obtain which he must show that the receiver or person having charge of the assets of the insolvent bank has in his hands some of the trust funds or property purchased by such funds or into which such funds have been changed or invested.

3. BANKS AND BANKING—FOLLOWING TRUST FUNDS.—One who left notes with a bank for collection is not entitled to a preference over other creditors out of the assets of the bank upon its subsequent insolvency, in the absence of proof that the notes or a fund derived therefrom was in the bank when it went into the hands of the Bank Commissioner.

Appeal from Franklin Chancery Court, Ozark District; *J. V. Bourland,* Chancellor; reversed.

STATEMENT BY THE COURT.

This is a proceeding in equity by Clara Wildman against Loid Rainwater, State Bank Commissioner, and, as such, receiver of the People's Bank of Ozark, Arkansas, to recover notes belonging to the plaintiff, or the proceeds thereof, or that the plaintiff's claim be decreed to be a preferred one. The defendant admitted the amount of plaintiff's claim to be correct, but defended the suit on the ground that, under the facts, the plaintiff's claim was not entitled to preference over the claims of the general creditors of the insolvent bank.

According to the evidence of Mrs. Clara Wildman, she had in the People's Bank in the year 1923 notes the principal of which amounted to $6,100. These notes were placed in an envelope and were left with the bank for collection. Subsequently the cashier of the bank collected these notes and substituted other notes for like amounts in the place of them. After the bank closed its doors she made a demand for the notes or the proceeds thereof. Said notes were not returned to her, and she has not received any part of the proceeds thereof.

According to the testimony of the cashier of the bank, he first took the money of the plaintiff and purchased notes with it. These notes were made payable to her, and were placed in an envelope showing that they were her property. Subsequently these notes were paid,

and the cashier invested the proceeds in the purchase of other notes, which were also payable to the plaintiff. When these notes were collected, the cashier of the bank invested the proceeds in various smaller notes which were payable to the order of the People's Bank. These notes were also placed in an envelope with the plaintiff's name on it.

The bank closed its doors on the 19th day of January, 1926, and Loid Rainwater, the State Bank Commissioner, took possession of the property and assets of the bank for the purpose of settling its affairs. The notes which were set apart by the cashier as the property of the plaintiff are not shown to have gone into the hands of the State Bank Commissioner. In other words, the evidence does not disclose what became of these notes. It only shows that an effort was made to find them after the bank closed its doors, but the plaintiff was unable to do so.

The evidence also reflects that the cashier of the bank was indicted in relation to his connection with the affairs of the bank, but the nature of the indictments is not shown.

The chancery court found the issues in favor of the plaintiff, and it was decreed that the plaintiff recover from the defendant the amount of her claim and that the same be declared a preferred claim over the general creditors of the insolvent bank. The case is here on appeal.

Hill & Fitzhugh, for appellant.

D. L. Ford, for appellee.

HART, J., (after stating the facts). It is the settled doctrine in this State that a *cestui que trust* who can trace trust funds into a particular property may assert a right to that property and its proceeds, if the proceeds are traceable and are found in the hands of those who can assert no better right thereto.

In *Hill* v. *Miles,* 83 Ark. 487, 104 S. W. 199, the court held: "The mere fact that an insolvent bank owes one for trust funds does not entitle such creditor to a preference, to obtain which he must show that the receiver or person

having charge of the assets of the insolvent bank has in his hands some of the trust funds or property purchased by such funds or into which such funds have been changed or invested."

In *Red Bud Realty Company* v. *South,* 96 Ark. 281, 131 S. W. 340, in discussing the subject, the court said: "But, before such a trust arises, it is essential that the fund thus wrongfully appropriated and converted be traced to the acquisition of the new species of property or investment upon which it is sought to impress the trust. The misappropriated funds must be traced to and located in the changed form or species of property. It cannot be pursued and located in the general mass of the wrongdoer's property, because such wrongdoer has incurred indebtedness generally in the acquisition of the general mass of his property and has subsequently applied the misappropriated funds to the payment of his debts generally."

The case of *Cavin* v. *Gleason,* 105 N. Y. 262, 11 N. E. 506, recognizes the rule and states the reason therefor in a clear and comprehensive way. It is there said:

"It is clear, we think, that, upon an accounting in bankruptcy or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent merely on the ground of the nature of his claim; that is, that he is a trust creditor as distinguished from a general creditor. We know of no authority for such contention. The equitable doctrine that, as between creditors, equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears, in addition, that there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment. If it appears that trust property specifically belonging to

the trust is included in the assets, the court doubtless may order it to be restored to the trust. So, also, if it appears that trust property has been wrongfully converted by the trustee, and constitutes, although in a changed form, a part of the assets, it would seem to be equitable, and in accordance with equitable principles, that the things into which the trust property has been changed should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property or funds, or proceeds of the trust property, entering into and constituting a part of the assets. This rule simply asserts the right of the trust owner to his own property.

"But it is the general rule, as well in a court of equity as in a court of law, that, in order to follow trust funds and subject them to the operation of the trust, they must be identified. A court of equity, in pursuing the inquiry and in administering relief, is less hampered by technical difficulties than a court of law; and it may be sufficient, to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place. The authorities require at least this degree of distinctness in the proof before preference can be awarded."

It follows that Mrs. Wildman is not entitled to a preference over the other creditors of the insolvent bank out of property or assets to which no part of the trust fund or proceeds thereof is traceable. While courts will go as far as they can in tracing the trust fund, where such fund cannot be traced the equitable right of the *cestui que trust* to follow it fails.

The facts proved in the case at bar fall short of establishing a preference within the rule above

announced. The trust fund was not traced into the assets in the hands of the receiver. While it is clear that the trust fund has been lost by the act of the trustee bank or its cashier, the facts do not show the fund to be specifically in the hands of the trustee or the receiver, nor is it represented by other notes or property into which it has been converted and traced. The trust fund is not shown to have been used by the bank in the purchase of a specific property, which is now in the hands of the receiver, or to have been deposited so that the notes purchased may be traced as derived from the trust fund.

The view most favorable to Mrs. Wildman, under the facts, that could be taken is that the cashier of the bank collected the notes which were in the possession of the bank, for her, and then loaned the proceeds to various other persons in smaller amounts and took their notes therefor. These notes were made payable to the bank and placed in an envelope where the cashier usually kept the notes payable to Mrs. Wildman. The evidence does not show what became of these notes. They are not traced into the hands of the receiver nor identified as being in his possession. They may have been placed by the cashier in the general assets of the bank before it went into the hands of the receiver. The cashier may have collected the notes and used the proceeds for purposes of his own. The proceeds may have been squandered, wasted, or lost by him. It is sufficient to say that the fund is not traced or identified as being in the hands of the receiver as a part of the assets of the insolvent bank.

The result of our views is that the court should have held that Mrs. Wildman was not entitled to a preference, and it should have allowed her claim as a general creditor of the insolvent bank. It follows that the decree must be reversed, and the cause will be remanded with direction to the chancery court to allow the claim of Mrs. Wildman as a general creditor of the insolvent bank, and for other proceedings in accordance with the principles of equity and not inconsistent with this opinion.

SHACKLEFORD *v.* FORD.

Opinion delivered January 10, 1927.

1. ATTORNEY AND CLIENT—SUMMARY JUDGMENT AGAINST ATTORNEY.—A summary judgment will not be entered for money collected by an attorney, under Crawford & Moses' Dig., §§ 609, 6250, where there is a real issue of fact or a substantial defense to the proceeding.
2. ATTORNEY AND CLIENT—PROCEEDING FOR SUMMARY JUDGMENT.—In a summary proceeding under Crawford & Moses' Dig., §§ 609, 6250, to recover money which an attorney collected and failed to pay over, where defendant's answer alleged facts constituting a good defense and the evidence was conflicting, the issue was properly submitted by consent to the judge sitting as a jury.
3. APPEAL AND ERROR—CONCLUSIVENESS OF FINDING.—A finding of facts by the trial judge is not subject to review where there is substantial evidence to support it.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; affirmed.

STATEMENT BY THE COURT.

This is a statutory proceeding by F. P. Ford against John D. Shackleford to recover a summary judgment in the sum of $1,362.52, which Shackleford collected for him as attorney and failed to pay over to him on demand.

Shackleford filed an answer, in which he admitted collecting the amount of money sued for, for the plaintiff, Ford, but claimed he was entitled to a greater fee than that tendered by Ford. The defendant also set up that the plaintiff was indebted to him in the aggregate sum of $872.50 for services as an attorney in other matters. The amount due on each item and the kind and character of services performed as such attorney are specifically set forth in the answer. The answer also admits that the defendant has a balance in his hands of $357.50 which is due the plaintiff, and offers to pay that amount to him. The answer was duly verified by the defendant, Shackleford.

On the trial of the case the plaintiff moved that the proceedings be treated as raising an issue of facts in an adversary proceeding and that the case do not proceed

further as a summary proceeding for judgment under the statute. The motion was sustained by the court, and the defendant saved his exceptions to the ruling of the court.

The court held that the case should proceed as an adversary one, and that it would be necessary to waive a jury if the parties wished to submit the case to it for a decision on the issues of fact. The defendant duly excepted to the ruling of the court in this respect. Thereupon both parties waived a jury, and agreed to submit the matters of fact and the issues to the court sitting as a jury.

F. P. Ford was a witness for himself. According to his testimony, John D. Shackleford, as his attorney, collected for him the sum of $1,229.92 on the 14th day of March, 1923. Under their agreement, Shackleford was to receive $100 as his attorney fee. Shackleford refused to pay Ford, and this proceeding was commenced on March 23, 1925. Ford denied that he owed Shackleford any other sum for attorney's fees or on any other account whatever. He categorically denied owing Shackleford the various amounts set up and claimed by him in his answer. Other evidence was adduced by the plaintiff to corroborate his own testimony.

The defendant, Shackleford, was also a witness for himself. According to his testimony, the plaintiff agreed to pay him a fee of twenty-five per cent. for collecting the sum sued for in this action. The plaintiff also owed him the sum set out in his answer for legal services in other matters. Shackleford testified to the character of services performed by him. Other evidence was adduced by the defendant tending to corroborate his own testimony to the effect that the fees charged by him were reasonable.

The circuit court, sitting as a jury, found that the defendant was indebted to the plaintiff in the sum of $731.14. Judgment was rendered accordingly, and, to reverse that judgment, the defendant has duly prosecuted an appeal to this court.

G. W. Hendricks, for appellant.

E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellee.

HART, J., (after stating the facts). This action was commenced as a summary proceeding under the statute to recover money which the defendant, as an attorney, had collected for the plaintiff and failed to pay the same over on demand. See Crawford & Moses' Digest, §§ 609 and 6250.

The defendant filed an answer, alleging facts which, if proved, constituted a good defense to the action, and his answer was duly verified to show that it was a *bona fide* one.

A motion for a summary judgment under the statute should not be allowed where there appears a real issue of fact between the parties or a substantial defense to the proceeding. In other words, if it is made to appear to the court that the matters of defense set up in the answer are genuine and that a substantial issue of facts is thereby created, the parties are entitled to trial in the regular way in which suits between adversary parties are tried and decided, and a summary judgment is improper. *Davies & Davies* v. *Patterson,* 132 Ark. 484.

In that case the court said that the proceedings against an attorney under the above statutes are not in the nature of a common-law action or an ordinary civil suit under our Code of Procedure, but are special statutory proceedings, and must be specifically followed. In that case the answer stated facts which, if true, were sufficient to constitute a defense to the motion for a summary judgment. After stating these facts, the court said that in all such cases the trial court should deny the motion and treat the proceeding as an ordinary action at law, and allow it to take its regular course as such an action.

This is precisely what was done by the circuit court in the case at bar. The facts were submitted to the circuit court sitting as a jury. The evidence was in direct and irreconcilable conflict.

Under our settled rules of practice, the finding of facts made by the circuit court upon the trial of a case is not the subject of review upon appeal where there is any evidence of a substantial character to support it. The court was the trier of the facts as well as the law. It had the right to accept such portion of the evidence as it believed to be true and to reject that part which it did not believe to be true. In this view of the matter, it cannot be said that the finding of facts made by the circuit court is without evidence to sustain it.

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

ALEXANDER v. STACK.

Opinion delivered January 10, 1927.

1. MORTGAGES—FORECLOSURE SALE—CONFIRMATION.—After confirmation of a foreclosure sale of mortgaged property, neither inadequacy of price nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale, or in opening the latter and receiving subsequent bids.
2. MORTGAGES—FORECLOSURE SALE—CONFIRMATION.—Objection that a foreclosure sale of mortgaged property was not advertised for the length of time required by the decree of sale came too late when not made until after the sale had been confirmed.
3. MORTGAGES—CONFIRMATION OF FORECLOSURE SALE—PARTIES.—Heirs of a deceased mortgagor suing to cancel a deed based on a sale under a power in the mortgage were affected with notice of proceedings ordering a resale of the property on default in payment of a balance of the debt, and are precluded from objecting, after confirmation of such sale, that the land was not advertised for the time required by the decree.

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

J. A. Tellier, for appellant.

Bogle & Sharp, for appellee.

SMITH, J. Appellants filed a complaint in which they alleged that in 1909 their ancestor, who then owned two lots in Smith's Addition to the city of Brinkley, mort-

gaged the lots to J. H. Stack, and that this mortgage was foreclosed under the power of sale incorporated therein. At this sale one Loeb became the purchaser, and he later conveyed the lots to Stack. Appellants brought suit to cancel these deeds, and in October, 1923, a decree was rendered which granted that relief. This decree recited that, while the foreclosure under the power of sale was void, a balance of $135 and interest was due Stack. Appellants were given eight months from the date of the decree to pay this sum, in default of which it was ordered that the clerk of the court, as commissioner, sell the lots, on a credit of three months, after first advertising the same in a newspaper for twenty days before the day of sale.

Appellants alleged that, through their absence from the State, they failed to pay the balance due on the mortgage, which was decreed to be a lien against the lots, but that a redemption was attempted on the day of the sale. They had been advised by their attorney that the amount necessary to redeem was $150, and one of the appellants appeared at the time and place of the commissioner's sale, and tendered that amount in redemption of the lots, but was informed by the commissioner that the judgment, with the interest and costs, amounted to $178.30. Not having this amount of money, and being unable to tender it, the commissioner proceeded with the sale, and Stack became the purchaser for that sum. Appellants alleged that the sale was not advertised for the twenty days as required by the decree, and that the lots sold for a grossly inadequate price, the lots being reasonably worth $600.

Appellants further alleged that, after the sale, they applied to Stack to redeem the lots from the commissioner's sale, and he agreed that they might do so by paying the debt and interest and all costs that had then accrued. They further alleged that they applied more than once to Stack for a statement of the amount required to redeem but were never furnished that information, and, when

they last applied to him for this information, they were advised that the sale had been confirmed by the court, and that the commissioner's deed to Stack had also been confirmed, and that Stack had sold the lots to another party. Appellants further alleged that the confirmation of the sale and the commissioner's deed had occurred before the expiration of the three months' credit allowed the purchaser, and that they had been misled by this premature confirmation of the sale and the conduct of Stack in neglecting and refusing to permit appellants to pay him as agreed the amount for which the lots sold and the costs of suit.

Wherefore appellants prayed that the sale and the confirmation thereof be set aside and that Stack be required to accept the tender contained in the complaint, of the money which Stack had agreed to accept.

Appellee Stack filed a demurrer and an answer. The demurrer was sustained, and the cause was dismissed as being without equity, and this appeal is from that decree.

It appears from the foregoing statement of facts that this litigation arose out of a proceeding to foreclose a mortgage executed in 1909; that the court set aside deeds based on a sale made under the power of sale incorporated in the mortgage, and, after doing so, gave appellants eight months within which to discharge the balance found due on the mortgage. This decree was rendered on the 23d of October, 1923, and the commissioner's sale did not occur until the 12th day of September thereafter. The complaint, to which the demurrer was sustained, does allege that Stack agreed to accept the debt due him and the costs which he would be required to pay as purchaser, but there is no allegation that he agreed not to ask the confirmation of the sale to him.

Had appellants excepted to the confirmation of the commissioner's report of sale, and there made the showing that the lots had been sold for a grossly inadequate price, without being advertised for the full time required by the decree, the court, no doubt, would have refused

to confirm it, but no action was taken to prevent the confirmation. No exceptions were filed to the confirmation of the commissioner's report, and appellants must be held to have known that the report would be confirmed in due course in the absence of some objection to that action. As we have said, there is no allegation that Stack agreed that he would not ask a confirmation of the sale, or that he would wait for any definite time for appellants to tender the sum which they alleged he agreed to accept. This sum could have been ascertained from the clerk as commissioner; in fact, Stack himself would have had to obtain the information from that official. No tender was ever made, at least none was alleged, prior to that made in the complaint, and we think the court below did not err in refusing to set aside the confirmation regularly made.

In the case of *Morrison* v. *Burnette,* 154 Fed. 617, Judge Sanborn said: "Hence the rule is settled, and it seems to be universally approved, that, after confirmation of a judicial sale, neither inadequacy of price nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids."

The sale here attacked was duly confirmed, and the facts alleged do not show fraud or any accident or mistake for which Stack was responsible. Appellants evidently relied upon a continued indulgence which Stack had not agreed to give. No deception was practiced by him; he merely failed, under the allegations of the complaint, to continue to extend an indulgence to appellants. They should either have made, in apt time, the tender which they alleged Stack agreed to accept, or they should have filed exceptions to the confirmation of the commissioner's report of sale.

As to the allegation that the lots were not advertised for the length of time required by the decree of sale, it suffices to say that this objection comes too late when not

made until after the sale has been confirmed. *Farnsworth* v. *Hoover,* 66 Ark. 367, 50 S. W. 865; *Waldo* v. *Thweatt,* 64 Ark. 126, 40 S. W. 782; *Carpenter* v. *Zarbuck,* 74 Ark. 474, 86 S. W. 299; *Glasscock* v. *Glasscock,* 98 Ark. 151, 135 S. W. 835; *Day* v. *Johnston,* 158 Ark. 478, 250 S. W. 532; *Little Red River Levee Dist. No. 2* v. *Thomas,* 154 Ark. 328, 242 S. W. 552; *Brasch* v. *Mumey,* 99 Ark. 324, 138 S. W. 458, Ann. Cas. 1913B, 38; *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166, 118 S. W. 250; *Apel* v. *Kelsey,* 47 Ark. 413, 2 S. W. 102.

Appellants were parties to this litigation—indeed, they were the moving parties, and were asking affirmative relief. They were therefore affected with notice of the proceedings subsequent to the rendition of the decree.

There appears to have been an entire lack of diligence on the part of appellants, and we think sufficient facts were not alleged to show that any fraud had been practiced upon them, or that they had been deprived of any legal right through any accident or mistake for which Stack was responsible, and the decree sustaining the demurrer will therefore be affirmed.

EARLE v. BOYER.

Opinion delivered January 10, 1927.

1. SALES—CONSTRUCTION OF COMPLAINT.—A complaint alleging that defendants sold to plaintiff cane seed represented to be a certain variety of sorghum suitable for making molasses, and that it proved not to be of that variety, and to be worthless for making molasses, *held* to support recovery on either an express or an implied warranty.
2. SALES—WARRANTY—INSTRUCTION.—An instruction that if defendants sold seed warranted to be of a certain variety, and plaintiff, relying upon such warranty, bought and planted the seed, which was not of that variety and was unfit for the purpose wanted, plaintiff could recover, was not erroneous in failing to charge that the plaintiff must have relied solely on such warranty and not on an inspection, where plaintiff testified that he made no inspection.

3. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.—An instruction by which the jury were told that defendants would be liable for a breach of warranty in the sale of seed represented to be of a certain variety was not open to the objection that it failed to tell the jury that, before he could recover, it must appear that he relied on such representation and not on his own inspection of the seed, where another instruction given correctly presented that theory of the defense.

4. SALES—BREACH OF CONTRACT—DAMAGES.—The measure of damages for breach of warranty in the sale of cane seed suitable for making molasses, *held* to be the value of a crop at maturity which would have been raised from the seed contracted for, less the value of the crop actually raised and the cost of growing the same and having it made into molasses.

5. SALES—WARRANTIES.—An express warranty in the sale of seed excludes an implied warranty.

6. TRIAL—APPLICATION OF INSTRUCTIONS.—Where the allegations of the complaint and the testimony were broad enough to sustain recovery for breach of either an express or an implied warranty, it was not error to instruct upon both theories of the case.

Appeal from Clark Circuit Court; *James H. McCollum,* Judge; affirmed.

Hardage & Wilson, for appellant.

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

HUMPHREYS, J. This suit was instituted in the circuit court of Clark County by appellee against appellant to recover damages in the sum of $225 on account of a sale and purchase of "Japanese Seeded" cane seed, intended to grow cane for making molasses, which proved worthless for that purpose. It was alleged in the complaint that appellants sold appellee seed which they represented to be a variety of sorghum known as "Japanese Seeded," suitable for making molasses; that appellee purchased said seed to grow cane to make a crop of molasses, and that appellants knew appellee's purpose in buying the seed at the time of the sale; that said seed was not "Japanese Seeded" sorghum seed, but was seed of a variety of plant without juice, and worthless for making molasses.

Appellants filed an answer, denying *seriatim* the allegations in the complaint.

The cause was submitted to a jury upon the pleadings, the testimony adduced by the respective parties, and the instructions of the court, which resulted in a verdict and consequent judgment in the sum of $100 against appellants, from which is this appeal.

It will be observed that the allegations in the complaint were broad enough to support a recovery either upon an express or implied warranty.

The testimony introduced by appellee tended to support the allegations of his complaint, and that introduced by appellants tended to disprove each and every material allegation in the complaint.

Appellants' first contention for a reversal of the judgment is that the court erred in giving instruction number one, which is as follows:

"If you find from a preponderance of the evidence that the defendants warranted the seed sold to plaintiff to be Japanese Seeded cane seed, and that the plaintiff, in reliance on said warranty, bought and planted said seed and cultivated the crop raised therefrom; and if you further find that the seed sold to plaintiff was not Japanese Seeded cane seed and was unfit for growing cane to make molasses, you are told that the plaintiff is entitled to recover from defendants a sum equal to the value of a crop at maturity which would have been raised from Japanese Seeded cane seed, less the value of the crop actually raised and the cost of cutting the same and having it made into molasses."

The first attack made upon the instruction is that it failed to tell the jury that, before appellee could recover, he must have relied solely upon appellants' alleged warranty. This instruction related to the alleged express warranty upon which appellee sought a recovery. It did not tell the jury, in so many words, that, before appellee could recover, he must have relied solely on the representation of appellants and not on inspection; but appellee testified that he made no inspection, so this instruc-

tion properly presented appellee's theory of his right to recover upon an express warranty, if the jury believed his testimony. It is true that the testimony offered by appellants tended to show that appellee made an inspection of the seed before purchasing same, but this point was taken care of by appellants' third request, given by the court, which is as follows:

"If you should believe from the evidence that plaintiff inspected said seed before he bought them, and bought them on his own belief, formed from inspection, that they were Japanese Ribbon cane seed, then your verdict will be for defendants."

Appellants are not in a position to assail instruction number one because it did not contain their theory in the case, when their theory was clearly and correctly submitted to the jury in a separate instruction given at their own request.

The second and last attack made upon instruction number one is that it did not specifically set out what items of expense were to be deducted from the value of a crop raised from Japanese Seeded cane seed. The instruction told the jury that, if they found for appellee, they should deduct from the value of such a crop the cost of growing same and having it made into molasses. This was a correct general measure of damages applicable to the case. The testimony in the case reflected the various items of expense necessary to produce and harvest a crop of molasses, and there is nothing in the verdict and judgment to indicate that appellants did not receive the benefit of all the necessary items incident to producing a crop of molasses.

Appellants' next and last contention for a reversal of the judgment is that the court erred in instructing the jury upon the law of an implied warranty. The objection is that there is no room for an implied warranty if there was an express warranty in the case. This contention would be sound if the undisputed testimony in the case had shown that there was an express warranty, but both the allegations and the testimony were broad

enough to sustain a recovery upon either an express or implied warranty, so a declaration of law in separate instructions upon both an express and implied warranty did not produce a conflict between the instructions. The instructions were upon different phases of the law, the first being applicable if the jury should find that appellants expressly warranted the seed to appellee, and second, applicable in case the jury should find that appellants sold "Japanese seeded" seed cane to appellee with the knowledge that he purchased same for the purpose of making a crop of sorghum molasses.

No error appearing, the judgment is affirmed.

RAINWATER v. DAVIS.

Opinion delivered January 10, 1927.

BANKS AND BANKING—INSOLVENCY—PREFERRED CLAIMS.—Under Crawford & Moses' Dig., § 2832, as amended by Acts 1923, p. 526, § 8, *held* that where funds of the State were deposited in an incorporated bank by the county collector, the relationship of debtor and creditor existed between the bank and the collector, and the collector had no preferred claim on the bank's subsequent insolvency.

Appeal from Franklin Chancery Court, Ozark District; *J. V. Bourland,* Chancellor; reversed.

Hill & Fitzhugh, for appellant.

J. P. Clayton and *Evans & Evans,* for appellee.

HUMPHREYS, J. This is an appeal by the State Bank Commissioner, Loid Rainwater, from a decree of the chancery court of Franklin County, Ozark District, allowing the claim of S. J. Davis, collector of taxes and other public revenues of Franklin County, to the amount of $13,587.03 as a preferential claim against the assets of the People's Bank of Ozark, Arkansas, which became insolvent and passed into the hands of said Commissioner. The amount allowed by the trial court to said collector as a preferred claim had been collected for licenses for automobiles due the State of Arkansas for the year 1926,

and had been deposited in said bank in his name as collector of said county.

The trial court allowed the claim as a preference, under his construction of § 2832 of Crawford & Moses' Digest, as modified and amended by § 8 of act 627 of the Acts of 1923. Section 2832, Crawford & Moses' Digest, is as follows:

"It shall be unlawful for any officer of this State, or of any county, township, city or incorporated town in this State, or any deputy, clerk or other person employed by any such officer, having the custody or possession of any public funds, by virtue of his office or employment, to use any of such funds in any manner whatsoever for his own purpose or benefit, or to loan any of such funds to any person or corporation whomsoever or whatsoever, or to permit any person or corporation whomsoever or whatsoever to use any of such funds, or to pay or deliver any such funds to any person or corporation, knowing that he is not entitled to receive it, or for any such officer to willfully fail or to omit to pay any such funds to his successor in office at the expiration of his term of office; but collectors of taxes, county treasurers and treasurers of cities and incorporated towns may deposit the public funds in their custody in incorporated banks for safekeeping; and the said officers and the sureties on their official bonds, the bank and the stockholders of the bank shall be liable for all funds that such bank on demand shall fail to pay to the person entitled to receive the same."

The amendment of 1923 to said section omitted the liability of stockholders for public funds deposited in incorporated banks, except in so far as such funds are protected by the double liability of stockholders in § 36 of the Banking Act of 1913, Acts 1913, page 462, which is as follows:

"The stockholders of every bank doing business in this State shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the

amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock."

This court construed § 2832, Crawford & Moses' Digest, before it was amended by § 8 of act 627, Acts of 1923, in the case of *Warren* v. *Nix,* 97 Ark. 374, 135 S. W. 896, to mean that collectors of taxes and certain other officers named therein could make a general deposit of public funds in an incorporated bank. It was specifically decided in that case that authority to deposit public funds for "safekeeping" in an incorporated bank only did not restrict such deposits to special deposits. The interpretation placed upon § 2832 of Crawford & Moses' Digest in the case of *Warren* v. *Nix, supra,* was reaffirmed in the case of *Wallace* v. *Davis,* 123 Ark. 70, 184 S. W. 834. The language of said section was not changed one whit by the amendment thereto in 1923, so the amendment, or modification, was, in effect, an adoption by the Legislature of the construction given said section in the cases of *Warren* v. *Nix* and *Wallace* v. *Davis, supra.* As stated above, the only effect of the amendment of 1923 to § 2832 of Crawford & Moses' Digest was to relieve the stockholders of an incorporated bank from liability for deposits of public funds made as general deposits, except on their general liability of an additional 100 per cent. assessment, if the bank in which they owned stock should become insolvent.

In the instant case the collector of taxes deposited public funds in the incorporated bank as a general deposit, thereby creating the relationship of debtor and creditor between himself and the bank. The trial court erred in preferring his claim over other nonpreferred claims.

The decree is therefore reversed, and the cause is remanded with instructions to allow the claim as a common one.

TAYLOR v. COLLINS.

Opinion delivered January 10, 1927.

1. ADOPTION—PETITION—NAME OF CHILD.—A petition for the adoption of a child which alleged that the child is a resident of the county, but his name is unknown and could not be ascertained, and that his parents are unknown and his mother dead, *held* a sufficient compliance with Crawford & Moses' Dig., §§ 252-256.
2. DOMICILE—RESIDENCE OF CHILD.—The residence of a child of unknown parents, delivered temporarily by a probation officer to persons desiring to adopt him, is that of the probation officer.
3. ADOPTION—COLLATERAL ATTACK.—Where the record of the probate court in the matter of the adoption of a child recites that the child is a resident of the county, such fact cannot be controverted by proof *aliunde*.
4. ADOPTION—CONSENT OF PARENT.—Testimony of two witnesses that the residence of the father of an infant sought to be adopted was unknown dispensed with the statutory requirement that he appear in open court and give consent to the order of adoption.
5. ADOPTION—JURISDICTION.—The probate court's jurisdiction to grant a petition for adoption of an infant does not depend on evidence that the residence of his father is unknown, nor on the recital thereof in the record.
6. ADOPTION—OBJECTION TO.—Neither petitioners for adoption nor any one claiming through either of them can object to a judgment granting the petition for want of evidence that the residence of the infant's father was unknown.

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

STATEMENT BY THE COURT.

This is a collateral attack upon a judgment and order of the Pulaski Probate Court adopting a minor, George Lee Collins, affecting his right as an heir of George and Hattie Collins, by whom he was adopted, to certain lands in Lonoke County, of which she died seized and possessed.

A baby boy was born on the east side in the city of Little Rock, Pulaski County, on April 4, 1920, and brought by Essie Wesley, at the age of three months, on July 20, 1920, to the office of Mamie A. Jeffries, a probation officer of the juvenile court, whose duty it was to look after neglected, dependent and delinquent children

of the county. She received the baby from Essie Wesley, who said she lived next door to where the child was; that its mother died, and was buried the day before in Little Rock; that she had kept the baby all night, and was going to Pine Bluff that day, and desired to get rid of him. She was a stranger to the probation officer, and said she knew nothing about the father, either who he was or where he could be found.

The probation officer placed the baby temporarily with Hattie and George Collins, near Scotts, in Pulaski County, and they carried the child to their home.

Testimony of other witnesses showed that George and Hattie Collins lived, in fact, at the time of the order of adoption and ever since, near Scotts, but in Lonoke County. Their petition to the probate court of Pulaski County for the adoption of the baby recited: "That they are residents of Pulaski County, Arkansas; desired to adopt a child of six months of age, a resident of Pulaski County, who has no estate, and that the parents of the child are unknown." Prayed the court "to make an order adopting unto them the said child, to be hereafter known as George Lee Collins, who is to have all the rights and privileges of a natural heir."

This petition was signed and verified by the petitioners, and had a notation on the back: "George Lee Collins, adopted to George Collins and wife; filed December 7, 1920. Dan. D. Quinn, county and probate clerk"; and "Petition granted. Lee Miles, Judge, 12/7/1920."

The order of adoption recites the presentation to the court of the petition of George and Hattie Collins, showing that they have in their possession a male child of the age of about six months, a resident of Pulaski County, whose present name is unknown to them; who has no estate of any kind; and also that the whereabouts of the parents of the child, if living, are unknown to them; that they are well able to care for him.

Further that, on examination of said petition and the testimony of Thomas Fisher, Charles Moyer and Mamie

Jeffries, householders of Pulaski County, and disinterested persons, who stated that the residence of the parents of the said child was unknown to them, the court granted the prayer of the petition and made the order.

The chancery court found that the said minor, George Lee Collins, was duly and in all things legally adopted as the legal son and heir of Hattie Collins of Lonoke County, and, as such, entitled to one-half interest in the estate of the said Hattie Collins, deceased, and decreed accordingly.

Thos. C. Trimble and *Thos. C. Trimble, Jr.,* for appellant.

T. E. Helm, for appellee.

KIRBY, J., (after stating the facts). Appellant contends that the Pulaski Probate Court was without jurisdiction to make the order of adoption, since the child, as a matter of fact, was living at the time in Lonoke County. The petition, however, states that the child is a resident of Pulaski County, as well as the petitioners who desired his adoption; that his name is unknown, and could not be ascertained, and that his mother was dead, and his father's whereabouts unknown.

The court found from the testimony of more than two competent witnesses that such was the fact. It was obvious that the name of the child could not be stated in the petition, since no one knew the name of its mother, who was dead, the woman who delivered the baby to the probation officer not disclosing it, and denying that she had any knowledge of the identity of the father, if living. It was not necessary therefore that the name of the child be set out in the petition, which was a sufficient compliance, under the circumstances, with the requirement of the statute. Crawford & Moses' Digest, §§ 252-256.

Even though it was a fact that the baby had been in the home of the petitioners in Lonoke County when they presented their petition for his adoption, it can make no difference, since he had been delivered to them temporarily by the probation officer of Pulaski County, who was entitled to his custody; and, whether the residence of the

child would, in legal contemplation, be that of the probation officer of Pulaski County, which is doubtless true under the circumstances, can make no difference, since the petition itself alleged that the child was a resident of Pulaski County at the time of the adoption, and as recited in the order, which allegation gave said probate court jurisdiction and cannot be disputed *aliunde*. *Avery* v. *Avery*, 160 Ark. 375, 255 S. W. 18.

The testimony of the two witnesses that the residence of the father of the infant was unknown dispensed, of course, with the statutory requirement that he should appear in open court and give consent to the order, and, had there been no such testimony, the jurisdiction of the court did not depend on such evidence nor its recital in the record, and, while the making of the order of adoption without such proof might be error and furnish ground for setting aside the order of adoption on the petition of the child's father, neither the petitioners on whose petition the order was made nor any one claiming through either of them, as appellant does, would be allowed to object to the judgment on that ground. *Coleman* v. *Coleman*, 81 Ark. 7, 98 S. W. 733.

No error is found in the record. The judgment is affirmed.

BOARD OF COMMISSIONERS OF STREET IMPROVEMENT DISTRICT NO. 349 *v.* LITTLE ROCK.

Opinion delivered January 10, 1927.

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ASSESSMENT OF BENEFITS.—By requiring three assessors to assess benefits from a street improvement, joint action on the part of the three assessors was contemplated, and an assessment was valid only when all three appointees took part in making it.
2. MUNICIPAL CORPORATIONS—INJUNCTION—ACTION OF COUNCIL ON ASSESSMENT.—Where plaintiff seeks a mandatory injunction to compel the city council to confirm an assessment of benefits made by assessors appointed by the council, plaintiff must show that a valid assessment was made.

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

Melbourne M. Martin, for appellant.

Lasker S. Ehrman and *Pat. L. Robinson,* for appellee.

MEHAFFY, J. The appellant filed its complaint in the Pulaski Chancery Court, alleging that, on August 29, 1925, there was filed with the city council of the city of Little Rock a petition praying that certain property in the city of Little Rock, Arkansas, be organized and annexed to Street Improvement District No. 349 for the extension of the improvement of said district within the territory proposed to be annexed. That the city council, in compliance with the statute, passed a resolution and published notice of the date for hearing said petition, to determine whether the same contained signatures sufficient to constitute a majority of the assessed valuation within the proposed territory to be annexed. That the council refused to establish said annexation, and that a suit was filed by a property owner in the Pulaski Chancery Court seeking a review of the action of the defendants, and that the chancery court entered a decree for said plaintiff. The decree, among other things, ordered the city council to proceed with the organization of the district by adopting a resolution and passing the ordinance filed with the said city council, and to pass such ordinances and to take such steps as are necessary to legally organize said territory. That an appeal was taken from the chancery court to this court, and that the decree was affirmed by this court on May 21, 1926.

That thereafter J. A. Brooks, J. B. Goodwin and J. S. Laird were appointed assessors, and took their oaths of office and qualified as assessors, and proceeded with the making of assessments of benefits. It is alleged that said assessment was duly made and lodged with the city clerk of the city of Little Rock, and remained for a period of ten days, in compliance with the statute. It is further alleged that, after the expiration of ten days, but during the period of time that the same was held by the city clerk, a number of protests were filed and appeals taken, and,

upon a hearing by the city council, the council referred the protests and appeals to the finance committee with directions to hear said protest and report its action to the council. That the finance committee neglectfully and wantonly failed and refused to make disposition until threatened with citation; that members of said finance committee persuaded two of the board of assessors to resign, and that, when the finance committee reported on October 11, 1926, they reported that they found from the evidence that there was no proper and legal assessment made, and recommended that an assessment be made. It was further alleged that the action of the finance committee and city council nullified the assessment and prayed that the action of the city council be reviewed, that the assessments be confirmed, and a mandatory injunction be issued.

Other parties were made parties defendant on their motion. Defendants filed an answer, denying the allegations of the petition, except they admitted that the protests and appeals were referred to the finance committee, but denied that the members of the finance committee neglectfully and wantonly failed to make disposition of said appeals; denied that they persuaded members of the board of assessors to resign; admitted that they reported to the council that they found, from testimony adduced on numerous hearings, that the assessment was not proper and legal. They denied that the assessments were valid, and denied that they nullified the assessments. Defendants alleged in their answer that, within ten days after assessments were filed, a number of protests were lodged with the city clerk and notice given that appeals were being taken. These matters were then referred to the finance committee. Defendants further stated that plaintiff had a remedy at law, and that the chancery court was without jurisdiction.

The only issue necessary to be determined here is whether the chancery court erred in refusing to issue an order requiring the defendants to proceed with the pas-

sage of an ordinance levying assessments as made by the board of assessors. The city clerk was called and introduced the ordinance, but about the validity of the ordinance there is no controversy. The assessment was introduced, together with the certificate from the three assessors; also the notice of filing the assessment, and proof of publication. The city clerk testified that there were a number of protests filed against the assessment of benefits and that they were referred to the finance committee on August 9, 1926. The certificate of the assessors is dated July 23, 1926. The finance committee reported back on October 11, 1926.

J. B. Goodwin, one of the assessors, testified that he had nothing to do with the assessment or with the making of the assessment; that Mr. Martin brought it to his house, and he signed it; that that was the only thing he had to do with it; that he never went over the district for the purpose of making the assessment, and that he would not know how to figure the benefits; that he met Mr. Brooks, another assessor, one time in Mr. Martin's office, but that they had nothing to do about the assessment, and he did not remember meeting the other assessor. That the only thing he knew about the basis upon which the assessments were made was that Mr. Martin told him how the figures were got. The only thing he knew about it was what Mr. Martin told him. "I signed the assessment, but I was told that that was the way it was done, and I stated at the time that I was signing something I did not have anything to do with."

J. S. Brooks, another assessor, testified that he did not attempt to act as assessor at any time or at any place, and that he did not arrive at the amount of benefits, never made a figure of any kind in making the assessments. "I know nothing about the basis upon which the assessment was made. I signed because I just took Mr. Martin's word. I did not know anything about the land values or anything like that. I signed the statement to the mayor and city council, but I told Mr. Martin that I

would sign it upon his word that everything was all right. I do not know who prepared the statement."

J. S. Laird, the other assessor, testified that he did not meet with the other two assessors; never met with them and discussed the assessment; that he went over the property twice; that he was called once to meet with the other assessors, but it was impossible for him to meet them at the time; that the other two assessors had already signed the assessment roll before he did; that he made a comparative valuation on the assessment roll, with the location of the lots and their relationship to each other, to determine if it was a just and uniform assessment; that, in his opinion, it was just and uniform. That if it had not been he would not have signed it. That one of the assessors, Mr. Goodwin, tried to get him to resign.

It seems perfectly clear that at least two of the assessors had nothing to do with making the assessment. This court has several times held that a collateral attack cannot be made upon the assessment of benefits unless void on the face of the proceedings. But that is a very different matter from the district itself invoking the jurisdiction of the court to compel action on an assessment claimed to be void. Without deciding whether the chancery court would have jurisdiction to make the order prayed for, we think that, when the plaintiff seeks a mandatory injunction compelling the city council to act on an assessment, he would have to show that there was an assessment made, and it appears from the evidence in this case that the assessment was made by one assessor only, and not by three. It is unnecessary to decide in this case whether they would have to meet as a board and make the assessment, because we have here no assessment made at all except by one assessor. The statute requires the appointment of three electors of the city or town, and says they shall constitute a board of assessment of the benefits. It requires each of them to take the oath of office before entering upon the discharge of his duties, and then provides that they shall at once

proceed to inscribe in a book the description of the property and shall assess the value to accrue to each of said lots, that is, the board of assessors shall assess the value, not one, but all of them. The law also provides for an appeal by a property owner and for a hearing on appeal by the council, and this law was followed by property owners and by the city council. By requiring three assessors, the law evidently intends that the assessment shall be made by the three. It contemplates the joint action on the part of the three assessors appointed, and all three assessors must take part in the assessment; and, while it might not require the unanimous agreement of the three, we think it would require joint action on the part of the three. Page & Jones, Taxation by Assessment, § 901; *Cicero* v. *Andren,* 224 Ill. 617, 79 N. E. 962; *Larsen* v. *Chicago,* 192 Ill. 298, 50 N. E. 179; *Hinkle* v. *Mattoon,* 170 Ill. 316, 48 N. E. 908.

In this case it appears from the evidence that there was not only no joint action but that two of the members of the board of assessors actually took no part at all and made no effort to assess, and the assessment made was therefore void.

The decree of the chancery court is affirmed.

SMITH v. GOLDBY.

Opinion delivered January 17, 1927.

1. DOWER—NEWLY ACQUIRED ESTATE.—Where a husband died leaving a widow and no children, her dower interest in one-half of her husband's newly acquired real property vests immediately on his death, under Crawford & Moses' Dig., § 3536, and, in the absence of assignment by her, will descend to her heirs on her death, while the other half descends to the collateral heirs of the husband, subject to her homestead right.
2. DESCENT AND DISTRIBUTION—RIGHT OF SURVIVING WIFE.—Where an only child died before the husband, the surviving wife did not, as the child's heir, inherit the whole of the husband's land on his death, as there was no title to pass through the child.

Appeal from Ouachita Chancery Court, Second Division; *George M. LeCroy,* Chancellor; affirmed.

Allyn Smith, for appellant.

McCULLOCH, C. J. J. S. McCluskey was the owner of the land in controversy, and he died in the year of 1915, leaving surviving his widow, Alpha C. McCluskey, and his sister, Mary Salino Goldby, as his sole heir at law. There had been a child, the issue of the intermarriage of J. S. McCluskey and Alpha C. McCluskey, but the child died before the death of its father, and there were no lineal descendants of J. S. McCluskey living at the time of his death. The land constituted the homestead of J. S. McCluskey, and it was occupied by his widow as a homestead until the time of her death, which occurred in the year 1923. There was never an assignment of dower during the lifetime of the widow. After her death, this action was instituted by the appellants, who were the sisters of Alpha C. McCluskey, against the appellee, Mary Salino Goldby, to recover, as such heirs, the whole of the land left by J. S. McCluskey. The contention of appellant is that the widow inherited the land from her deceased husband, and that the inheritance inured to the collateral heirs of the widow upon her death.

It seems to have been conceded below that the land in controversy was a new acquisition by J. S. McCluskey, and not an ancestral estate, that it constituted his homestead, and that the widow was entitled to hold the same for life as the homestead, and was also entitled to an undivided one-half of the land in fee simple as dower, pursuant to the statute (§ 3536, Crawford & Moses' Digest), and that this interest passed to the collateral heirs of the widow upon her death.

The section of the statute quoted above provides, in substance, that, if a husband dies leaving a widow and no children, the widow shall, as against collateral heirs, be endowed of one-half in fee simple of real estate which was a new acquisition and not an ancestral estate. This court has held that the interest of the widow, under the dower statute, vests in her immediately on the death of

the husband, and will, without assignment, descend to her heirs. *Barton* v. *Wilson,* 116 Ark. 400, 172 S. W. 1032; *Arbaugh* v. *West,* 127 Ark. 98, 192 S. W. 171; *Maxwell* v. *Awtrey,* 151 Ark. 85, 235 S. W. 384.

The court below, in its decree, awarded one-half of the land to the appellants as collateral heirs of the widow, but overruled the prayer for recovery of the other undivided half. The ruling of the court was correct, for the widow took only an undivided one-half as dower. She took nothing by inheritance, the other one-half descending to the collateral heirs of the husband, subject to the widow's homestead rights.

Counsel for appellants claim that the whole of the land was inherited by the widow under our statutes of descent and distribution (Crawford & Moses' Digest, 3471 *et seq*). This claim is based upon the theory that the inheritance came to the widow through the deceased child, but the answer is that the child, having died before either of the parents, could not inherit, therefore there was no title to pass through the child to the widow.

The decision of the trial court was correct, and must be affirmed. It is so ordered.

J. H. ASKEW & COMPANY *v.* LINDSEY.

Opinion delivered January 17, 1927.

LANDLORD AND TENANT—WHEN RELATION DOES NOT EXIST.—To justify the recovery of rents and the enforcement of a lien therefor, the relation of landlord and tenant must exist, and that relation depends upon contract, express or implied; but there is no implied promise on the part of a judgment debtor, whose land has been sold under execution, to hold as tenant of the purchaser.

Appeal from Columbia Circuit Court; *L. S. Britt,* Judge; affirmed.

Wade Kitchens, for appellant.

W. D. McKay, for appellee.

WOOD, J. On October 16, 1924, J. H. Askew & Company had a summons and attachment issued out of a justice court against Sam Lindsey and Mrs. J. D. Moore. The writ of attachment commanded the constable to attach and safely keep the crop of Sam Lindsey and Mrs. Moore, produced on the farm of the plaintiff, J. H. Askew & Company, in Columbia County, during the year 1924, to satisfy the debt of the defendants to the plaintiff in the sum of $100 for rent for the year 1924. The summons directed the defendant to appear on October 30, 1924, to answer the claim of the plaintiff. The plaintiff filed its complaint before the justice court on the 30th of October, 1924, alleging that the defendants were indebted to the plaintiff in the sum of $100 rent for land during the year 1924, and that the plaintiff had a lien on the crop produced on the land for payment of such rent. The trial before the justice court resulted in a judgment in favor of the defendant. There was a trial before a jury in the circuit court, and the following facts were developed from the testimony.

On the 11th of June, 1924, the chancery court entered a decree foreclosing a deed of trust executed by J. D. Bryan and wife on certain land in Columbia County, Arkansas, and directed the lands be sold on July 19, 1924. The lands were sold by the commissioner on that date, and were purchased by the appellant. The commissioner executed his deed to the appellant and made his report of the sale to the court on October 27, 1924. The report was approved and the deed confirmed and approved on that day.

The appellee, Lindsey, rented the land from J. D. Bryan prior to Christmas, 1923, for the year 1924, and made a crop on the land that year. The appellee was present at the sale of the land on July 19, 1924. J. E. Askew testified that he informed the appellee on the day of the sale that the appellant had bought the land and would expect the appellee to pay him rent for the year 1924, the rent paid to be a third of the corn and a fourth of the cotton produced on the land, a customary rent in

that section of the country. The appellee, in his testimony, denied that appellant had notified him that he would be expected to pay the rent to appellant. He testified that he was at the sale, but did not talk with Askew. He paid the rent for the year 1924 to Mrs. J. D. Bryan, from whom he rented the land and with whom he renewed the contract, after Bryan's death, for the rent of the land. He was informed that Askew had bought the land, but witness did not know whether he had bought it or not. Mrs. Bryan was living on the land, and witness moved into the house with her. The crop which had been attached by the appellants was raised on the place. At the close of the above testimony the appellant moved the court for a peremptory instruction, which the court refused. The appellee moved for a peremptory instruction, which was granted. The jury returned a verdict as directed in favor of the appellee. From a judgment in favor of the appellee is this appeal.

The court ruled correctly in directing a verdict in favor of the appellee, because the undisputed testimony shows that the relation of landlord and tenant did not exist between the appellant and the appellee for the year 1924. There was no contract between the appellant and the appellee for the rent of the land which the appellant claims for the year 1924.

In *Tucker* v. *Byers,* 57 Ark. 215, it is said: "To justify the recovery of rents, the relation of landlord and tenant must exist, and that relation depends upon contract, express or implied. But there is no implied promise on the part of a judgment debtor, whose land has been sold under execution, to hold as a tenant of the purchaser." See also *Love* v. *Cohn,* 93 Ark. 215.

The judgment in favor of the appellee is therefore correct, and it is affirmed.

CLARK v. LEWIS.

Opinion delivered January 17, 1927.

1. PARTNERSHIP—DISTINGUISHED FROM TRUST.—In a suit between persons who engaged in an oil and gas enterprise, in which the title was taken in the name of one of them as "trustee," the pleadings alone *held* insufficient to show a trust relationship between the parties rather than a partnership relation.
2. TRUST—WHEN NOT CREATED.—The fact that an oil and gas lease was taken in the name of one of the parties engaging in the enterprise as trustee did not constitute him a trustee of an express trust, rather than a partner.
3. PARTNERSHIP—WHEN RELATION CREATED.—Parties to an oil and gas enterprise who joined their money in definite ratios, with mutual agreement to share in the gain and loss in proportion to contribution, were partners.

Appeal from Ouachita Chancery Court, Second Division; *George M. LeCroy,* Chancellor; affirmed.

T. J. Gaughan, J. T. Sifford, J. E. Gaughan and *Elbert Godwin,* for appellant.

Thos. W. Hardy and *Powell, Smead & Knox,* for appellee.

WOOD, J. In August, 1923, the plaintiff met the defendant, Dr. Clark, and Judge Gould, and the three of them inspected a well which had just been drilled in and known as the Magnus well. G. M. Martin was the owner of a lease which was an offset to the lease on which the well was located, and the plaintiff, having information that Martin would be willing to sell the lease for a consideration payable entirely out of oil, advised Dr. Clark and Judge Gould of this fact, and, after some discussion, it was agreed that they would acquire the lease and undertake its development. The Magnus well was a rather large well, and the parties believed that the first well on their property would be at least a four-hundred-barrel well, which, as they figured it, would be sufficient to insure sufficient money to carry on the further development of the lease. The most serious problem confronting them was the matter of financing the drilling of the first well, which, according to the then prevailing prices, would cost

$10,000. It was finally decided that Dr. Clark would contribute $5,000, and would own a half interest in the lease, that Judge Gould, or rather his wife, Beulah Gould, would contribute $4,000, and would own a four-tenths interest in the lease, and that the plaintiff, Lewis, would contribute $1,000 and would own a one-tenth interest in the lease. The amounts were paid into the fund, and the lease acquired in the name of Dr. O. W. Clark, trustee. No declaration of trust or other writing evidencing the trust was executed, and the rights and duties of the parties were not defined. It was agreed that Mr. Lewis, who was an experienced oil operator, would operate the lease, and it seems that he employed all the labor, bought the necessary material, and was in full charge of the actual operations. Dr. Clark seemed to hold the purse strings, and all invoices for material and possibly statements of account for labor were sent to him, likewise the payments received from the pipe-line companies were made to him, and he handled all the receipts and disbursements for the enterprise. Just what duties Judge Gould, as the agent of his wife, performed, is not clear. It is admitted that there was no agreement that Dr. Clark would receive any salary, but it is undisputed that Lewis should receive $200 per month for superintending the lease. The evidence shows that this amount was meager and far below the customary salary paid for such work in the field, and Mr. Lewis explains this by saying that it was understood that, in case more than $10,000 was needed, Dr. Clark and Mrs. Gould would advance his portion and charge him no interest.

When, after several months of operation, Lewis could obtain no statement from Clark, he brought this suit for an accounting. He alleged the respective interests of the parties, and alleged that they were to share in all profits and all losses in proportion to their interest. This was admitted by the answer. Plaintiff prayed for the appointment of a master to state an account, and the defendants consented to such an appointment. Dr. Clark presented an account, on which he made no claim for

salary, for traveling expenses, or for interest on money which he claimed to have advanced to the enterprise.

Before the close of the taking of the testimony in the case before the master, Dr. Clark, at the suggestion of his counsel, filed a claim for his services and interest on money he had advanced, and for his expenses. During the taking of his testimony he and his counsel assumed that the relation he sustained toward those associated with him in the development of the lease was that of trustee. This is shown by the questions asked by his counsel and answered by him.

The master filed a report, too voluminous to set forth, in which he states that the testimony shows that O. W. Clark was trustee for himself and his associates in owning and operating the lease. Exceptions were filed by both the plaintiff and the defendant to the master's report, and the court held that the master had erred in stating the account on the theory that the subject-matter of the cause was a trust estate, and directed the master to restate the account between the parties, basing the same on the theory that the relation existing between them was that of partners and not that of a trust estate. The final decree recites as follows: "That the plaintiff, J. I. Lewis, do have and recover of and from O. W. Clark, trustee, and Mrs. Beulah Gould an undivided one-tenth interest in and to all of the net profits derived from the operation and sale of the oil and gas lease covering the following described land, to-wit: The west half of the southeast quarter of section 24, township 15 south, range 17 west, lying south and west of the Missouri Pacific Railroad, in Ouachita County, Arkansas, in keeping with the statement and finding of the amended and substituted report of the master heretofore filed in accordance with the directions of the court heretofore made; that the plaintiff do have and recover of and from said defendants all his costs in and about this cause laid out and expended. To all of which the defendants except, and ask that their exceptions be noted of record, which is accordingly done. Whereupon said defendants

pray an appeal to the Supreme Court of Arkansas, which is granted."

The above are the facts as stated by counsel for the plaintiff. Counsel for the defendants set forth the complaint and answer, the report of the master and the exceptions thereto filed by the plaintiff and the defendant, and state: "We deem it unnecessary to abstract the testimony of the various witnesses testifying before the master, for the reason that practically all of said testimony was directed toward the establishment or disallowance or some identification of some item of expense incurred in the operation of the property in question. Inasmuch as the findings of fact by the master are sustained in most instances by a preponderance of the evidence, we shall merely set out the report of the master, and not incumber the brief with an extended abstract of the testimony of the various witnesses."

1. The appellant concedes that the only issue is, what was the relation existing between the appellant and the appellees with reference to the ownership and operation of the oil and gas lease covering the property described in the complaint? The appellant contends that the property described in the lease was a trust estate, of which he was trustee, and of which appellee was a beneficiary, and the appellee contends that the relationship between the parties was that of partners. The facts as set forth by counsel for the appellee are correct, and the finding of the court that these facts established a partnership between the parties in interest is not against a clear preponderance of the evidence. The appellee alleged in his complaint, in substance, that the appellant trustee had purchased the lease of the lands in controversy, and that, after such purchase, he employed appellee to superintend the drilling operations, and agreed to pay him for his services in the sum of $200 per month and his expenses. The appellee also alleged that he purchased an undivided one-tenth interest in the oil and gas lease and paid the appellant the sum of $1,000 therefor in cash, and that appellee was to share in all profits and losses

in proportion to the amount expended on the lease by the appellant.

The appellant, in his answer, admitted these allegations of the complaint, and alleged that "he holds the legal title to said lease in trust; that, as such trustee, he holds the same for the appellee a one-tenth interest, for himself a five-tenths interest, and for James Gould a four-tenths interest, after all expenses and obligations of the trust are paid and discharged." Appellant contends that these allegations of the pleadings show that the appellant was a trustee of the appellee, and not a partner, and that the parties are bound by the allegations of their pleadings, since neither party asked that the same be amended. But it cannot be determined merely from the allegations of the pleadings whether the relationship between the appellant and the appellee was that of a common-law, or "Massachusetts," trust, or whether it was a partnership. From the allegations of the pleadings alone, the theory that the relationship between the parties was that of a partnership can be as plausibly maintained as that the relation was that of a common law, or "Massachusetts," trust, such as was declared by us to exist in *Betts* v. *Hackathorne,* 159 Ark. 622, 252 S. W. 602. Learned counsel for the appellant contend that the doctrine of that case applies to the pleadings and testimony in this record and establishes the relation between the parties in the case at bar as that of a common-law, or pure business, trust, commonly known as a Massachusetts trust, rather than the relation of a partnership. In that case we said: "The only right accorded to holders of certificates of stock is to share in profits or dividends. They are in the attitude of one of lending money to a partnership for a share of the profits in lieu of interest. A reading of the trust instrument in its entirety has convinced us that the shareholders are not associated with each other and the trustees for the purpose of conducting a business in person or through agents for a profit. There is nothing in the instrument showing an intention

on the part of the shareholders to enter into a copartnership, or an intention on the part of the trustees to cooperate with the shareholders in the conduct of the business. The test, after all, in determining whether a business is a partnership, is to ascertain whether the parties intended one." In the case of *Haskell* v. *Patterson,* 165 Ark. 65, at page 90, 262 S. W. 1002, in construing an instrument of writing, we said: "It is certain that this syndicate is not a pure common-law trust, as was created by the instrument in *Betts* v. *Hackathorne,* 159 Ark. 621-625, 252 S. W. 602. The syndicate created by the instrument under review combines some of the features of a partnership with those of a pure trust, but the predominant features are those of a partnership rather than a pure trust, because the interest-holders have the power to amend the declaration of trust, to remove the trustees without cause and substitute new ones, to continue or to terminate the trust, to require of the trustees a statement of their accounts in dealing with the syndicate and its assets, and to transact any other business pertaining to the properties of the syndicate specified in the call for their meeting. In other words, here the beneficiaries or interest-holders are the masters of the trust, rather than the trustees. Where such is the case the association or syndicate should be classified as a partnership, rather than a pure trust."

Counsel for appellant contend that, under the doctrine announced in *Haskell* v. *Patterson,* above, neither the appellee nor the Goulds had any power or authority to change or to alter the agreement of Clark, the trustee, with reference to his authority; that they had no power to remove him, nor to substitute another in his place as trustee; that they had no power to continue or to terminate the trust; that neither the appellee nor the Goulds had any power or authority to require Clark, as trustee, to make any statement of his accounts in dealing with the trust estate and its assets; that neither appellee nor the Goulds had any power to transact any business whatever pertaining to the properties held by Clark as trustee.

In the above cases the court was construing written instruments purporting to be declarations of trust, and, under the facts developed in those cases, the doctrine above quoted was announced. There was no instrument in the case at bar purporting to create a trust. True, the deed was taken in the name of Clark as trustee, but there was no instrument defining and declaring what his rights and powers, his duties and liabilities, should be. The mere fact that the lease was taken in his name as trustee did not constitute him the trustee of a pure business trust vested with the powers, responsibilities and liabilities of such trustee. In 20 R. C. L., p. 859, § 66, it is said: "Where real estate is acquired in a partnership business, and for its purposes, it is partnership assets, though the legal title be taken in the name of one of the partners. Whether real estate standing in the name of a member of a partnership is, as between the partners, to be treated as partnership property must be determined by ascertaining, from their conduct and course of dealing, their understanding and intention. Here, as in other cases, the intention may be shown by parol, in the absence of written evidence, and where the partners intend that the property shall be partnership assets, the fact that the title is taken in the name of one of the partners will not affect the question. Real estate is not necessarily the individual property of the members of the firm because the title is held by one member in his individual name, and, if several persons purchase real estate as a speculation, they may become partners in respect to it, and the mere fact that the title is taken in the name of one of them, although he executes a mortgage for the unpaid purchase money, does not change the relationship of the parties or the ownership of the property."

Under the oral testimony in this case the trial court was justified in finding that, although the lease was taken in the name of the appellant as trustee, nevertheless it was the intention of the appellant and the appellee and the Goulds, in the development and operation of the lease,

to hold the property as partnership assets. The proof shows that the appellee and the Goulds did transact business pertaining to the operation and development of the lease; that the appellee bought materials and hired labor and was in full charge of the operations, and James Gould, acting for his wife, counseled with Dr. Clark concerning the management, control and disposition of the property. We believe the preponderance of the testimony warrants the conclusion that these parties joined together their money, Dr. Clark contributing one-half, Mrs. Gould two-fifths, and the appellee one-tenth, with the mutual understanding that they should share in the gain and the loss in the purchase and development of the gas and oil lease in the proportion each had contributed. This, under our cases defining partnership, would constitute them partners. In *Stevens* v. *Neely,* 161 Ark. 114, 118, 225 S. W. 562, quoting from *Howell* v. *Harvey,* 5 Ark. 270, we said: "A partnership, in its most significant and extended sense, is a voluntary contract of two or more persons for joining together their money, goods, labor and skill, or either of them, upon an agreement that the gain or loss shall be divided proportionately between them, and having for its object the advancement and protection of fair and open trade. In later cases this court has said that a partnership may be defined as the relation existing between two or more persons who have agreed to carry on a business together, and to share the profits thereof as the joint owners of the business. This court has also held that participating in the profits of a partnership is of itself cogent proof that the person who does so is a partner, and that, if unexplained, this may be conclusive proof. *Johnson* v. *Rothschilds,* 63 Ark. 518; *Herman Kahn Co.* v. *Bowden,* 80 Ark. 23, and cases cited; and *Mehaffy* v. *Wilson,* 138 Ark. 28." See also 20 R. C. L. p. 800, § 2.

The decree is correct, and it is therefore affirmed.

SECURITY FINANCE COMPANY v. OZARK HARDWARE COMPANY.

Opinion delivered January 17, 1927.

1. APPEAL AND ERROR—REFUSAL OF INSTRUCTIONS—SETTING OUT ENTIRE CHARGE.—It cannot be shown that the error of refusing instructions requested was ground for reversal where all of the court's charge is not presented in appellant's abstract or brief.
2. TRIAL—INSTRUCTION IGNORING ISSUES.—In an action on notes, an instruction ignoring issues raised as to fraud in procuring the notes, and as to whether the plaintiff-assignee had notice thereof, *held* defective.
3. APPEAL AND ERROR—REFUSAL OF INSTRUCTION—HARMLESS ERROR.—Modification of wholly defective prayers for instruction, though inaccurate, gave no ground for complaint by the party offering such instructions, where the modifications did not render the instructions inherently erroneous.
4. TRIAL—ABSTRACT INSTRUCTION.—An instruction which did not attempt to apply abstract principles of law stated therein to the facts of the case was properly refused.
5. TRIAL—ARGUMENTATIVE INSTRUCTION.—In an action on notes by an assignee, an instruction that the mere fact that plaintiff had to sue on other notes purchased from the same assignor did not constitute notice of defense to notes sued on was properly refused, being argumentative.
6. BILLS AND NOTES—INNOCENT PURCHASER—EVIDENCE.—In an action on notes, evidence *held* to sustain finding that plaintiff purchased the notes with notice that defendant had a good defense.

Appeal from Carroll Circuit Court, Eastern District; *W. A. Dickson,* Judge; affirmed.

Joe T. McKinney, for appellant.

Festus O. Butt, for appellee.

WOOD, J. This action was brought by the appellant against the appellee in the justice court to recover judgment on six separate promissory notes, dated April 22, 1924. Five of the notes were for the sum of $87 each and one for the sum of $84.26. The notes were executed by the appellant in favor of the Brenard Manufacturing Company. They were given in payment for certain graphophones which, the appellant claims, were sold and delivered to the appellee by that company. The appellant alleged that the notes were later assigned to it

by the Brenard Manufacturing Company for value before maturity, and that it was therefore an innocent purchaser of the notes, and entitled to recover judgment thereon in the aggregate sum of the principal and interest shown to be due on the notes, for which it prayed judgment.

The appellee claimed that it had a good defense to the notes. There was no formal answer filed in either justice or circuit court, but the testimony developed on the trial in the circuit court shows that the appellee predicated its defense on the ground that the notes were executed by the appellee's secretary and treasurer without authority, and through fraud perpetrated by the Brenard Manufacturing Company on him, and that the appellant was not an innocent purchaser for value of the notes. The testimony on behalf of the appellant tended to prove that the Brenard Manufacturing Company, hereafter called the Brenard Company, was a partnership, doing business in Iowa City, Iowa. On April 24, 1924, the appellee signed a printed order, dated at Berryville, Arkansas, which came into the hands of the Brenard Company through the mail on April 25, 1924. The Brenard Company accepted the order. The order was for talking machines, and the company inspected it and approved it, and wrote the appellee a letter to that effect, inclosing an exact copy of appellee's order and the notes which it had signed. The records and printed matter called for in the order were delivered to the American Railway Express Company at Iowa City, Iowa, April 30, 1924, and consigned to the appellee at Berryville, Arkansas. The order was sent in to the Brenard Company by its solicitor, W. E. Howe, a traveling salesman. He was employed by the company to call upon merchants to take orders for the company's line of goods on blanks furnished him for that purpose. He was to send the orders to the Brenard Company at Iowa City, Iowa, for approval, as soon as he procured them. He was instructed by the company not to make any reference or statement other than was contained in the order blank.

The Brenard Company inspected the orders as they came in, and, when found satisfactory, it approved them. The Brenard Company then paid the salesman his commission. When the order was received by the company, there came with it a report of the salesman, in which he said he made no verbal or written agreement in securing the order other than was shown in the original order.

The notes in controversy were executed at the time the order was executed, and were given in settlement of the terms of the order. The Brenard Company detached the notes, as the order provides, and sold them to the appellant for cash, May 31, 1924. The notes were dated April 22, 1924, and were due two, three, four, five and six months after date. None of the notes were due when they were sold to the appellant. The Brenard Company, owning the notes, had no interest in the appellant company which purchased the notes. There was no connection, either direct or indirect, between them. The appellant purchased the notes of the Brenard Company on May 31, 1924, in the total sum of $3,003.52, and gave the Brenard Company its check for same in the sum of $2,600.

There was testimony by the witnesses for the appellant to the effect that the general attorney for the appellant is also the attorney for the Brenard Company, and had his office in the same building with the latter company. The Brenard Company began selling its commercial paper to appellant on August 31, 1923. Up to June 15, 1925, the appellant had purchased of the Brenard Company commercial paper of the total value of forty or fifty thousand dollars. It had purchased several thousand dollars' worth of such paper August 31, 1923, and May 31, 1924. The paper so sold and purchased was similar to the paper in controversy. All these notes had been detached from the contracts before being offered to the appellant. The notes had perforated edges, showing that they had been detached from contracts. On the notes purchased from the Brenard Company between August 31, 1923, and May 31, 1924, the appellant had to

bring a number of suits. The witness stated that he had been a witness for the appellant a dozen times on paper which his firm had sold to the appellant prior to May 31, 1924. The notes on which these actions were brought were given to the Brenard Company for phonographs on agency contracts similar to that in the present case. The notes sold appellant were all taken from the Brenard Company's customers, and were all of the same general form, but for varying amounts. The notes involved had been detached from contracts similar to the notes and contracts the Brenard Company used in dealing with the appellee. The president of the appellant might have known that the notes sued on had been detached from a contract. There was no secret about it. The notes were perforated at the ends and sides, showing that they had been detached from something. The president of the appellant, in his testimony, corroborated the testimony of the manager of the Brenard Company. The appellee had to sue the Brenard Company twenty or thirty times on notes purchased of them. Some of the suits were on paper bought from the Brenard Company prior to May 31, 1924. Those actions were on notes similar in size, design and printed matter to those in controversy. Witness knew the notes had been detached from an order, contract, or other paper; witness knew, when he purchased the notes in controversy, that the Brenard Company was selling phonographs under some agency contract and taking customers' notes therefor. After buying the notes in controversy, appellant did not correspond with the appellee about collecting them. Appellant did not investigate appellee's financial standing; supposed it was good.

The above is substantially the testimony of appellant's own witnesses.

According to the testimony of the secretary of appellee, a representative of the Brenard Company approached witness and represented that he had phonographs for sale with a radio attachment. Appellee is a corporation, and it was not handling phonographs.

Witness had no authority to purchase phonographs. The representative of the Brenard Company stated that he would not expect the appellee to sell them; he only wished to store them with the appellee, with the privilege of demonstrating them; he stated that he would sell them himself, and would refund to appellee the freight it paid on the phonographs. Witness signed one big piece of paper. The Brenard agent represented that it was an acceptance. It was not in the form of notes as they are now. When the shipment of talking machines arrived, the appellee, to save storage charges, let them be brought over and stored in appellee's warehouse, supposing that the Brenard Company's agent would soon show up to begin selling them. Appellee had never uncrated any of them; it did not know what they really were; sent to the Brenard Company a bill for the freight, and they replied that appellee had bought the shipment and had signed notes for them, which would soon be due. Witness wrote, denying that appellee owed the Brenard Company any notes, and stating that appellee would ship the stuff back. The Brenard Company shortly wrote, saying it had sold the notes to some one else, and refused to receive the stuff back. The Brenard Company wrote, in one of its letters, that the shipment was phonographs only, and did not have radio attachments. Appellee had never opened the shipment, and did not try to sell the machines. Two other witnesses for the appellee corroborated the testimony of the above witness.

The appellant presented the following prayer for instruction, which the court refused: "No. 3. You are instructed that, where there is a valid written assignment of a note in a suit by the assignee, the maker of the note cannot question the amount of consideration paid for the assignment; that a *bona fide* holder of a note is not affected by want of consideration between the original parties."

Appellant requested prayer for instruction No. 5, as follows: "You are instructed that, even though you may find from the evidence that the defendant, Ozark

Hardware Company, had a defense as to the Brenard Manufacturing Company, such defense would not affect the plaintiff's right to recover in this case, unless it be shown by proof that the plaintiff, Security Finance Company, knew (or had reason to know) of said defense at the time said notes were assigned to it, and the burden of proof in showing that said plaintiff has such knowledge of equities or defenses is upon the defendant in this action."

The trial court refused to grant prayer for instruction No. 5, but modified same by inserting the words in parentheses.

The appellant also presented prayer for instruction No. 6, which the court refused, but modified, and gave the same as modified by adding the words in parentheses. "No 6. You are further instructed that a *bona fide* purchaser of a note is one who takes the same in due course of business, before maturity, for a valuable consideration, and without knowing (or having reason to know) of any equities or defenses. If you find from the evidence in this action that the plaintiff, the Security Finance Company, is a *bona fide* holder of said notes herein sued on, then, in that event, it is your duty to find for the plaintiff in this action."

Appellant requested prayer for instruction No. 7, as follows, which the court refused: "You are further instructed that the mere fact that the plaintiff in this action may have had to sue on other notes heretofore bought from the Brenard Manufacturing Company does not constitute notice of a defense to the notes herein sued on."

Counsel for appellant, in his brief, complains of the ruling of the court in refusing appellant's prayers for instructions numbered 3 and 7. He also complains that the court erred in not granting his prayers for instructions numbered 5 and 6 as asked, and in modifying and giving the prayers as modified. Counsel for appellee, in his brief, calls attention to the fact that counsel for appellant has not brought into his abstract and brief all

of the instructions that were given by the trial court. Appellant's counsel sets out certain of the instructions by number and comments thereon. These numbers show that the court had given other instructions in the case.

1. We find no reversible error in the rulings of the trial court. Since the appellant's counsel has not presented in his abstract or brief all of the instructions that were given by the court, it is impossible for us to determine whether there was any reversible error in the rulings of the court in granting and refusing prayers by appellant for instructions numbered 3 and 7, and also in the granting of appellee's prayer number 3. For aught we know, the instructions given by the court which are not set out may have presented, as a whole, a correct charge to the jury applicable to the issues raised and the proof in the case, and may have cured all the alleged errors in the rulings of the court of which counsel for appellant complain. *Chicago Mill & Lbr. Co.* v. *Cooper,* 90 Ark. 326-335, 119 S. W. 672. Moreover, we have examined appellant's prayers for instructions numbered 5 and 6. These prayers as originally offered were wholly defective, in that they completely ignored the issue of fraud, and all the testimony adduced by the appellee tending to prove that appellant had notice that the paper purchased by it of the Brenard Company was not issued *bona fide* and that appellee had a good defense thereto. The court, for this reason, might have rejected these prayers outright. The court instead attempted to modify same to embrace this defense. Even though its modification may have been inaccurate, the appellant is in no attitude to complain of the court's ruling, because the prayers offered by it were erroneous, and the modification by the court did not render the prayers wholly and inherently erroneous.

Appellant's prayer for instruction 3 did not attempt to apply the abstract principle of law stated therein to the facts which the testimony tended to prove, and the court, for this reason, did not err in refusing it. Appel-

lant's prayer for instruction number 7 was wholly argumentative, and was therefore properly rejected. There was no specific objection by appellant to any of the prayers.

The jury were warranted in finding from the testimony of the appellee that appellant purchased the notes with notice that appellee had a good defense thereto, and that appellant was not therefore an innocent purchaser thereof. The testimony adduced tending to prove this is fully set forth *supra,* and it could serve no useful purpose to comment upon it.

The judgment is correct, and it is affirmed.

BONNER v. STROUD BROTHERS' GIN.

Opinion delivered January 17, 1927.

1. MORTGAGES—CONSTRUCTION—WHAT LAW GOVERNS.—In construing and determining the priority of mortgages covering cotton to be grown in another State, where the contracts were to be performed, the courts must be governed by the laws of that State.
2. ACKNOWLEDGMENT—SUFFICIENCY.—A certificate of acknowledgment of a mortgage *held* valid under the laws of Oklahoma.
3. MORTGAGES—SUFFICIENCY OF DESCRIPTION.—Crop mortgages describing the crop as so many acres of cotton to be planted and grown by the mortgagor on a named person's land "in Poteau bottom in Leflore County, Oklahoma," *held* not void for uncertainty of description.
4. MORTGAGES—CERTAINTY OF DESCRIPTION.—Evidence that a mortgagor grew only 15 acres of cotton on a certain farm *held* to render certain a description in one mortgage as the crop grown on 30 acres of land and in another as the crop grown on 15 acres.
5. MORTGAGES—PRIORITY.—A junior mortgagee is not entitled to judgment against a senior mortgagee for conversion of the mortgaged property where it was not sufficient to pay the senior mortgages.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; affirmed.

STATEMENT OF FACTS.

This is an action by Joe Bonner against the Stroud Bros. Gin, a partnership, and Mamie Cleaver, to recover

$161.14 for the conversion of seed cotton claimed by the plaintiff. The answer justified the taking and converting of the seed cotton under two chattel mortgages executed by the person who planted and grew the cotton, duly transferred to Mamie Cleaver. The seed cotton in controversy was grown on the Mamie Cleaver farm, in LeFlore County, Oklahoma, during the year 1924.

The plaintiff introduced in evidence a chattel mortgage executed to him on the 25th day of May, 1924. The mortgage was duly acknowledged and filed for record in LeFlore County, Oklahoma. The mortgage was given to secure an indebtedness of $250 owed by Bud Hill to Joe Bonner. The property described in the mortgage was two horses, some plow tools, "and my entire crop, consisting of 15 acres of growing cotton, no acres of growing corn, to be planted and grown on Mamie Cleaver farm in said LeFlore County, State of Oklahoma, about 4 miles east from Peno, LeFlore County, Oklahoma, during the year 1924." Bud Hill failed to pay any part of the mortgage indebtedness.

Mamie Cleaver claimed the seed cotton in controversy under two chattel mortgages executed by Jefferson Hill to the Williams Horse and Mule Company, which were transferred to her. On the 24th day of December, 1923, Jefferson Hill executed a chattel mortgage on a bay mare mule "and all of my, or our, interest in the following described crops planted and grown by me, or us, by tenants, lessees and employees: 30 acres cotton; ..... acres corn; ..... acres potatoes; .....acres ..... on the following described lands, to-wit: On Mamie Cleaver's land near Poteau Bridge, 1 mile southwest Fort Smith, in Poteau Bottom, section ....., township ....., range ....., State of Oklahoma, 1/4 rent; said property now being within the county of LeFlore, State of Oklahoma."

The mortgage was duly signed by Jefferson Hill, and the acknowledgment of it reads as follows:

"Jefferson Hill, being duly sworn according to law, says that he is the sole and exclusive owner of all the

property mentioned and described in the foregoing chattel mortgage; that there are no chattel mortgages or liens of any kind whatsoever on any part of said property; and that each and every representation in the foregoing mortgage is true, and has been made for the purpose of securing a loan of money on said property; said loan being based upon said representations.

[Signed] "Jefferson Hill.

"Subscribed and sworn to before me this 24th day of Dec. 1923. Kate Bell, notary public.

"My commission expires Feb. 15, 1925."

This mortgage was given to secure a note of even date with the mortgage for $193.

On the 13th day of February, 1924, Jeff Hill executed a mortgage to the Williams Horse & Mule Company on certain live stock and 15 acres of cotton to be planted and grown by him on Mrs. Mamie Cleaver's farm, in Poteau Bottom, LeFlore County, Oklahoma. This mortgage was given to secure an indebtedness of $50, and no part of the mortgage debt has been paid. The mortgage was signed by Jeff Hill, and the acknowledgment to it is as follows:

"..... being first duly sworn according to law, says that he is the sole and exclusive owner of all the property mentioned and described in the foregoing chattel mortgage; that there are no chattel mortgages or liens of any kind whatsoever on any part of said property; and that each and every representation in the foregoing mortgage is true, and has been made for the purpose of securing a loan of money on said property; said loan being based upon said representation.

"[Signed].....

"Subscribed and sworn to before me this 13th day of February, 1924. [Seal] Nina Garmon, notary public.

"My commission expires May 5, 1925."

According to the testimony of Mrs. Mamie Cleaver, Bud Hill, Jeff Hill and Jefferson Hill were the same person, and, during the year 1924, raised a crop of cotton on her farm in LeFlore County, Oklahoma. Hill planted

about 40 acres of cotton, but most of it grew up in weeds and bushes, and some of it got under water. Hill became disheartened, and did not work more than 15 acres of the crop planted by him. He raised only two bales and a remnant of 300 ponds. After paying the expenses of picking, Mamie Cleaver got in all $161.14 for the cotton raised by Hill. Mrs. Cleaver gave the Williams Horse & Mule Company $225 for the transfer of the two mortgages to her.

The jury returned a verdict for the defendants, and the plaintiff has duly prosecuted an appeal to this court.

John P. Roberts, for appellant.

W. L. Curtis, for appellee.

HART, J., (after stating the facts). At the outset it may be stated that all the mortgages show that the cotton was to be planted and grown in the State of Oklahoma, and, by their terms, show that the contracts which they evidence were to be performed there. Hence in construing the mortgages and in determining their priority we must be governed by the laws of the State of Oklahoma. *Tallman* v. *Union Loan & Trust Co.,* 161 Ark. 614, 256 S. W. 379; *Guardian Life Insurance Co.* v. *Dixon,* 152 Ark. 597, 240 S. W. 25; *Wilson* v. *Todhunter,* 137 Ark. 80, 207 S. W. 221; and *Nelson* v. *Forbes & Sons,* 164 Ark. 460, 261 S. W. 910.

The first reliance by counsel for the plaintiff for a reversal of the judgment is that, although the two mortgages transferred to Mamie Cleaver were executed before the mortgage on the same property to the plaintiff Bonner, the acknowledgments to these two mortgages were so defective as to render them invalid as far as the rights of third persons are concerned. The acknowledgments to the two mortgages given by Hill to the Williams Horse & Mule Company and transferred by it to Mamie Cleaver are set out in our statement of facts, and need not be repeated here. A reading of the acknowledgments copied in our statement of facts will show that they are valid under the laws of Oklahoma. The body of each mortgage is in the usual form, reciting that it

is a mortgage, and is signed by the mortgagor. It is true that the certificate of acknowledgment is in the form of an affidavit, but the signature of the mortgagor to the mortgage is identified, and the acknowledgment to each mortgage shows that Hill stated that he was the sole and exclusive owner of all the property described in the chattel mortgage, and that every representation in the mortgage was true, and that the mortgage was executed for the purpose of securing a loan of money on the property. An acknowledgment in all essential respects the same as the one in the case at bar has been held valid by the Supreme Court of the State of Oklahoma. *First National Bank of Buffalo* v. *Devore*, 110 Okla. 283, 234 P., 734.

It is next insisted that the judgment should be reversed because the description of the property in the mortgages to the Williams Horse & Mule Company, which were transferred to Mamie Cleaver, are void for uncertainty of description of the cotton mortgaged. We do not agree with counsel in this contention. In *Wichita Mill & Elevator Co.* v. *Farmers' State Bank,* 102 Okla. 83, 226 Pac. 870, it was held that a description in a chattel mortgage which is sufficient to put a third person upon inquiry, which, when pursued, will enable him to ascertain the property intended to be included in said mortgage, is good, and parol evidence is admissible in order to show the particular property intended to be covered by the description in the mortgage. In *Watson* v. *Pugh,* 51 Ark. 218, 10 S. W. 493, it was held that a mortgage which described the property conveyed as "eight bales of cotton weighing 500 pounds each, of the crop" which the mortgagor should raise in a designated locality, is not void for uncertainty, where the whole crop did not amount to eight bales. See also Jones on Chattel Mortgages, 5 ed., §§ 55 and 55a.

It will be observed from our statement of facts that the mortgage of Hill to the Williams Horse & Mule Company to secure the $193 indebtedness describes the cotton as 30 acres to be planted and grown by Hill on Mamie Cleaver's land in Poteau Bottom, LeFlore County,

Oklahoma. In the mortgage to secure the $50 indebtedness the description is 15 acres of cotton to be planted and grown by Hill on Mamie Cleaver's farm in Poteau Bottom, LeFlore County, Oklahoma. The only element of uncertainty in the mortgage is that the mortgagor might plant and grow on Mrs. Mamie Cleaver's farm 45 acres of cotton; in which event, no separation having been made by the parties, it could not be ascertained what particular cotton was covered by each mortgage. According to the testimony of Mamie Cleaver, Hill planted 40 acres of cotton, but about 25 acres of it were overflowed and grew up in weeds and bushes. Hill did not work this part of his crop of cotton. He only worked 15 acres of the amount planted, and the cotton in controversy was grown on the 15 acres. Each mortgage provides that the cotton is to be planted and grown on Mamie Cleaver's farm. That part of it which provides that the crop is to be grown on the Mamie Cleaver farm is as much a part of the description as that part referring to the planting of the cotton. When it was shown that the entire crop of cotton thus planted and grown and subject to the description was not more than 15 acres, the description became definite and certain; hence there was no occasion for its separation from a larger mass.

The record shows that the mortgage to the plaintiff was executed on the same cotton subsequent to the execution of the two mortgages to the Williams Horse & Mule Company and transferred by it to Mamie Cleaver. The cotton obtained by Mamie Cleaver under the two mortgages held by her was not sufficient to pay the mortgage indebtedness, and it follows that the judgment of the circuit court was correct. It will therefore be affirmed.

GREEN v. HOLLINGSHEAD.

Opinion delivered January 17, 1927.

1. APPEAL AND ERROR—ASSIGNMENT OF ERROR.—ABANDONMENT.—Where the refusal of an instruction was not made one of the grounds in a motion for new trial, the appellate court will not review such ruling.
2. CONTRACTS—CONSIDERATION.—Defendants' agreement to pay a certain amount for plaintiff's used car if plaintiff or one of his employees should buy a new car from defendants *held* to be based on a good consideration.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; affirmed.

STATEMENT BY THE COURT.

This is an action by J. H. Hollingshead against Martin Green and Mrs. Martin Green, doing business as Green Motor Company, to recover the sum of $200 alleged to be due for a second-hand automobile.

The defendants denied liability on the contract as stated in the plaintiff's complaint. They allege that they were dealers in automobiles, and agreed to allow the plaintiff $200 for his second-hand car if he would purchase a new automobile from them, that they were ready at all times to furnish the new car to the plaintiff under their contract, and that the plaintiff had refused to accept the same.

J. H. Hollingshead was a witness for himself. According to his testimony, he purchased a Chevrolet sedan from the defendants and gave them a Ford touring car in part payment of the same. Subsequently he paid the balance of the purchase price of the Chevrolet sedan. At a later date defendants agreed with the plaintiff that they would allow him $200 for a second-hand Dodge touring car if he would purchase a new Chevrolet roadster, or if any one of his employees would buy a car from them. Subsequently W. H. Chriswell, an employee of the plaintiff, bought a car from the defendants. He made a payment of $200 on the car and gave his note for the balance of the purchase money. Subsequently Chriswell paid the note.

According to the evidence for the defendants, the plaintiff negotiated with them for the purchase of a Chevrolet sedan, and wanted to turn in a Ford truck and a Dodge touring car in part payment of the purchase price. The defendants told the plaintiff that they could not take more than one car. It was then agreed that the plaintiff should turn in the Ford truck and be given a $200 allowance on the purchase price of the sedan. The sedan was delivered to the plaintiff, and he gave a note for the balance of the purchase price, which was paid. Some time later the plaintiff told the defendants that his wife objected to him using the new Chevrolet sedan. Plaintiff then proposed to buy a Chevrolet roadster from the defendants, and asked for an allowance on his old second-hand touring car. The defendants agreed to allow the plaintiff $200 for his Dodge car in case he should purchase a new Chevrolet roadster from them. The plaintiff delivered the Dodge car to the defendants, and stated that he did not want the new roadster at that time because he was a little short of money. The defendants have been at all times willing to deliver to the plaintiff a new roadster upon payment of the balance of the purchase money in accordance with the terms of the contract. The plaintiff refused to accept the new roadster, and demanded of them $200 in payment for his Dodge car, less a repair bill for $14.70 which the plaintiff owed the defendants.

The jury returned a verdict for the plaintiff in the sum of $185.30, and from the judgment rendered the defendants have duly prosecuted an appeal to this court.

Cravens & Cravens, for appellant.

Roy Gean, for appellee.

HART, J., (after stating the facts). After the court had read its instructions to the jury, counsel for the defendants asked the court to give to the jury an oral instruction, which was copied by the court stenographer. A reversal of the judgment is now asked by the defendants on the ground that the court refused to give this instruction. Counsel for the defendants failed to make

the refusal of the court to give this instruction one of the grounds in their motion for a new trial. Therefore their objections to the action of the court in refusing to give the instruction must be treated as abandoned. *Oliphant* v. *Hamm,* 167 Ark. 167.

The next assignment of error is that the court erred in giving instruction No. 2, which reads as follows: "You are instructed that, if you find from the preponderance of the evidence that the plaintiff Hollingshead bought from the defendants a certain automobile, and, as a part and parcel of said trade, the defendants accepted, among other things, plaintiff's old Dodge touring car, for which defendants agreed to allow plaintiff the sum of $200 on another car if he should decide to purchase another new car, or, if the plaintiff did not buy another car and one of his employees did buy a new car from the defendants, then the defendants would pay plaintiff the sum of $200, and you further find that, after said trade was so made between the plaintiff and defendants, one of the plaintiff's employees did purchase a new car from the defendants, you will find for the plaintiff."

It is claimed by counsel for the defendants that this instruction was abstract, and therefore prejudicial to the rights of the defendants. We do not agree with counsel in this contention.

According to the evidence adduced by the plaintiff, he delivered an old Dodge touring car to the defendants upon their agreement to allow him $200 for the same if he would purchase a new car from them, or if one of his employees should buy a new car from the defendants. The evidence for the plaintiff shows that W. H. Chriswell, one of his employees, subsequently bought a car from the defendants and paid for the same.

It is also contended that, if the defendants had agreed that they would allow the plaintiff $200 for his old Dodge touring car in the event that one of his employees would purchase a new car from the defendants, such an agreement was a purely voluntary undertaking on their part, and without any consideration to support it.

Page on Contracts defines a valid consideration to be some legal right acquired by the promisor in consideration of his promise, or forborne by the promisee in consideration of such promise. This definition was quoted and approved in *Nothwang* v. *Harrison,* 126 Ark. 548.

Now it will be readily agreed that, if the plaintiff had gone to the defendants and offered them his old Dodge touring car for $200 and they had accepted his offer and the Dodge car had been delivered to them by the plaintiff, they would owe him $200. Again, all would agree that if the plaintiff had applied to the defendants to buy a new car and offered to turn in his old Dodge car at $200 and defendants had accepted his offer, this would constitute a valid and binding contract. We cannot see that the transaction could be any different because there was attached to it a condition that the defendants would give him $200 for his Dodge car if one of his employees should buy a new car from them. The delivery and acceptance of the Dodge touring car by the defendants was a sufficient consideration for their agreement to pay the plaintiff $200, and the agreement cannot in any wise be said to be changed into a contract without consideration to support it because there was attached to the agreement a further condition that one of the employees of the plaintiff should buy a new car from the defendants.

The evidence for the plaintiff shows that he delivered his old Dodge car to the defendants, and that they accepted it under the terms of the contract. The evidence for the plaintiff also shows that, at later date, one of his employees purchased a new car from the defendants and paid them for it. Under these facts it cannot be said that the instruction was not predicated upon facts proved in the case, or that the agreement proved by the evidence of the plaintiff was void because there was no consideration to support it.

It follows that the judgment of the circuit court was correct, and it will therefore be affirmed.

MARKLE v. FALLIN.

Opinion delivered January 17, 1927.

1. APPEAL AND ERROR—SUPERSEDEAS BOND—LIABILITY OF SURETIES.—In a suit against the sureties on a supersedeas bond, after affirmance of the suit in which it was given, it was error to charge them with the costs of executions issued to enforce a liability which did not exist against them.
2. APPEAL AND ERROR—LIABILITY ON SUPERSEDEAS BOND.—Where a decree confirming a purchase by plaintiff at a foreclosure sale has been affirmed, the sureties on defendant's supersedeas bond are liable for the rental value of the land while detained by defendant, as the purchase price was credited on the judgment and bore no interest.
3. USE AND OCCUPATION—DAMAGES.—The measure of damages for detention of real estate, to the possession of which one is legally entitled, is the rental value of the property.
4. APPEAL AND ERROR—LIABILITY ON SUPERSEDEAS BOND.—Where a decree confirming a purchase by plaintiff at a foreclosure sale was affirmed, it was not error to render judgment against one only of the sureties on the defendant's supersedeas bond for rents on the property detained collected by such surety.

Appeal from Washington Chancery Court; *Sam Williams,* Chancellor on exchange; modified.

W. N. Ivie, for appellant.

SMITH, J. J. A. Fallin brought suit in the Washington Chancery Court to foreclose a vendor's lien on a house and certain lots in the city of Fayetteville which he had sold to Mrs. Lillie Vick, now Markle. A decree in his favor was rendered, and the clerk of the court was appointed commissioner to sell the land. The judgment in Fallin's favor was for $5,698.24 and interest. After advertising the lots for the time and in the manner directed by the decree, the commissioner sold the lots, and Fallin became the purchaser, his bid at the sale being $4,850.

The Arkansas National Bank filed an intervention in this foreclosure proceeding, in which it claimed that certain of the purchase-money notes had been assigned to it by Fallin as collateral to a $1,500 loan which the bank had made Fallin.

Exceptions were filed by Mrs. Markle to the confirmation of the report of the commissioner, but, as no testimony was offered in support of the exceptions, the report was confirmed, and the commissioner was directed to pay to the bank the sum found to be due it, unless Mrs. Markle should, before noon of the 20th day of March, 1923, "file a bond with the clerk of the Supreme Court on such terms as to procure a supersedeas, and shall cause the supersedeas to be delivered to said commissioner before said hour on said date." The bond was filed with the clerk of the Supreme Court on the 18th day of March, and the supersedeas issued on that day.

This bond was conditioned as follows: "Now, the undersigned, as sureties, hereby covenant with the said appellee that the said appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on appeal; or in the event of the failure of the appellant to prosecute said appeal to a final judgment in the Supreme Court; or, if the said appeal shall for any cause be dismissed, that said sureties shall pay to the appellee all costs and damages, together with all rents or damages to property during the pendency of the appeal, of which the appellees are kept out of possession by reason of the appeal."

Before this bond was filed the commissioner's report was confirmed.

The decree appealed from was affirmed by the court on December 27, 1923, and a judgment was rendered against appellant and the sureties on the supersedeas bond for the debt, interest and costs. The mandate from this court did not go down until July 19, 1924. Thereafter Fallin caused execution to be issued by the clerk of the chancery court against said sureties on this judgment. One of the executions was directed to the sheriff of Madison County, the other to the sheriff of Washington County. A motion was then filed by Mrs. Markle and the sureties to amend the judgment of this court, and the prayer of that motion was granted, and a *nunc pro tunc* order was entered affirming the decree of the court below

and rendering judgment for all costs. In this judgment it was ordered that the executions which had previously been issued be recalled and quashed.

Fallin brought this suit against the sureties on the supersedeas bond, and alleged the facts recited above, and prayed judgment for the rents which had accrued on the property sold since the date of the confirmation of the sale to him, and for all costs in the foreclosure proceedings.

Testimony was offered to the effect that, after the affirmance of the foreclosure decree by this court, negotiations were entered into between Fallin and the sureties on the supersedeas bond whereby the judgment should be paid and the property returned to Mrs. Markle. The proposition was also considered of making a private sale of the property by Mrs. Markle, and, as a means to that end, she executed a deed to J. P. Harter, who was one of the sureties on the supersedeas bond, as trustee. Harter was in possession of the property from May 19, 1924, to April 24, 1925, during which time he collected the rents on the property.

A decree was rendered in the suit on the supersedeas bond, in which all the sureties were held liable for all the costs of the foreclosure proceeding, including the costs on the two executions, and the costs of the commissioner's sale and the confirmation thereof, and for the rent of the property to the time Harter, as trustee, took possession of the property, and a decree was rendered against Harter alone for the rent collected by him, less certain expenses he had incurred in making repairs and certain insurance he had paid, and this appeal is from that decree.

We think the court below was in error in charging the sureties with the costs on the two executions, amounting to $17, because there was never in fact any authority for the issuance of these executions. They were issued to enforce a liability which we held, when the matter was called to our attention, did not exist against the sureties.

We think, however, judgment was properly rendered against the sureties for all other costs. The supersedeas bond expressly covered those items.

The real point in controversy, however, is the rents on the property accruing since the confirmation of the commissioner's sale. Appellants invoke the doctrine of many cases to the effect that a mortgagor in possession cannot be held liable for rent on the mortgaged property, the measure of his liability being interest on the debt which the mortgage secures.

We think, however, that this doctrine is not applicable here. It is true Mrs. Markle was a mortgagor in possession, but she had another relation to the property. She is also a judgment debtor in possession of property which had been sold under a decree of foreclosure and the sale had been duly confirmed after exceptions thereto had been overruled. After the decree of confirmation the purchaser was entitled to the possession of the property, and his right to the possession was postponed by reason of the supersedeas bond, wherein the sureties assumed and agreed to pay the damages and costs. Fallin's bid became a credit on his judgment when the sale was approved and confirmed, and he was thereafter entitled to the possession of the property. He was not thereafter entitled to interest on his entire judgment, but to interest only on the part of the judgment which his bid at the commissioner's sale did not suffice to pay. The supersedeas bond operated to deprive Fallin, not of interest, but of rent, because the measure of damages for the detention of real estate, to the possession of which one is legally entitled, is the rental value of the property.

In the case of *Wilson* v. *King,* 59 Ark. 32, Judge BATTLE said: "The effect of the bond (a supersedeas bond to enable appellant to retain possession of land) is to secure the payment of the value of the use of the property for the time the appellee was deprived of the possession and the damages to it during the same time, in the event the judgment or decree is affirmed."

Appellants say, however, that there was no demand for possession until most of the rent here sued for had accrued. It may be conceded that Fallin might have secured possession of the property at an earlier date than he did secure it by suing out a writ of possession; but it is also true that Mrs. Markle and her sureties could have arrested the accumulation of liability on the bond by surrendering the possession of the property. Moreover, it is shown here that the delay in taking possession of the property was the result of an indulgence to enable the sureties to retake the property and make a more advantageous sale thereof than the commissioner had made. This sale was not made, and the sureties are in no position to complain of the delay.

It is finally insisted that it was error, in any event, to render judgment against Harter individually for any of the rent, for the reason that this is a suit on the supersedeas bond, and that Harter's liability is common to that of the other sureties.

We think there was no error in rendering a decree against Harter for a larger amount than was rendered against the other sureties on the bond. The complaint alleges "that, after the affirmance of the said judgment by the Supreme Court, the defendant, J. P. Harter, took possession of the premises, and has rented the same to other persons to the present time."

Had Fallin elected so to do, he might have sued Harter alone on the bond. Harter might have raised the question of the right of contribution as against the other sureties; but that question does not arise here, because the judgment against Harter individually is for a sum which he does not question came into his hands personally. The decree only requires him to pay a sum of money which he admits receiving, and he was allowed the credits to which he was entitled.

The decree of the court below will therefore be modified by striking out the items of costs incurred in connection with the executions, and in all other respects will be affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. AVANT.

Opinion delivered January 17, 1927.

1. RAILROADS—FAILURE TO KEEP LOOKOUT—QUESTION FOR JURY.—In an action against a railroad for collision with an automobile at a crossing, the issue whether the engineer kept a proper lookout was properly submitted to the jury, where the evidence tended to establish the negative, though a failure to keep a lookout was not alleged as negligence.
2. APPEAL AND ERROR—SUFFICIENCY OF ASSIGNMENT OF ERROR.—An assignment in a motion for new trial that the verdict was contrary to law and evidence is not sufficient to present the question that the jury was not properly instructed.

Appeal from Poinsett Circuit Court; *W. W. Bandy,* Judge; affirmed.

Thos. B. Pryor and *Gordon Frierson,* for appellant.

G. B. Knott, Aaron McMullen and *S. T. Mayo,* for appellee.

SMITH, J. On July 5, 1924, appellee left Harrisburg in his automobile for the purpose of driving to Forrest City. At Cherry Valley, a station on appellant's railroad, he started to drive over the railroad crossing at that place. The railroad there runs north and south. There were three tracks, the center one being the main track; the others were sidetracks. Appellee was driving west as he started over the crossing across these tracks. There were numerous objects to obstruct his vision as he drove on to the railroad, among these being a cattle-pen, some sheds, a freight train on the west track, the engine to which was emitting steam, some piles of crossties, and, south of the cattle-pen, a sawmill, which was being operated, and a burning pile of sawdust. All these things were on the east side of the railroad and on or near the railroad right-of-way. Appellee drove across the east sidetrack, and was about to drive on to the main track when a northbound passenger train struck his automobile and damaged it, and inflicted a rather severe personal injury to appellee himself.

This suit was brought to recover damages to compensate both the injury to the car and appellee's per-

sonal injury. The jury returned a verdict in appellee's favor for $1,455 for the personal injury, but returned a verdict in favor of the railroad company for the automobile. The railroad company has appealed, and appellee has cross-appealed.

It was alleged—and there was testimony to support the finding—that the passenger train ran across this dangerous crossing at a high rate of speed, without blowing the whistle or ringing the bell. The complaint contained no allegation that there had been any failure to keep a proper lookout.

At the conclusion of the introduction of the testimony, the court and respective counsel retired to settle the instructions, and the court, of its own motion, prepared an instruction on the duty of the railroad company to keep a lookout. This instruction was objected to by the railroad company upon the ground that the failure to keep a lookout had not been alleged as an act of negligence. The court stated to counsel—the jury being absent—that the testimony presented this issue and that the engineer's testimony showed that he was not keeping a proper lookout. Counsel for the railroad company excepted to the ruling of the court in preparing an instruction on this issue, and then asked permission to recall the engineer for further examination on this subject.

This request was granted, and the engineer was examined in the presence of the jury on this issue. He testified that the automobile came on to the track from his side of the engine, which was the east side of the track; that he was looking up the track, and, when he first saw the automobile, which was moving slowly, it was only 150 feet away, and that he made an emergency application of the brakes, but, before the train could be stopped, the engine had struck the automobile. Appellee testified that, just before he drove on the crossing, he stopped, and that he stopped again just before he drove on to the first or east sidetrack. The testimony of all

the eye-witnesses was to the effect that appellee was driving very slowly.

We think, under the facts stated, the instruction on the duty to keep a lookout was not abstract. The jury might have found that, had a proper lookout been kept, the engineer would have seen the car at a much greater distance than 150 feet, and, had this been done, a warning whistle could have been blown in time for appellee to stop his slowly-moving automobile, even though the train itself could not have been stopped.

We think the court was correct in the view that the testimony raised the issue of the failure to keep an effective lookout, and this testimony had been admitted without objection. No continuance was asked upon the ground of surprise; indeed, the witness whose duty it was to keep the lookout was present, and permission was given to recall him for further examination, and he was recalled and further examined on that subject.

We consider therefore that there was no error in the submission of that issue to the jury.

In support of his cross-appeal, appellee asserts that the court erred in giving certain instructions and refusing to give certain others; but the only error assigned by him in his motion for a new trial was that the verdict was contrary to the law and the evidence, and this assignment is not sufficient to present the question that the jury was not properly instructed.

No other questions are raised which require discussion, so the judgment must be affirmed, and it is so ordered.

MARKLAND v. MERCHANTS' & FARMERS' BANK.

Opinion delivered January 17, 1927.

1. SALES—VENDOR'S LIEN.—A lien for the purchase price of personal property must be actually reserved in order to give the vendor a lien thereon.
2. SALES—RECITAL OF LIEN.—A statement in a note that it is secured by a vendor's lien on certain personal property amounts to no more than a declaration that a lien existed thereon for the purchase money, and does not authorize the purchaser of the note to foreclose a lien thereon.
3. LANDLORD AND TENANT—RIGHT TO COLLECT RENTS.—The purchaser of a note which recited that it was secured by a vendor's lien on a house on a certain lot could not collect rent after expiration of the vendor's lease of the ground on which the house was situated, and was liable to the owners of the lot for the rents thereafter collected, with interest.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor; reversed in part.

Mahony, Yocum & Saye, and *J. N. Saye,* for appellant.

Stewart & Oliver, for appellee.

HUMPHREYS, J. Appellee instituted this suit in the Second Division of the Union County Chancery Court against F. M. Cates and one of the appellants, William Markland, to foreclose an alleged vendor's lien for $256.25, with 10 per cent. per annum from April 15, 1920, against a house standing on lot 4, block 2, East Junction City, Arkansas, and for rents in the sum of $150 for the use of same. The suit was based upon the following note and the indorsement of same before maturity to appellee by the payee therein:

"$256.25 Junction City, Ark. Jan. 15, 1920.

"Ninety (90) days after date, we, or either of us, promise to pay to H. A. Dowdy, or order, two hundred fifty-six and 25/100 dollars. Payable to the Merchants' & Farmers' Bank, Junction City, Arkansas, for value received, negotiable and payable without defalcation or discount, and bearing interest at the rate of ten per cent. per annum from maturity until paid, and if the interest

be not paid annually, to become as principal and bear same rate of interest. The drawer and indorser severally waive presentation, protest and nonpayment of this note. Secured by a vendor's lien on a house in lot 4, block 2, East Junction City, Ark. If this note has to be collected by an attorney I agree to pay ten per cent. attorney's fees.

"F. M. Cates.

"Due 4-14-20. No. 6699.

Indorsement on back: "H. A. Dowdy, without recourse."

It was alleged in the complaint that the lot was owned by Frank McQuillan, who leased it to J. C. Moore on May 29, 1913; that, pursuant to authority contained in the lease, J. C. Moore moved the house referred to in the note onto the lot; that, under the terms of the lease, he, or his assigns, had the right to remove the house; that, on March 1, 1924, appellant, William Markland, without right, title or authority, took possession of said house and retained the possession thereof without payment of rent to appellee. The appellant, William Markland, filed an answer, denying the material allegations in the complaint.

No service was had upon F. M. Cates, and he did not enter his appearance.

The heirs of Frank McQuillan, deceased, filed an intervention, adopting the answer of William Markland. In addition they set out the lease made by their father to J. C. Moore, which is as follows:

"This contract entered into between Frank McQuillan, as party of the first part, and J. C. Moore, as the party of the second part. Party of the first part hereby agrees to lease to party of the second part a certain tract of land described as follows: Lot 4, block 2, in East Junction City, Ark. This lot being 60 feet running east and west and 100 feet running north and south, and located between lots 3 and 5.

"Party of the second part hereby agrees to improve said lot and pay as rent for said lease the sum of two dollars per month, monthly payments, for a period of five

years. It is further agreed that party of the second part has the option to extend this lease for as long a period at the above stipulated price.

"It is further agreed between the parties of the first part and second part that whatever improvement that party of the second part may place upon said lot shall remain the property of the said J. C. Moore, or to whom he may sell lease, they having the right to move improvement when above contract has been complied with, if party of the first part, Frank McQuillan, does not see fit to buy same, at an agreed price.

"It is further agreed that party of the first part pay taxes on lot and party of the second part pay taxes on improvement placed on lot.

"It is further agreed that, when rent shall be 90 days past due and does not pay upon demand upon him, that this contract shall be null and void, and party of the first part may order premises vacated, and party of the second part has no further claim or protection under this contract."

They also alleged that, at the expiration of the lease, appellee retained possession of the house and collected rents thereon from third parties to the amount of $175, for which they pray judgment against said appellee.

Appellee filed an answer, denying the allegations of the intervention, and, in addition, alleged that the lease contract was extended until June 1, 1923; that, before the expiration of said lease, J. C. Moore sold, transferred and assigned it and the improvements erected and constructed on said lot to the Citizens' Bank of Junction City, Arkansas; that the Citizens' Bank sold and transferred the same to H. A. Dowdy; that Dowdy sold and transferred the same to F. M. Cates; that Cates executed and delivered the note referred to above to Dowdy, and that Dowdy transferred the note to appellee before maturity for a valuable consideration.

The cause was submitted to the court upon the pleadings and testimony adduced by the respective parties, which resulted in a decree dismissing appellee's com-

plaint for the want of equity, and the cross-complaint and intervention of appellants for the same reason, from which both appellants and appellee have prosecuted appeals to this court.

The record reflects, according to the undisputed testimony, that the interveners are the owners, by inheritance, of said lot; that J. C. Moore leased the lot from their father for a term of five years, at $2 per month, with the privilege of renewal, for the purpose of constructing the improvements thereon, with an option to the lessee or his assignees to remove same at the expiration of the lease; that, pursuant to the terms of the lease, J. C. Moore moved the building in question onto the lot, and that he and his assignees retained the possession of the house, but failed to remove same at the expiration of the lease, or at the expiration of the alleged extension thereof; that the only claim that appellee has to the house arises out of the assignment of the $256.25 note assigned to it before maturity, without recourse, by H. A. Dowdy, the payee in the note; that this note was executed to H. A. Dowdy by F. M. Cates in payment of the house; that Dowdy had bought the house from the Citizens' Bank of Junction City, who had theretofore purchased same from J. C. Moore, the original lessee; that the following indorsement appears upon the original lease heretofore set out in this opinion:

"September 1, 1913.

"For value received I hereby transfer all my rights to the within lease and all improvements thereon to the Citizens' Bank, Junction City, Ark. J. C. Moore.

"Feb. 3, 1919.

"This lease is extended until June 1, 1923.

"William Markland,
"Agent for McQuillan estate."

That William Markland moved into the house between the first of January and last of February, 1924; that, at the time he moved in, the house was occupied by Mr. Batie, a subtenant of R. E. Davis, who had leased the house from appellee; that William Markland moved

in for the purpose of taking possession of the house for the interveners; that he accomplished this purpose, and was in the exclusive possession thereof when this suit was instituted; that, during the time appellee retained possession and control of the house, it collected $90 in rents from Mrs. Earl Bass, at least $60 from B. V. Hunter, $14 from R. E. Davis, and $20 from R. E. Grennen; that this rent, and perhaps more, was collected by appellee without paying ground rent to the interveners or their agent, William Markland.

The record discloses a conflict in the testimony as to whether there ever was a renewal of the lease and the exact date on which the last ground rental was paid to the interveners or their agent. According to a clear preponderance of the testimony, appellee paid no ground rent after it acquired the Cate-Dowdy note between January 15 and April 15, 1920, and it is extremely doubtful whether any one paid ground rent after that time.

The first question arising for determination on this appeal is whether appellee had any lien upon the house by virtue of the Cate-Dowdy note it acquired by purchase. The note recites that it is "secured by a vendor's lien on a house on lot 4, block 2, East Junction City, Ark." This court decided in *Roach* v. *Johnson,* 71 Ark. 344, 74 S. W. 299, that a vendor of personal property has no statutory or equitable lien for the unpaid purchase price; and in *Barnett* v. *Mason,* 7 Ark. 253, and *Peay* v. *Field,* 30 Ark. 600, that a lien upon personal property can be created only by contract; and in *Roberts* v. *Jacks,* 31 Ark. 597, that a mere declaration in a note to the bank that a lien exists upon the property sold for the unpaid purchase price does not, in itself, constitute a contract lien thereon to secure the payment thereof. A lien must actually be reserved upon personal property sold in order to give a vendor thereof a lien thereon to secure the payment of the purchase price. *Howell* v. *Crawford,* 77 Ark. 12, 89 S. W. 1046. The statement in the note in the instant case amounted to no more than a declaration to the effect that

a lien existed on the property for the purchase money, under the rule announced in the cases cited above. It follows therefore that there was no basis upon which appellee could maintain a proceeding in foreclosure to enforce a lien against the house, or to claim rents from the interveners or their agent, on account of his occupancy of the house after the expiration of the lease. The complaint of appellee was properly dismissed for the want of equity.

Appellee had no right to collect rents after the expiration of the lease, and, if same was extended, it had no right to collect rents either after it forfeited its rights under the lease by a failure to pay ground rent to the interveners or their agents, and especially after the expiration of the alleged extension of said lease. As we understand this record, it collected all of the rents it received from third parties, after failing to protect its rights to the possession of the house by payment of ground rents, and collected more rents from the third parties than the amount for which it was sued. The amount of rents claimed by the interveners was $175. The trial court should have rendered judgment in favor of the interveners for that amount, with interest at 6 per cent. per annum from August 1, 1925.

The judgment of the trial court dismissing appellee's complaint for the want of equity is affirmed, and, on account of the error indicated, the judgment of the trial court dismissing appellants' intervention and cross-bill is reversed, and the clerk is directed to enter a judgment here in favor of appellants against appellee for $175, with interest at 6 per cent. per annum from August 1, 1925, until this date, to cover the rents collected by it.

POLK-BOURNE REAL ESTATE COMPANY v. KAHN.

Opinion delivered January 17, 1927.

BROKERS—EXCLUSIVE CONTRACT TO SELL LAND.—Giving exclusive authority to a broker to sell land, without specifying a time limit as to when the sale should be completed, merely prevented the placing the property for sale in the hands of other agents, but not the sale of the property by the owner himself, while acting in good faith towards his agent.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

STATEMENT OF FACTS.

This suit was brought by appellant company, real estate brokers, to recover from defendant, Alfred G. Kahn, a commission claimed to be due under a contract between the parties for the sale of certain real estate, it being alleged that they had in fact procured the purchaser, and that defendant sold the property in violation of his contract giving them the exclusive right to make sale.

On May 23, 1924, appellant wrote appellee a letter as follows:

"Little Rock, Ark., May 23, 1924.

"Mr. Alfred Kahn,
Kahn Bldg., Little Rock, Ark.

"Dear sir: Referring to conversation with you a few days ago, will you kindly give us exclusive sale of the 75 feet of ground on Broadway, between 17th and 18th? We have a number of parties interested in buying a location for a home on Broadway, Arch or Gaines, and it is possible we might interest them in this home-site of yours.

"Yours very truly,
"Polk-Bourne Real Estate Co.
"By R. W. Polk."

"RWP-LS

Appellee wrote the word "Yes" on the bottom of the letter in ink, and his initials, "A. G. K.," and returned

it to the company. Appellant wrote him again on May 28, 1924, as follows:

"Little Rock, Ark., May 28, 1924.

"Mr. Alfred G. Kahn,
Kahn Bldg., Little Rock, Arkansas.

"Dear sir: We thank you for your indorsement on our letter of May 23, stating you would give us an exclusive sale on the property on Broadway between 17th and 18th. You did not put a price on the property in your letter, but some time ago you gave us a price on this of $7,500.

"Yours very truly,
"Polk-Bourne Real Estate Co.
"By R. W. Polk."

"rwp-ls"

Appellee indorsed on the bottom of this letter in ink, "$7,500 is right. A. G. K.," and returned it to appellant.

Appellant company then wrote some letters on June 21 and June 26 to the officers of the Ku Klux Klan, suggesting that the 75 feet of ground, upon which there was a good garage with servants' room above, should be purchased at the specified price by the Women's Klan for use in connection with the property on the corner, which it adjoined, already purchased by the organization, and which had no garage and servants' room.

Mr. Polk, of appellant company, also testified he had talked with Miss Gill, of said organization, about the sale of the property three or four days before he found out it had been sold, and that he had had a telephone conversation with defendant, who also asked: "Why don't you sell that to the organization you belong to?" and he had laughed and replied, "That those were the people he was figuring with, and that he expected an answer in a day or two." He didn't find out about the sale until several days after it was made, when he saw some workmen around the garage on the property. He also stated that a reasonable time for a real estate agency selling contract to run would be sixty days, and that a reasonable commission for the sale of such property would be five per cent.

Butler, a real estate agent of twenty years' standing, also stated that a reasonable time for the sale of the property would be ninety days, and that he would try to get six months; that five per cent. would be a reasonable commission; that that was the commission established by the real estate bureau and customary in this vicinity.

W. S. Holt testified that he was in the real estate and loan business; had sold Mr. Comer the place adjoining on the corner, and that Mr. Comer was interested in the Kahn property at the time that deal was closed, about the 17th of June; that about two weeks were consumed in making the sale; that he had talked with Mr. Comer about the Kahn property, telling him he thought it would be a good idea for them (Women of the Ku Klux Klan) to buy the Kahn property. In a few days after the trade for the corner property was closed, Comer asked him to see what he could get the Kahn property for, and he called Mr. Kahn to his office and made him an offer of $7,000, which he would not accept, but stated he would accept $7,500, and on that basis the trade was closed. He thought this was about the first of July; that he had a conversation about the Kahn property with Comer some time before June 17, and thought he was interested, as he said, "We will get this closed up first, and then see." He was representing Mr. Comer at the time he called Mr. Kahn, and Mr. Kahn paid the commission to him. He didn't talk to Mr. Kahn until about the first of July. He asked him for a ten days' exclusive contract for the sale, but he would not grant it, saying "that he was about to make a sale himself."

James A. Comer testified he wanted to purchase a piece of property for the women of the Ku Klux Klan, and called in W. S. Holt to aid him. He looked at the house on the corner, and, at the time, told Mr. Holt to see if the Kahn lot could be purchased, and at what price. He first saw this property with a view to its possible purchase in negotiating for the purchase of the building on the corner; was not shown the property by any real estate dealer, and would not have bought the corner house if he

had not been assured that this was for sale, and in dealing with the Kahn property Mr. Holt was acting for him. He told Holt he would give $7,500 for the property, no more; that if he had any commission it would have to come out of that. He made a flat offer of $7,500, which Mr. Holt reported was accepted, and details of closing the deal were started. He would not buy any property in Little Rock without consulting Mr. Holt.

He had the conversation with Mr. R. W. Polk about the property before it was purchased, but Mr. Polk did not in any way influence or induce him to buy it; said Miss Bobby Gill was the supreme national officer of the Women of the Ku Klux Klan.

She stated in her deposition that she had asked Mr. Comer to purchase the property for her if he could get it, and he acted for the Women of the Klan at her request. Her attention was called to this property at the time she was inspecting the residence on the corner lot. No real estate dealer had anything to do with calling her attention to it. Mr. Comer attended to all details in buying the property. Mr. Polk either wrote her a letter or called her while she was out of town. He came to her office and told her something about the property.

The defendant testified Mr. Holt telephoned him on June 24, asking if the property was for sale, and he told him it was. He said he was representing Judge Comer for the Ladies of the Ku Klux Klan, who had just bought the house on the corner, and "that Judge Comer was his close personal friend, and made his real estate purchases through him." Two or three days later he came back and said Judge Comer was willing to pay $7,500 if the commission could be deducted. He told Mr. Holt it could be, and the deal was closed on that basis. He did not consult Mr. Polk, because "he had no contract with Mr. Polk." He knew about the letters, but had made no contract, unless the letters were a contract. He did not have the property listed with any other real estate dealers. Herman Kahn owned the one lot and the defendant owned the half lot. Mr. Holt called him about the

property somewhere the last of June, and he called Mr. Polk about it somewhere around that time, he thought before.

The case was tried before the court, a jury being waived. The court made the following findings of fact at appellants' request:

"The court finds that defendant sold said property or caused said property to be sold to the Women of the Ku Klux Klan for said price of $7,500, said property being conveyed to said purchaser by deed executed July 10, 1924.

"The court finds that defendant has not paid plaintiff any commission on the sale of said property." And refused to make other findings, and refused to declare it a matter of law that the letters between the parties constituted a contract giving "the exclusive right of sale of said property for a reasonable time, and that a reasonable time, under the circumstances, would be ninety days, and that, under the terms of said contract, if plaintiff had sold said property for defendant during said ninety days, it would have been entitled to receive from the defendant a commission of five per cent. of the purchase price." And also that defendant had the right to breach the contract without notice so long as the breach of same was made in good faith, but finds that he did not act in good faith, in the absence of which he had no right to breach the contract; that plaintiff had a right to recover a five per cent. commission on the sale price.

The court made the following findings of fact at appellee's request:

"The court finds that the sale of lot 3 and the south half of lot 2, block 203, in the city of Little Rock, to the Women of the Ku Klux Klan was made by the defendant directly to the purchaser.

"The court finds that, in making the sale, the defendant acted in good faith, even though it had developed that he had an exclusive contract with the plaintiff, containing no time limit.

"The court finds that the defendant did not place the property in the hands of any other real estate dealer, and that he sold the property personally and not through any agent in his employ.

"The court finds that the plaintiff was not the procuring or inducing cause of the sale of the property in controversy;" and declared the law, at his request, that no contract was entered into between the parties.

"The court finds that, if there were a contract entered into between the plaintiff and defendant, the same did not deprive the defendant personally of the right to make sale of the real estate in question, without liability for commission, provided he acted in good faith and without having placed the lands in the hands of any agent or broker, other than plaintiff, for the purpose of sale."

The court stated, on his own motion, that he did not think the two letters with the notations constituted final contract, or that any outside evidence could be admitted to determine whether or not there was a written contract, leaving the impression on him that there was something final to be done afterwards; that, even if there was an exclusive contract, the owner had the right to make sale direct, and entered judgment for the defendant, from which this appeal is prosecuted.

Buzbee, Pugh & Harrison, for appellant.

Clayton & Cohn, for appellee.

KIRBY, J., (after stating the facts). The great weight of the testimony shows that the sale of the property was effected by the owner upon negotiations begun by the representative of the purchaser; also it is true that appellee finally consented to a reduction of the price in an amount equal to the usual agent's selling commission in order to make the sale; that appellee had not given any other agent than appellant, if its letters with his notations constituted an exclusive contract for selling, authority to make sale, and the court also found expressly that the appellee acted in good faith in making the sale himself, and its finding on contradictory testimony is conclusive.

Conceding that the letters between the parties, with the notations thereon, constituted an exclusive contract authorizing the sale of the property by appellant company, there was no time limit specified therein, nor can such contract be construed an exclusive one to make such sale, within a reasonable time, at the usual and customary commission, and could not deprive the owner of the right to make the sale without liability for payment of commission, while acting in good faith. In *Harris & White* v. *Stone*, 137 Ark. 23, this court said:

"In the present case the contract did not contain a time limit within which the agent might make a sale of the property, and there was an implied reservation of right of the owner to sell the land himself, free from any liability for commissions, provided he acted in good faith towards his agent. The contract, not specifying any exact period of time within which the agent was to have the exclusive right to sell, does not deprive the principal of the right to sell the land himself when he acts in good faith towards his agent."

The giving exclusive authority under the circumstances to appellant to sell, without a time limit as to when the sale should be completed, merely prevented the placing of the property for sale in the hands of other agents, but not the sale of the property by the owner himself, while acting in good faith towards his agent.

The testimony amply sustains the findings and judgment, which is in all things affirmed.

WRENN v. MANUFACTURERS' FURNITURE COMPANY.

Opinion delivered January 17, 1927.

JUDGMENT—VACATING DEFAULT JUDGMENT AFTER TERM.—Where one of plaintiff's attorneys agreed with defendant's attorney that the case should be continued and set down for a date to be approved by defendant's attorney, but subsequently another of plaintiff's attorneys, having no knowledge of this agreement, took judgment by default in the absence of defendant's attorney, who learned this

fact after the term had expired, the judgment was properly vacated at the next term of court.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

Rogers, Barber & Henry, for appellant.

Abner McGehee, for appellee.

MEHAFFY, J. The facts, as they appear from the pleadings, are substantially as follows: The appellant, the plaintiff below, filed suit in the Pulaski Circuit Court against the defendant; the defendant filed answer, and depositions were taken by both parties. The attorney for defendant and a member of the firm of the attorneys for the plaintiff agreed that the case should be continued from time to time, and that the case would be set down subject to the convenience and approval of the attorney for the defendant. The attorney for defendant was absent from Little Rock from December 15 until after the 8th of January, except one day. Attorney for defendant received no notice of the setting of the case. The attorney for the plaintiff who had been handling the case, and the one with whom the agreement was made, was absent from the city the latter part of the year, and another member of the firm took charge of the case. It does not appear that this attorney had any knowledge of the agreement. The case had been set by the court for the 8th of January. Judgment by default was taken on said day. Attorney knew nothing of the judgment having been taken until some time in May, after the term of court at which the judgment was taken had adjourned. On June 1, defendant filed its petition to vacate and set aside the judgment, and on June 4 plaintiff filed his response. Defendant's petition states the facts, and that it had a good defense.

There does not seem to be any controversy about the facts, but, as stated in appellant's brief, the appeal is here on the simple proposition that the trial court had no right to set aside the judgment after the term. It does not appear that attorney for defendant was guilty of any negligence, and the fact that the judgment by

default was taken by a member of the firm other than the one with whom the agreement was had is immaterial.

This court has held that, where the sickness of the wife of an attorney is the cause of his failure to appear at court and give his attention to the case, this is not such neglect as should operate to the prejudice of his client. It was stated that the sickness of the attorney's wife was an unavoidable casualty excusing his nonattendance at the court. *Leaming* v. *McMillan,* 59 Ark. 162, 26 S. W. 820.

In a recent case, where a defendant relied on conversations and statements of attorney for plaintiff, this court said: "There was such a misunderstanding as constituted unavoidable casualty or misfortune which prevented the defendant from appearing and defending. There is no room to suspect—and the lower court did not find—that plaintiff's attorney had intentionally misled the defendant, but the defendant and her husband, who was her representative in the matter, did testify that they were misled, and, because of that fact, had not arranged with the attorney they intended to employ to file an answer presenting a defense which, if true, would defeat a recovery, and had not furnished the attorney the information needed to prepare the answer." *McElroy* v. *Underwood,* 170 Ark. 794, 281 S. W. 368.

We think that, while the attorney who took the default judgment knew nothing of the agreement, yet that the attorney for the defendant was misled, and the judgment of the circuit court is affirmed.

SCHOOL DISTRICT No. 25 *v.* PYATT SPECIAL SCHOOL DISTRICT.

Opinion delivered January 17, 1927.

1. SCHOOLS AND SCHOOL DISTRICTS—CREATION BY LEGISLATURE.—The Legislature has power to organize school districts, and may do so without the consent of the inhabitants of the district.
2. SCHOOLS AND SCHOOL DISTRICTS—CREATION BY SPECIAL ACT—CHANGE OF BOUNDARIES.—Where a special act of the Legislature created a certain school district, the county board of education could not change its boundaries.

Appeal from Marion Circuit Court; *J. M. Shinn,* Judge; affirmed.

Floyd & Floyd, for appellant.

Elmer Owens, for appellee.

MEHAFFY, J. The appellants filed a petition with the county board of education in Marion County, Arkansas, stating that District No. 25 was organized under the laws of the State, embracing certain territory; that, in the year 1923, the Legislature created a school district known as the Pyatt Special School District in Marion County, and that a portion of the territory of the school district created by act of the Legislature was taken from District No. 25, and the petition asked that that territory be restored. Special school district filed a demurrer, and the county board of education sustained the demurrer on the ground that it had no jurisdiction.

The only question to be determined is whether the county board of education can change the boundary line of a district created by special act of the Legislature. This court has several times held that a school district is the creature of the Legislature, or of some governmental agency named by the Legislature. This court has said: "The Legislature is primarily vested with the power to create school districts, and it may create or abolish a school district, or change the boundaries of those established, for any reason that may be satisfactory to it. The Legislature may do this without consulting and without obtaining the assent of those persons who reside in the

territory affected." *Norton* v. *Lakeside Special School District,* 97 Ark. 71, 133 S. W. 184.

The court also said in the same case: "The above provisions of the statute are applicable to the common school districts of the county, and it is under and by virtue of these provisions that the petitioners herein seek the transfer of the children from Lakeside School District. We do not deem it necessary in this case to pass upon the question as to whether or not these statutory provisions are also applicable to special school districts created by the Legislature or established in cities and towns, because we do not think that the petition sets forth sufficient facts to warrant the court in making the order prayed for, if such petitions are applicable to this special school district."

The court, in the case quoted from, does not decide the question now before this court.

This court again, in speaking of the power of the Legislature with reference to school districts, said: "The legislative power in these respects is full and complete, and is conferred by the provisions of the Constitution. This power of the Legislature has been recognized many times by the court in determining questions relating to the formation of school districts and the changing of the boundaries of districts already created." *Special School District No. 2* v. *Special School District of Texarkana,* 111 Ark. 379, 163 S. W. 1164.

In *McIlroy* v. *Stephens,* 121 Ark. 591, 181 S. W. 887, the court said, in referring to an act of the Legislature: "The act as to rural special school districts had the effect of repealing the law authorizing the dissolution of one district and annexing to another."

Again, it has been said repeatedly that, in all cases, the legislative control over the creation and boundaries of school districts is plenary, subject only, however, to the limitation that such action shall not impair the contracts or obligations of such districts.

The Legislature has full power, it may organize a district itself, and may do so without the consent of the

inhabitants of the district, or it may authorize the county court or board of education or other governmental agency to form districts and change boundary lines; but, when the Legislature itself creates a district, of course it cannot be said that it authorizes any governmental agency to change the boundaries of a district so created, and neither the county board of education nor any other agency would have authority to change the boundaries of a school district created by the Legislature, unless the Legislature expressly authorized such agency to do so.

In a case in Illinois where it was sought to detach a portion of a district organized under special act of the Legislature, the court said: "On hearing this demurrer, it was agreed by parties that the court should determine only the question of law, whether or not the trustees of schools were authorized by the Constitution and laws of the State of Illinois to detach a portion of said District No. 3 and include the same in a new district, by them otherwise properly organized, and that, on behalf of relators, said special act in relation to the Waterloo graded schools should be considered by the court as properly before it. The first section of that act organizes the territory of District No. 3, together with such additions as may, from time to time, be made thereto by the action of boards of school trustees, special act of the Legislature, or otherwise, into a school district, the schools therein established to be known and designated as the Waterloo graded schools. The subsequent sections provided that the schools shall be under the exclusive control and management of a board of directors, and defined their powers. The court, in pursuance to the foregoing stipulation, sustained the demurrer to the plea, and gave judgment of ouster to the defendants," etc.

The court further said, in the same case: "It will be seen that the special act established District No. 3 by its terms, and does not authorize the board of trustees to detach territory therefrom, but it is insisted that, by construction, such power is given. There is no occasion for construction, as we understand the act. By express

terms the Legislature fixed the boundaries of the district. Those boundaries, by the provisions of the act, could only be changed by making additions thereto. To say that it was the intention of the Legislature by special act to erect a school district and establish such a graded school as is provided in the several sections of this act, and yet leave its territory liable to be diminished without limit, is unreasonable and in direct conflict with the language of the act. The Legislature clearly intended that at least so much territory as is described in § 1 should be secured to the district for the support and maintenance of the schools provided for by the act. To give this language a different meaning is not to construe, but to abrogate, the statute." *Schaefer* v. *People,* 20 Ill. App. 605.

The special act of the Legislature creating Pyatt Special School District not only fixes the boundary but takes the very territory from District No. 25 which District No. 25 now seeks to detach from Pyatt Special School District. In other words, they seek to have the county board of education abrogate the law creating the special school district. The sections of the Digest referred to, authorizing the county board of education to change the boundary lines of districts, do not authorize such board to change the boundary lines of a district created by special act of the Legislature. The act creating Pyatt Special School District does not authorize the board of education or any other agency to change the boundaries; it expressly repeals all laws in conflict therewith.

The judgment of the circuit court was therefore correct, and is affirmed.

GRIFFIN v. STATE.

Opinion delivered January 17, 1927.

1. CRIMINAL LAW—CORROBORATION OF ACCOMPLICE.—Under Crawford & Moses' Dig., § 3181, a conviction of a felony cannot be had on an accomplice's uncorroborated testimony as to defendant's connection with the commission of the crime, whether the court and jury believed the accomplice or not.
2. CRIMINAL LAW—COMPETENCY OF TESTIMONY.—Testimony that the pages of a hotel register for dates mentioned by an accomplice as those on which defendant was registered there were missing, *held* incompetent, in absence of any showing that defendant had anything to do with their removal.

Appeal from Hempstead Circuit Court; *James H. McCollum,* Judge; reversed.

Steve Carrigan, for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

MEHAFFY, J. The appellant, David L. Griffin, was convicted of the crime of burglary and grand larceny. He contends that the evidence is not legally sufficient to support the verdict.

The law provides that a conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. Crawford & Moses' Digest, § 3181.

Joe Mayfield testified that the appellant, two others and himself, participated in the burglary of the bank at Washington, Arkansas, as charged in the indictment; that, prior to the burglary, witness was at Van Buren, Arkansas, where he met the appellant, and that the appellant told him about the bank at Washington and their intention to break into it and get the money, and that the appellant told him the other boys were over in Fort Smith, and asked him to come over to the St. Charles Hotel, room 6. That he went over there, and found the door locked, but afterwards met the appellant.

That the date he was at the St. Charles Hotel was ten or twelve days before the crime was committed. That he and appellant met again the next day and discussed the bank robbery, and the appellant caught a train and went to Little Rock. Witness said that he and his companions, other than appellant, were registered at the Como Hotel, in Fort Smith. That appellant caught the train on Friday morning, and that witness and the other parties connected with the robbery went through that evening. There is not a scintilla of evidence that appellant was in Fort Smith or was with Mayfield either at Fort Smith or Van Buren, except the testimony of the accomplice.

Witness further testified that they left Little Rock at one o'clock and went to Texarkana, and registered at the Courier Hotel; that the appellant was registered at the Benefiel Hotel. He then tells about how the bank was broken into and robbed, and the part that he claims the appellant took in the matter. The proof also showed that the register containing the name, D. L. Griffin, was got from the Benefiel Hotel at Texarkana, and that they secured a letter which appellant had written while he was in the custody of the penitentiary officers at Little Rock, and expert witnesses testified that the signature on the hotel register and the signature to the letter which appellant had written were both, in their opinions, written by the same person, although they admitted there was some difference in the way the name was written. The cashier of the bank also testified that, some months before, a man came to the bank at Washington, asking for help, and he gave him fifty cents or a dollar, and, while he would not say that appellant was the same man, he really believed he was. The State also introduced a witness who testified that he had gone to the St. Charles Hotel at Fort Smith, and that the leaves of the hotel register for the dates which Mayfield said appellant was at the St. Charles Hotel, had been torn out, were missing.

Edwards, one of the parties who, Mayfield testified, assisted in the crime, was convicted, and his conviction

was affirmed September 27, 1926. It was there contended that there was no corroboration of Mayfield's testimony, but, in that case, a witness for the State testified that he saw the defendant, Edwards, and Joe Mayfield in Hope on the 15th day of December, 1925, the day before the burglary; that the defendant and Mayfield stayed around the railroad station a good deal that afternoon, and that the witness recognized defendant as one of the parties he had seen in Hope. A deputy sheriff also testified for the State in the Edwards case, to the effect that he heard Edwards tell his wife to go ahead and borrow the money and when he got out of there he would rob another bank and they would have plenty of money; that this statement of the defendant to his wife was voluntarily made and was in the presence and hearing of the deputy sheriff. The court in the Edwards case said that the testimony of the deputy sheriff and the constable tended to connect the defendant with the commission of the crime and sufficiently corroborated the testimony of Joe Mayfield. In this case, however, there is no testimony, except the testimony of the accomplice, that appellant was ever seen in the company of any of the persons who committed the robbery, and no testimony that he ever said a word indicating that he had anything to do with the bank robbery or knew anything about it. In other words, there is no testimony corroborating Mayfield's testimony tending to connect appellant with the commission of the crime.

Since the statute expressly provides that a conviction cannot be had in the case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and there being no such corroborating testimony in this case, it follows that his conviction was wrong. It is immaterial whether the court and jury believed the accomplice or not. His story may have been such and his manner such that, from his testimony alone, there would be no reasonable doubt about the appellant's guilt, but, if that were true, under the statute above

quoted he could not be convicted without evidence corroborating the accomplice, and, as we have said, there is none in this case.

We also think that the testimony of the sheriff, to the effect that he examined the register of the hotel in Fort Smith and found that the pages for the dates mentioned by Mayfield were missing, was incompetent, as it did not tend in any way to show that Griffin had anything to do with the removal of the pages or the mutilation of the record.

We find no other prejudicial errors in the record, and, for the errors above mentioned, the case will be reversed, and remanded for new trial.

BURRIS v. STATE.

Opinion delivered January 24, 1927.

1. INTOXICATING LIQUORS—EVIDENCE OF SALE.—Evidence *held* to sustain conviction of selling intoxicating liquor.
2. CRIMINAL LAW—EVIDENCE—SMELL OF LIQUOR.—In a prosecution for selling intoxicating liquor, the opinion of a witness, based on the smell of liquor, is competent to identify it as whiskey.
3. WITNESSES—CROSS-EXAMINATION—TEST OF CREDIBILITY.—In a prosecution for selling intoxicating liquor, where a witness testified that, on the evening of the alleged sale, defendant was at a dance and not at the place of sale, it was admissible, for the purpose of testing her credibility and reason for remembering the date of the dance, to elicit on cross-examination that she remembered the date because she noticed defendant's arrest in a newspaper the next day.

Appeal from Union Circuit Court, First Division; *L. S. Britt,* Judge; affirmed.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

McCULLOCH, C. J. Appellant was convicted on an indictment charging him with the offense of selling intoxicating liquor. An appeal was duly prosecuted to this court. Counsel for appellant has not filed a

brief, but we will proceed to consider the assignments of error contained in the motion for new trial.

The first contention is that the evidence is not legally sufficient to sustain the verdict of conviction. Appellant was operating a place of business in Dumas City, Union County, Arkansas, and the State introduced testimony tending to establish the sale of whiskey by appellant at that place. Two deputy sheriffs testified that they drove out to Dumas City and stopped in front of appellant's place of business, and sent a negro boy in to buy liquor; that the boy, in a few minutes, returned with two bottles of liquor, which they received from the boy, and preserved and produced before the jury. One of the witnesses, Mr. Hayden, testified that he saw appellant hand the bottles of liquor to the boy. Witnesses Hayden and Duck testified that they went back to appellant's place next morning and arrested him, and found a large quantity of liquor, the same kind as that purchased by the negro boy the night before. Hayden testified that the liquor was not analyzed by a chemist, and none of the witnesses testified about drinking any of it. Hayden testified that he examined it by smelling it, and stated positively it was whiskey. Witness Duck testified that, after appellant was arrested, he made the statement to witness that he had been "fooling with liquor" for more than a week, and, when asked how much he had sold that night, he replied about one hundred bottles, and also stated that it was liquor that came from Hot Springs. The negro boy, Joe Nash, testified that, on the occasion mentioned by the two officers, he went into appellant's place of business and purchased two bottles of liquor from appellant, and paid him for it. He stated he did not drink any of the liquor, but that "it looked like liquor." The testimony was, of course, sufficient to sustain a verdict of conviction.

Error of the court is assigned in permitting witness Hayden to testify that he identified the liquor as whiskey by the smell. The opinion of the witness, based upon the smell of the liquor, was competent evidence, and its

weight was a question for the jury. It cannot be said as a matter of law that the evidence of the identification of intoxicating liquor must rest upon more substantial basis than that of the sense of smell. Blackmore on Prohibition, page 123; *Strada* v. *United States*, 281 Fed. 143.

Error is assigned in permitting witness Maggie Yates to state that she had noticed publication in the newspaper about appellant's arrest. This witness was introduced by appellant, and testified concerning his presence at a dance on the evening the liquor is said to have been sold by him at his place of business. On cross-examination witness stated that she remembered the date because she noticed in the paper, the next day, an account of his being arrested. This testimony was brought out on cross-examination, and in testing the credibility of witness to see whether she had any substantial reason for the identification of the particular date on which she was with appellant at the dance. There was no error committed; in fact the entire record is free from error, and the judgment is affirmed.

ALEXANDER *v.* TEMPLE.

Opinion delivered January 24, 1927.

1. EMINENT DOMAIN—NOTICE OF CONDEMNATION OF DITCH.—A landowner, though without actual notice of condemnation of the right-of-way for a drainage ditch, under Acts 1909, p. 829, was bound thereby.
2. EMINENT DOMAIN—RIGHT OF LANDOWNER TO COMPENSATION.—A landowner who continued to occupy and cultivate the right-of-way of a drainage ditch after condemnation, under Acts 1909, p. 829, was complete, did so at his peril, though he was not actually notified of the condemnation, and he was not entitled to compensation for destruction of the crop raised thereafter by the construction of the ditch; the maxim that one seeking equity must do equity not applying.
3. EMINENT DOMAIN—DAMAGES INCLUDED IN CONDEMNATION.—All of a landowner's damage arising from taking of a right-of-way for

a drainage ditch, under Acts 1909, p. 829, is conclusively presumed to have been included in the condemnation, in the absence of objection to the award in apt time.

Appeal from Jefferson Chancery Court; *H. R. Lucas,* Chancellor; reversed.

Danaher & Danaher, for appellant.

R. W. Wilson, for appellee.

McCULLOCH, C. J. Appellants, as commissioners of the Tucker Lake Levee & Drainage District, instituted against appellee this action in the chancery court of Jefferson County to restrain appellee from interfering with the construction of the improvement by the contractor or subcontractor.

Appellee owned a small tract of land in line with the right-of-way, and, when the subcontractors appeared, in the early part of November, 1925,to begin work with the dredging machine, appellee prevented them from coming on the land. He had planted a crop of cotton, which had matured, on the tract included in the condemned right-of-way, and he insisted that no work be done interfering with the gathering of his crop. Appellants then instituted this action to prevent the interference, the cause was heard by the chancery court on November 23, 1925, and a decree was entered by the court restraining appellee from interfering with the work, but in favor of appellee for recovery of the sum of $100 as damages for the destruction of the crop grown on the right-of-way.

It appears that, in the organization of the district and in the formation of the plans for the improvement, there was an assessment of benefits and damages filed in accordance with the statute (Acts 1919, page 829). Appellee had no actual notice of the statutory condemnation, but was bound by it. *Dickerson* v. *Tri-County Drainage District,* 138 Ark. 471, 212 S. W. 334. However, the condemnation was complete December, 1923, and nothing was done toward the construction of the improvement until November, 1925, when the subcontractors appeared on appellee's land to begin work, and appellee insisted that his crop be not taken or damaged without compensation,

for the reason that he had been permitted to plant the crop without actual notice that the ditch would be dug along the right-of-way before he had gathered the crop. The chancery court based its decision in favor of appellee on the ground that appellants, before obtaining relief, should be required to do equity by paying for the damage done under the circumstances. Apparently the court applied the familiar maxim that he who seeks equity must do equity. Our conclusion is that this was a misapplication of the equity doctrine, for the condemnation was complete, and appellee continued at his peril to occupy and cultivate the right-of-way. All of his damage for taking the right-of-way was conclusively presumed to have been included in the award made by the assessors, there having been no objection made to the award in apt time. Appellee's continued possession of the property was, at most, permissive, and he can claim no damages by reason of the indulgence. The decree is erroneous, and is therefore reversed, with instructions to enter a decree in favor of appellants in accordance with this opinion.

ELLIS v. STATE.

Opinion delivered January 24, 1927.

1. INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain conviction of manufacturing liquor and mash and of possessing a still and stillworm.
2. CRIMINAL LAW—EVIDENCE.—In a liquor prosecution, where defendant testified that he and another were at a still from which they fled as an officer approached, and that his companion said he was under suspended sentence and did not want to be caught, it was not error to admit the officer's testimony that he had not seen defendant's companion since the day he ran off.
3. CRIMINAL LAW—EVIDENCE—RES GESTAE.—In a prosecution for manufacturing liquor, admission of the testimony of a State's witness as to finding defendant and another at a still, and as to what they said and did, *held* admissible as part of *res gestae*.
4. CRIMINAL LAW—HARMLESS ERROR.—In a prosecution for manufacturing liquor, where a State's witness testified that defendant's

father appeared at the still shortly after defendant and his companion had fled and called out to such companion, a question asked defendant's father whether he knew that such companion was in the habit of making liquor and was looking for him, though improper in form, was not prejudicial in view of the witness' negative answer.

5. CRIMINAL LAW—IMPROPER TESTIMONY—INVITED ERROR.—In a prosecution for manufacturing liquor, examination of defendant's father as to whether he knew that defendant's companion was in the habit of making liquor was invited by defendant's statement that such companion, when he fled at the sight of the officer, stated that he was under a suspended sentence, and had to run.

6. CRIMINAL LAW—STATEMENT OF COURT—WEIGHT OF TESTIMONY.—In a prosecution for manufacturing liquor, where, during an argument of defendant's counsel that the jury could convict only by guessing that defendant had some connection with possession of the still, the court's remark to counsel that the word "guess" was not proper, and that, if there was no evidence at all, the case would not be on trial, *held* not an invasion of the jury's province.

Appeal from Pulaski Circuit Court; *Abner McGehee,* Judge; affirmed.

Snodgress & Snodgress, for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

WOOD, J. The appellant and one Wesley Roller were indicted in three separate indictments for the crimes of manufacturing intoxicating liquor, manufacturing mash, and possessing a still and stillworm, contrary to the statute in such cases made and provided. By consent the cases were consolidated for trial, and the appellant was convicted and sentenced by judgment of the court to one year's imprisonment in the State Penitentiary in each of the three causes, from which judgments he appeals. No objection is raised to the validity of the indictments.

J. C. McKenzie testified that he was the constable of Ellis Township, in Pulaski County, and, as such, arrested the appellant in that township. The witness located a still where appellant was at the time. The still was about 200 yards from the mash barrel. The still and mash were located on Clark's place, in a very

dense thicket. It was a copper still. Witness found altogether twelve mash barrels. He located the mash barrels a week or two before he found the still. The still was in operation when witness found it. They had run off a gallon of whiskey that morning. The appellant and another boy were at the still. Witness did not see them until they ran away. Witness followed them until they got in the field. The other man with appellant was Wesley Roller. Witness went back to the still and hid himself in the bushes, to see what would happen. In a few minutes Horace Ellis, father of the appellant, came up the creek and got up right near the still, and called, "Wesley, Wesley!" and witness stepped out and arrested him. He was twenty or thirty feet from the still. There was a shirt at the still that appellant's father stated belonged to the appellant. Appellant had on an undershirt and no top shirt when he ran away. There were one or two kegs and a big eight or ten-gallon stone jar and two half-gallon fruit jars there. The whiskey was running out of the still into a half-gallon vessel, which was nearly full. Witness did not see anybody else at all around the still. Witness found, at another place, the mash barrels in an awful thicket. Two or three days afterward appellant came down to the justice of the peace and gave up. When witness first saw the appellant and Wesley Roller, they were ten or twelve feet from the still. Witness had known appellant all his life. He lived something like three and a-half miles from witness.

On cross-examination appellant's counsel asked the witness the following question: "Did Wesley (Roller) come back to the justice of the peace in two or three days?" Witness answered, "Ernest did—Wesley didn't." On redirect examination witness, over the objection of appellant, stated that he had never seen Wesley Roller since the day he ran off, and witness did not know whether he was in the county or not. This all occurred in Pulaski County about June 18, 1926.

Another witness testified to the effect that, at the request of McKenzie, on June 18, 1926, he went to assist

McKenzie about getting out a still, and found the still running. His testimony substantially corroborated the testimony of the other witness in regard to finding the stillworm, still, and mash. This witness did not know anything about the defendant having anything to do with the still.

Appellant testified in his own behalf, and admitted that he was at the still on the day designated, but stated that he had nothing to do with it. A man by the name of Wilkerson had offered him $10 to find two cows, and he had been looking for these cows at the time. Wesley Roller, who had married appellant's sister, was with appellant at the time. They had just walked down there to the still—had never been there before. Witness denied that he had a shirt at the still. He had a white shirt on, with no sleeves in it.

During the argument of counsel for appellant he stated to the jury that they could only convict the appellant by guessing that he had some connection with the possession of the still or manufacturing of mash or liquor. The court remarked to the counsel that the word "guess" used by him was not a proper one, and that the jury should not guess at the guilt or innocence of a defendant; that, if there was no evidence at all, the case would not be on trial, and that it was competent to convict on circumstantial evidence as well as direct evidence if the facts and circumstances warranted a verdict under the instructions given. Witness also stated, on cross-examination, without objection, that he didn't know where Wesley Roller was at that time.

The father of the appellant testified that, when he got near the still on the day designated by witness McKenzie for the State, he called "Wesley, Wesley!" On cross-examination he was asked, "You just knew Wesley Roller was in the habit of making liquor, and were looking for him?" to which the witness replied, "No."

The appellant contends that there is no testimony to sustain the verdict. The testimony set out above speaks for itself, and it is sufficient to warrant the jury in find-

ing appellant guilty. The explanation appellant gave of his presence at the still did not explain it to the satisfaction of the jury, and the jury are the sole judges of the weight to be given his testimony. See *Stover* v. *State, ante,* p 76.

The court did not err in permitting the witness for the State, on redirect examination, to testify that he had never seen Wesley Roller since he ran off that day, and that he did not know whether he was in the county or not. Appellant himself testified that Wesley Roller was with him that morning at the still, and, without objection, on cross-examination he stated that, when the officer came up, Wesley said: "There comes McKenzie. I am under a suspended sentence, and don't want to be caught," and ran away, and appellant ran with him.

There was no prejudicial error in the ruling of the court in permitting the witness McKenzie, for the State, to testify that he had not seen Wesley Roller since he ran away, and that he didn't know whether he was in the county or not. The appellant himself, on cross-examination of witness, had elicited the fact that Wesley Roller had not come back to the justice of peace court after he ran away. The testimony of this witness, on redirect examination, as to whether or not he had seen Roller, was along the same line of examination as that which the appellant had pursued with reference to the whereabouts of Roller. Appellant himself had testified that Roller said that he was under a suspended sentence, and had run away. It was not error for the court to permit witnesses for the State to testify that they found appellant and Wesley Roller at the still and what they said and did at the time. This was a part of the *res gestae.* They were jointly charged with the commission of these several offenses, and, as appellant concedes, Roller was in company with him at the still on that day, and they ran away from same at the approach of the officer at the same time, Wesley Roller remarking that he was under a suspended sentence and had to run. The appellant is in no attitude to complain of the testimony, because, without objection, he

had elicited testimony tending to prove that Roller had fled from the still and had not returned for his examination before the justice court. There was no error, under the circumstances, in permitting the State to show that Roller had not been seen since he fled on the day the officer saw him at the still.

There was no prejudicial error in the question asked appellant's father concerning Wesley Roller. While this question, in the form set forth, was improper, the witness answered it in the negative, and it therefore could not have been prejudicial to the appellant. Besides, the appellant's own testimony, as we have stated, was to the effect that Roller himself, when he fled at the sight of the officer, stated that he was under a suspended sentence and had to flee. All this examination, if improper, was in the nature of invited error, and the appellant cannot complain thereof. *Tarkington* v. *State,* 154 Ark. 365, 242 S. W. 830; *McDonald* v. *State,* 165 Ark. 411, 264 S. W. 961.

The remarks of the court to the attorney for the defense were not an invasion of the province of the jury, as these remarks cannot be construed by the court as an expression of an opinion by the court on the weight of the evidence. Considered as a whole, the remarks were only tantamount to telling the jury that it would be justified only in finding the defendant guilty if the evidence, either direct or circumstantial, warranted such verdict, otherwise not.

The record shows no reversible error, and the judgment must therefore be affirmed.

COLEMAN v. MITCHELL.

Opinion delivered January 24, 1927.

1. JUDGMENT—RES JUDICATA.—To render a judgment in one suit conclusive of matter sought to be litigated in another, it must appear from the record or from extrinsic evidence that the particular matter sought to be concluded was raised and determined in the prior suit, or that it might have been litigated in that case.
2. JUDGMENT—RES JUDICATA—PRESUMPTION.—On the issue of *res judicata,* where matters involved in a subsequent suit were within the issues tried in a prior suit, it will be presumed that evidence necessary to support the prior judgment was introduced and considered in the trial court.
3. JUDGMENT—RES JUDICATA.—The value of a plea of *res judicata* is not to be determined by the reasons which the court rendering the former decree gave for doing so.
4. APPEAL AND ERROR—ABSENCE OF EVIDENCE—PRESUMPTION.—Where a decree dismissing a cause of action with prejudice for want of equity recited that it was heard on oral evidence which is not brought into the record, it will be presumed on appeal that there was sufficient evidence to sustain the decree.

Appeal from Drew Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

STATEMENT OF FACTS.

Harriett Coleman and others, who are named in the complaint, brought this suit in equity against Elisha Mitchell and others, who are also named in the complaint, to enjoin Elisha Mitchell, as administrator with the will annexed of the estate of Virginia Mills, deceased, and Elisha Mitchell and Pettus Mitchell, as legatees under said will, from in any manner disposing of any of the property belonging to said estate, and for the appointment of a receiver to take charge of said property, and require an accounting from the defendants for the proceeds of the property belonging to said estate received by them.

According to the allegations of the complaint, Elisha Mitchell and Pettus Mitchell are the nephews of the husband of said Virginia Mills, deceased, and are the sole legatees under her will. The defendants, Major Baker and Isabel Trambell and the plaintiffs, are all cousins of

Virginia Mills, deceased, and her heirs at law. It is further alleged that the will was denied probate, and that Elisha Mitchell and Pettus Mitchell appealed to the circuit court from the order of the probate court holding that the will was not entitled to be admitted to probate. It is further alleged that the defendants compromised the suit in the circuit court, and that a full and true showing of the facts was not presented to the circuit court. The plaintiffs also allege that the execution of the will was obtained by the undue influence of Elisha Mitchell and Pettus Mitchell.

The defendants filed an answer, in which they denied all the material allegations of the complaint. They denied that a compromise of the case was had in the circuit court, as alleged in the complaint, and that a full and complete hearing on the facts relative to the probate of the will was not had in the circuit court.

The defendants also interposed a plea of *res judicata*. The defendants also alleged that the plaintiffs in this suit were present and represented by their attorney of record during the proceedings above referred to, and refused to make themselves parties to the proceedings.

The probate of the will was contested by Major Baker and Isabel Trambell as heirs at law of Virginia Mills, deceased. The defendants also filed what they termed a demurrer and motion for dismissal, which is as follows:

"Come the defendants, and move the court to dismiss the action and complaint and pleadings of the plaintiffs for want of equity, and for cause they state:

"1. The complaint and pleadings of the plaintiffs do not state facts sufficient to constitute a cause of action.

"2. The pleadings of the plaintiffs fail to show that all necessary parties have been made parties to the action.

"3. This court has no jurisdiction in the premises.

"4. The will of Virginia Mills, which is attacked by this action, was offered for probate in the Drew Probate Court, and the plaintiffs were present at the trial in the

Drew Probate Court, represented by the same attorney who brings the present action. There was an appeal from the decision of the Drew Probate Court to the Drew Circuit Court, where the issue of the validity of the will of Virginia Mills was tried *de novo* on February 11, 1925, and the validity of the will was sustained by judgment of the Drew Circuit Court. Plaintiffs were also present at the trial by their present counsel and attorney, and no appeal was taken from the decision of the Drew Circuit Court. Plaintiffs therefore have had their day in court and had adequate remedies at law, and the present issue is *res judicata.*

"5. On mandate from the Drew Circuit Court, the will of Virginia Mills was admitted to probate, and an administrator was properly appointed by the Drew Probate Court. Said administrator qualified, and has been constantly acting under orders of the Drew Probate Court since his appointment, and the administration of the estate of Virginia Mills has progressed many months under the jurisdiction of the Drew Probate Court. Plaintiffs have appealed from none of the orders of the Drew Probate Court, and have availed themselves of none of their remedies at law, although at all times well acquainted with their alleged rights and of the proceedings referred to. They are now estopped from maintaining this action and interfering with the jurisdiction of the Drew Probate Court. This court has no power to disrupt said administration nor to invalidate any of the proceedings which have been had in said probate court, including the probating of the will involved.

"Wherefore, the premises considered, defendants pray that the action of the plaintiffs be dismissed at their cost for want of equity, and for all other and further general, equitable relief."

The final decree in the case reads as follows:

"Now on this day comes on this cause to be heard upon the complaint of the plaintiffs, Harriett Coleman, Carrie Ann Shelby, Minerva Larry, Henry Jones, Marindy Moore and Queen Smith, filed February 12,

1925; and upon the amendment to the complaint filed by said plaintiffs on February 26, 1925; and upon *lis pendens* notice filed by the plaintiffs February 26, 1925; and upon the separate answer of defendants, Elisha Mitchell and Pettus Mitchell, filed March 3, 1925; and upon the motions of the defendants to dismiss, including a demurrer, and a plea of the jurisdiction of the court, and a plea of *res judicata,* and a plea of estoppel; and upon the motion of defendants to dismiss the actions because of noncompliance by the plaintiffs with the provisions of § 4206-a of Crawford & Moses' Digest of the Statutes of Arkansas; and upon the reply of the plaintiffs to the defendants' motion to dismiss; and upon oral testimony *ore tenus* in open court of the witnesses, Judge John W. Kimbro, W. H. Hardy, and John T. Cheairs, Jr.; and upon the records of the Drew Probate Court covering the probation of the will of Virginia Mills, deceased, and the administration of her estate to this date; and upon the records of W. H. Hardy, as clerk of the Drew Circuit Court, relative to the attendance of witnesses and persons present at the trial in the Drew Circuit Court on February 11, 1925, on the issue of the validity of the will of Virginia Mills, deceased; and upon statements and arguments of attorneys for the respective parties in open court; and the court, being well and fully advised in the premises, doth find that both the motions to dismiss filed by the defendants should be, and the same are, hereby by the court sustained.

"Wherefore, the premises considered, it is by the court considered, ordered, adjudged and decreed that the complaint and the amended complaint of the plaintiffs above named, and their entire cause of action be, and the same is, hereby by the court dismissed with prejudice, for want of equity; and the *lis pendens* notice filed by the plaintiffs is hereby by the court canceled, dissolved and held for nought; and the defendants are hereby awarded judgment against plaintiffs for all costs in this action accruing."

To reverse that decree the plaintiffs have duly prosecuted an appeal to this court.

John T. Cheairs, for appellant.

Williamson & Williamson, for appellee.

HART, J., (after stating the facts). The record shows that the court heard the case, among other things, on the motion of the defendants to dismiss, including a demurrer and their plea of *res judicata.* The decree recites that the motion to dismiss is by the court sustained. The motion to dismiss referred to in the decree is copied in our statement of facts, and need not be repeated here. Reference to it will show that it contains matters which, if proved, would sustain a plea of *res judicata.* To render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear from the record, or from extrinsic evidence, that the particular matter sought to be concluded was raised and determined in the prior suit, or that it might have been litigated in that case. *Gordon* v. *Clark,* 149 Ark. 173, 232 S. W. 19; *Tri-County Highway Imp. Dist.* v. *Vincennes Bridge Co.,* 170 Ark. 22, 278 S. W. 627; *Howard-Sevier Road Imp. Dist.* v. *Hunt,* 166 Ark. 62, 265 S. W. 517; and *Newton* v. *Altheimer,* 170 Ark. 366, 280 S. W. 641.

The matters involved in the present suit were within the issues tried in the suit relative to the admission of the will under consideration to probate, and it must be presumed that any evidence necessary to support its judgment that the will was entitled to probate was introduced and considered by the circuit court in its determination of the case. Some of the heirs at law of Virginia Mills, deceased, were parties to that proceeding, and the plea of *res judicata* of the defendants alleges that the plaintiffs in this suit were present in court in person and by attorney, and refused to take any part in the proceedings.

It has been held by this court that, if a plea of *res judicata* should not be sustained when the issues are practically the same, the litigation would not end until the parties had no more money or the ingenuity of counsel in suggesting additional grounds in support of the issues

has been exhausted. The court further said that the value of a plea of *res judicata* is not to be determined by the reasons which the court rendering the former decree gave for doing so. *Tri-County Highway Improvement Dist.* v. *Vincennes Bridge Co.*, 170 Ark. 22, 278 S. W. 627. It is the settled doctrine of this court that, where a judgment or a decree recites that it was heard upon oral evidence and that evidence is not brought in the record by bill of exceptions or other legal means, this court must indulge the presumption that there was sufficient evidence to sustain the decree of the lower court within the issues joined in the proceeding. *Weaver-Dowdy Co.* v. *Brewer,* 129 Ark. 193, 195 S. W. 367; *Wiegel* v. *Moreno-Burkham Construction Co.,* 153 Ark. 564, 240 S. W. 732; *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096; and *Fletcher* v. *Simpson,* 144 Ark. 436, 222 S. W. 710.

The oral evidence recited in the decree was not brought into the record at all. It follows that the decree of the chancery court was correct, and it will be affirmed.

CITY NATIONAL BANK *v.* CITIZENS' BANK OF PETTIGREW.

Opinion delivered January 24, 1927.

1. BANKS AND BANKING—ACCEPTANCE OF CHECK.—The general rule is that, where a check is offered and accepted by the drawee bank as a deposit, credited to the holder's account and charged to the account of the drawer, the transaction is closed and cannot be rescinded or recalled except for fraud or mistake.
2. CONTRACTS—FRAUD OR MISTAKE.—In equity fraud or mistake vitiates every transaction.
3. BANKS AND BANKING—MISTAKE IN ACCEPTING CHECK.—Where a bank forwarding a check for collection suffered no loss by reason of the drawee bank mistakenly crediting the forwarding bank's account therewith, the drawee bank, on discovering the same day that the drawer had no funds to meet the check, had a right to correct the mistake by notifying the forwarding bank.

4. BILLS AND NOTES—ACCEPTANCE OF CHECK.—There can be no acceptance of a check by delivery to the bank on which the check is drawn until the draft passes through the books of the bank, charging the drawer's account and crediting the account of the remitting bank and making a complete transaction.

Appeal from Washington Chancery Court; *Lee Seamster,* Chancellor; reversed.

STATEMENT OF FACTS.

So far as the issues raised by the appeal in this case are concerned, this is a suit in equity by the Citizens' Bank of Pettigrew against the City National Bank to recover the sum of $1,000, the amount of a draft drawn on the defendant in favor of the plaintiff and alleged to have been accepted by the defendant. The suit is defended on the ground that the drawer of the draft had no funds in the defendant's bank with which to pay it, and that the acceptance of the defendant was made under a mistake of fact.

The record shows that, on November 10, 1923, the Citizens' Bank of Pettigrew, in Madison County, Arkansas, mailed at Pettigrew to the City National Bank of Fort Smith, Arkansas, the following draft:

"The Farmers' State Bank

Oklahoma City, Okla., Nov. 6, 1923.

"Pay to the order of Citizens' Bank ($1,000) one thousand dollars for value received, and charge to account of R. J. Conneway.

"To City National Bank,

"Fort Smith, Arkansas."

November 11 was Sunday, and November 12 became Armistice day, and a holiday. When the City National Bank opened for business on Tuesday, November 13, the draft had arrived. One of the clerks in the bank mailed on the same day a postal card to the Citizens' Bank of Pettigrew, which is as follows:

"The City National Bank, Fort Smith, Ark., November 13, 1923. Your letter of 11 received.

We credit your account.....$1,000
We entered for collection.....
We debit your account.....

"Checks and drafts on other points credited subject to payment.

"Yours truly,
"The City National Bank."

The account of R. J. Conneway was also charged with the sum of $1,000 by another clerk. The attention of the cashier of the City National Bank was called to the matter later in the day of the 13th inst., and he examined the account of Conneway to see if he had any funds in the bank. Finding that Conneway had no funds in the bank, he directed the draft to be at once returned to the Citizens' Bank of Pettigrew. This direction was given before the close of banking hours, but it seems that the letter returning the draft was not received by the Citizens' Bank of Pettigrew until November 15, 1923. The advice-card or acceptance copied above was received by the Citizens' Bank of Pettigrew on November 14, 1923.

According to the testimony of the cashier of the City National Bank, Conneway was not a regular customer of the bank, but had borrowed money from it on one occasion previously and had deposited some collateral security with the bank. The amount so borrowed was due and unpaid at the time of the transaction in question, and the collateral was still in the hands of the City National Bank. The draft and the notice of nonpayment were dated November 15, but this was a mistake of the stenographer, and the actual date was November 13. The direction of the cashier to return the draft with notice of nonpayment was made during banking hours, but too late to be forwarded to the Bank of Pettigrew on that day.

The Citizens' Bank of Pettigrew refused to accept the return of the draft, on the ground that the postal card received by it, above referred to, was an absolute accept-

ance of the check, and was not merely an advice-card showing the receipt of the draft, as claimed by the Citizens' National Bank. R. J. Conneway had been connected with the Citizens' Bank of Pettigrew, and that bank knew that he had no funds on deposit in the City National Bank at the time the draft in question was drawn, but it expected that Conneway would be in Fort Smith on November 12, 1923, and arrange for the payment of the draft. Conneway had returned from Oklahoma, and was in the Citizens' Bank of Pettigrew on the day the card of acceptance or advice was received, which was November 14, 1923. The Citizens' Bank of Pettigrew, as soon as it received the postal card in question, treated it as an acceptance or payment of the draft, and made an entry in its books crediting the account of R. J. Conneway with $1,000. The draft was given by Conneway to the bank in payment of an antecedent indebtedness, and it is not shown that the Citizens' Bank of Pettigrew will in any wise be injured if the postal card in question is not treated as an absolute acceptance and payment of the draft.

The chancellor found the issues in favor of the plaintiff, and rendered a decree in favor of the Citizens' Bank of Pettigrew against the City National Bank of Fort Smith in the sum of $1,000. To reverse that decree this appeal has been prosecuted by the City National Bank.

James B. McDonough, for appellant.

W. N. Ivie, for appellee.

HART, J., (after stating the facts). Michie, in his treatise on Banks and Banking, vol. 2, § 141 (1c), lays down the general rule governing cases of this sort as follows:

"Where a check is offered and received by the drawee bank as a deposit, credited to the holder's account, and charged to the account of the drawer, the transaction is irrevocably closed and cannot be rescinded or recalled by the bank or the drawer without the consent of the person to whom payment was made, except for fraud or mistake."

The general rule proceeds upon the theory that, when a bank accepts a check or draft on itself, by depositing to the credit of the person presenting it the amount of the check, it is presumed to know whether the check at that time is good or not, and, if it unconditionally accepts it, it cannot thereafter repudiate it in this respect. The general rule has been recognized and followed by this court. *Burns* v. *Yocum,* 81 Ark. 127, 98 S. W. 956; and *Sanders* v. *W. B. Worthen Co.,* 122 Ark. 104, 182 S. W. 549.

In *American National Bank* v. *Miller,* 185 Fed. 338, the Circuit Court of Appeals, Sixth Circuit, lays down the rule to be that, where a check was offered and received by the drawee bank as a deposit, credited to the depositor's account and charged to the account of the drawer, the transaction constituted complete payment of the check and could not be rescinded except for fraud or mutual mistake.

This case was appealed to the Supreme Court of the United States and the judgment affirmed in 229 U. S. 517, under the style of the *American National Bank* v. *Miller.* Mr. Justice Lamar, who delivered the opinion of the court, in discussing the subject said:

"There are some disadvantages of sending a check for collection directly to the bank on which it is drawn, but, when such bank performs the dual function of collecting and crediting, the transaction is closed, and, in the absence of fraud or mutual mistake, is equivalent to payment in usual course. *National Bank* v. *Burkhart,* 100 U. S. 686, 689."

We are of the opinion that the exceptions recognized in the cases just cited are in accord with the holding of this court on the subject. In *Arkansas Trust & Banking Co.* v. *Bishop,* 119 Ark. 373, 178 S. W. 422, the court said:

"The only question in this case for the decision of the jury was whether the bank accepted the check and became liable for the payment of the amount for which it issued its deposit slip to the drawee thereof. The

intention of the parties to the transaction could properly have been shown for the determination of this question, and, the bank having issued its regular deposit slip or ticket for the amount of the check to the drawee thereof, the burden rested upon it to show that it was not in payment of the check."

Again, in *Sanders* v. *W. B. Worthen Co.,* 122 Ark. 104, 182 S. W. 549, the court said:

"When a check is taken to a bank and the bank receives it and places the amount to the credit of the customer, the title to the check is vested in the bank. The rule as stated is not an absolute rule, but it is *prima facie* merely, and yields to the intention of the parties, express or implied, from the circumstances."

It is a well recognized doctrine of equity jurisprudence that fraud or mistake vitiates every transaction. It is evident that, if the bank acted through a mistake of fact in making the acceptance, it should not be bound thereby, unless the other party suffered some loss on account of its act in making the acceptance.

In the case at bar no loss was suffered by the Bank of Pettigrew. It knew that Conneway had drawn the draft in its favor in payment of an antecedent indebtedness and that he had no funds in the City National Bank at that time with which to meet it. It also knew that he intended to go to the City National Bank at Fort Smith by the 12th of November and make arrangements for the payment of the draft. Conneway was in the bank when the postcard copied in our statement of facts was received. The Citizens' Bank of Pettigrew did not ask him if he had made arrangements to pay the draft with the City National Bank, but credited his account with the amount of the draft. In doing so, the Bank of Pettigrew treated the postcard as an absolute acceptance instead of a card advising it that the draft had been received by the City National Bank. It is true that the card, on its face, is an absolute acceptance, but, according to the testimony of the cashier of the City National

Bank, it was not intended as such, but was only intended to be a notification that the bank had received the draft.

It is also true that the bookkeeper credited the account of Conneway with the sum of $1,000, the face value of the draft, on the day that it was received, but, according to the testimony of the cashier of the bank, this was done through mistake. On account of the two previous days being holidays, an accumulation of business had come through the mails, and the routine work of the bank was being done hastily on Tuesday, which was the day the draft was received and on which the transactions with regard to it were had by the City National Bank. As soon as the cashier discovered that this had been done, he examined Conneway's account to see if he had any funds on deposit with which to pay the draft. Finding that he had none, he directed the item to be charged off of the books of the bank and that the Bank of Pettigrew be notified that the draft was returned to it because the drawer had no funds with which to pay it. This was done during banking hours on the day of the 13th of November, the day it was credited, although the letter notifying the Citizens' Bank of Pettigrew that the draft was returned for nonpayment for want of funds was dated November 15. The cashier of the City National Bank, however, testified that was due to a mistake of the stenographer, and that the letter was directed to be sent on the 13th, although the mistake was discovered too late for it to be mailed on the train going to Pettigrew on that day.

The City National Bank acted in the dual capacity of collecting agent of the Citizens' Bank of Pettigrew, the holder of the draft, and as drawee. In such case there can be no acceptance by delivery until the draft passes through the books of the bank, charging the account of the drawer and crediting the account of the remitting bank, and making a complete transaction. *First National Bank of Murfreesboro* v. *First National Bank of Nashville,* 154 S. W. 965.

Under the circumstances of this case, it is evident that the City National Bank charged the amount of the draft to the account of Conneway in the hurry of the day, which was caused by the accumulation of business on account of the two previous days being holidays, and that there was no intention to treat the transaction as completed until the close of the day's business.

The postal card was not intended to be an absolute acceptance, but was only intended by the bank to be a card advising the Citizens' Bank of Pettigrew that the draft had been received. No loss was suffered by the Citizens' Bank of Pettigrew on account of the transaction.

The result of our views is that the City National Bank never intended to treat the transaction as a completed one and that it had a right to correct the mistake when it discovered, on the same day, that Conneway had no funds in the bank with which to meet the draft. The Citizens' Bank of Pettigrew, having been promptly notified and having suffered no loss on account of the mistake, is in no position to claim that the facts of this case did not bring it within the exception that the acceptance was made under a mistake of fact. It follows that the decree must be reversed, and, inasmuch as the case of the plaintiff seems to have been fully developed, its cause of action will be dismissed here.

RAINWATER v. FEDERAL RESERVE BANK OF ST. LOUIS (LITTLE ROCK BRANCH).

Opinion delivered January 24, 1927.

1. BANKS AND BANKING—AUTHORITY TO SUE BANK COMMISSIONER.—A bank which has been constituted the agent of certain drafts and was the legal holder thereof was authorized to sue the State Bank Commissioner in charge of an insolvent bank, which had collected the drafts, to have claims therefor allowed as preferred, where drafts sent in remitting such collections were not honored.

2. BANKS AND BANKING—INSOLVENCY—PREFERENCE.—The claim of the Federal Reserve Bank against the Bank Commissioner in charge of a bank which made collections for claimant and had funds sufficient to honor drafts sent as remittance of collections, which were not paid, owing to the bank being closed, *held* a preferred claim, since the collecting bank was the claimant's agent and held the money collected in trust.
3. BANKS AND BANKING—REMITTANCE IN EXCHANGE.—A bank making collections for the Federal Reserve Bank may remit in exchange, instead of in money, in view of the large amount of collections made by the Federal Reserve Banks.
4. BANKS AND BANKING—COLLECTIONS—NEGLIGENCE.—It is not negligence for banks receiving for collection checks or drafts payable in another city to send them for collection to the bank on which they were drawn, in view of Acts 1921, p. 914, § 14.

Appeal from Franklin Chancery Court, Ozark District; *J. V. Bourland,* Chancellor; affirmed.

Hill & Fitzhugh, for appellant.

James G. McConkey, for appellee.

SMITH, J. The Little Rock Branch of the Federal Reserve Bank of St. Louis, hereinafter referred to as the Reserve Bank, filed a complaint which contained the following allegations: The Reserve Bank is a corporation created by an act of Congress approved December 23, 1913, popularly known as the Federal Reserve Act, and among its functions is the collection of all items payable in its district when received from member banks and other Federal Reserve banks. The People's Bank of Ozark, Arkansas, is a corporation created under the laws of Arkansas, and was engaged in the banking business at Ozark, Arkansas. Under the Federal Reserve Act all national banks are required to become member banks of the Federal Reserve system, and all State banks and trust companies which are eligible may become members, and all member banks are required to clear at par items drawn on or payable at their respective banks. Nonmember banks voluntarily agreeing to do so are permitted to enter into an agreement with the Federal Reserve Bank to clear at par all items drawn on or payable at such nonmember banks when sent direct to them.

The People's Bank was not a member of the Federal Reserve System, but was a party to an arrangement existing between nonmember banks and the Federal Reserve Bank and branches, whereby the Federal Reserve Bank of St. Louis agreed that, through its Little Rock Branch, it would send through the United States mail direct to the People's Bank and other nonmember banks, as the Federal Reserve Bank's agent, for collection and remittance, all items drawn on or payable at such nonmember banks, and that remittances for collections could be made either by the shipment of money at the expense of the Federal Reserve Bank or by exchange acceptable to the Federal Reserve Bank. It was a part of the agreement on the part of the People's Bank (and other nonmember banks) that it would, as agent of the Reserve Bank, present such items as were drawn on it to itself for collection, and, if the drawer had sufficient funds on hand to entitle the payment of the draft, to pay it to itself as collection agent of the Reserve Bank, and immediately remit the funds so collected, and in the case of the People's Bank the agreement was that the remittance should be made to the Little Rock Branch, either by shipment of money or by furnishing satisfactory exchange, and would cause to be protested and returned all items it was not willing to pay or could not collect.

The arrangement recited had been in operation for some time, when, on January 20, 1926, the Reserve Bank forwarded to the People's Bank, indorsed "For collection and remittance," its certain cash letter containing items aggregating $2,569.71. The People's Bank collected $2,502.46 worth of these items, and, on January 21, 1926, forwarded to the Reserve Bank its draft drawn on the Bankers' Trust Company of Little Rock for the amount collected. On January 21, 1926, the Reserve Bank forwarded to the People's Bank, indorsed "For collection and remittance," a cash letter containing items aggregating $2,503.51, of which the People's Bank collected $2,458.76, and, on January 22, 1926, forwarded to the

Reserve Bank its draft for the amount of the collection on the Grand National Bank of St. Louis, Missouri. In each case the uncollected items were also returned.

The Reserve Bank, upon receipt of the respective remittance drafts, duly presented the same to the Bankers' Trust Company of Little Rock and the Grand National Bank of St. Louis for payment, and payment was refused and the drafts protested. In the meantime the People's Bank had been closed by order of the State Banking Department and placed in its hands for liquidation.

At the time these items were collected by the People's Bank, the drawers and makers thereof had on deposit with the People's Bank funds sufficient to pay them, and the People's Bank had sufficient funds in its vault and with solvent correspondents to have paid the items, although the account of the People's Bank with the Grand National Bank was at the time overdrawn.

After the Bank Commissioner had reconciled the various correspondent bank balances as of the date of closing on January 22, 1926, the date on which the Commissioner took charge of the People's Bank, it was found that the true amount of balances due from all banks amounted to $7,738.99, and that the cash in the vault of the People's Bank amounted to $8,155.59. At no time between the collection of the items contained in the cash letters referred to and the time the liquidating agent took charge had the cash in the People's Bank been less than $8,155.59, nor the balances with solvent correspondents been less than $7,738.99. The total assets of the People's Bank at the date of closing amounted to $197,374.37. Its liabilities were not shown.

The Reserve Bank, acting on the request of and as the agent for its immediate indorsers and the owners of the respective items, filed a claim with the Bank Commissioner, in the manner required by law, and prayed that the claim so filed be allowed as a preferred claim. The claim was approved by the Bank Commissioner as a

common claim, leaving the court to determine whether the claim is a preferential one.

It was stipulated that the facts as recited in the complaint were true, and, in addition, it was further stipulated that the items involved in the cash letters referred to in the complaint were items drawn on or payable at the People's Bank, and were collected by charging the accounts of the makers, and that there were no bills of lading or similar instruments accompanying any of the items.

Upon the facts so stipulated to be true, it was prayed that the court decree that the claim of the Reserve Bank is entitled to a preference and the Bank Commissioner be directed to allow it as such. The court granted the relief prayed, and the Bank Commissioner has appealed.

It is first insisted that the Reserve Bank was without authority to sue, for the reason that a statute of this State requires that every action must be prosecuted in the name of the real party in interest (§ 1089, C. & M. Digest), except as provided in certain other sections which, it is insisted, do not apply. We think, however, that the Reserve Bank had the right to sue. The Reserve Bank had been constituted the agent of the owners, and was the legal holder of the various items, all of which had been accepted and an abortive attempt had been made to pay. The agency was not discharged until the purpose of the agency had been accomplished, which was to make the collections and to remit the proceeds.

Section 1092, C. & M. Digest, provides that:

"An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or the State, or any officer thereof, or any person expressly authorized by the statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted."

We think the relation of the Reserve Bank to the items sued on is such, under the facts stated, as to make the statute quoted applicable. The owners of the respec-

tive items cannot recover from the drawers direct, for the reason that the People's Bank has collected the amounts thereof from the drawers and has charged to them their canceled checks, duly marked "Paid." *Loth* v. *Mothner*, 53 Ark. 116, 13 S. W. 594. Nor can the owners of these claims, after their allowance by the Bank Commissioner, maintain suit thereon, for they have expressly authorized this suit to be filed by the Reserve Bank for their benefit.

In the case of *Second National Bank of Baltimore* v. *Bank of Alma,* 99 Ark. 386, 138 S. W. 472, the facts were that the Judge Machine Company deposited to its account with the Second National Bank of Baltimore a draft with bill of lading attached on the Alma Canning Company. The Baltimore bank sent the draft with the bill of lading attached to the Bank of Alma for collection, which last-named bank surrendered the bill of lading without collecting the draft. The Baltimore bank brought suit against the Bank of Alma for the face value of the draft, and, among other defenses, it was insisted that the Baltimore bank had no capacity to sue. It was there said:

"It (the Baltimore bank) had the right to sue in its own name for any default of the defendant (the Bank of Alma) by reason of which any liability was incurred by it to the Judge Machine Company, and it also had the right to institute suit against the defendant for any loss which it caused by reason of a breach of duty committed by it in collecting the draft, because the title thereof had been actually transferred to it, although for collection, by the Judge Machine Company."

Upon the question of the right to preference, respective counsel have filed elaborate briefs, which review many authorities. It may be said that these authorities are in hopeless conflict, and it is impossible to reconcile them. We do not review these cases because, in the case of *Darragh Co.* v. *Goodman,* 124 Ark. 532, 187 S. W. 673, we announced the principles which are controlling here. Two cases were involved in that appeal, but, as they pre-

sented the same legal questions, they were disposed of as a single case. It will suffice therefore to state the facts in a single one of them.

The First National Bank of Atchison, Kansas, sent drafts with bills of lading attached on Darragh Company of Little Rock to the State National Bank for collection. This bank, of which Darragh Company was a customer, presented the drafts on June 15, 1914, and they were paid by that company's checks on the collecting bank, which charged the checks against the account of the payer, and sent its drafts on the National Bank of Commerce of St. Louis to cover the collection. Immediately upon receipt of the exchange the Kansas bank forwarded it to St. Louis for collection, but, before it reached there, the State National Bank had suspended business, and payment of the draft was refused by the St. Louis bank because of the failure of the drawer.

During the day, and before the close of business on June 15, 1914, the State National Bank had on hand over $32,000 in cash, and when it closed its doors it had $7,000 in cash, which went into the hands of the receiver who took charge of the assets of the bank. This sum was the lowest amount of cash the defunct bank had on hand at any time after the collection of the drafts. The chancery court held that the collection constituted a trust fund, and ordered it paid out of the cash going into the hands of the receiver, to the exclusion of the general creditors of the bank.

It was contended there, as it is here, that the transaction detailed created only the relation of debtor and creditor, and that the collection did not become a trust fund because the funds of the bank were not augmented. It was insisted that the Federal courts had so held, and that we should follow the decisions of the Federal courts so holding. These contentions were not sustained, and in the opinion holding to the contrary it was said that, while a general deposit of money in a bank passes the title immediately to the bank and establishes the relation of debtor and creditor between the bank and the depositor,

yet, where a bank receives a draft for collection merely, it is the agent of the remitter, drawer or forwarding bank, and takes no title to the paper, or the proceeds when collected, but holds the same in trust for the purpose of remitting it.

It was there recited that the drafts were sent for collection only and with the expectation that the proceeds of the collection should be remitted immediately upon the receipt thereof by the collecting bank, and that there was nothing to indicate that the parties intended that the drafts, or the proceeds, should not remain the property of the owner, and that, such being the case, the proceeds of the collection did not become the property of the collecting bank nor establish the relation of debtor and creditor for the amount thereof between it and the drawer bank, but that the relation created was that of principal and agent, and that the agency could be discharged only by remitting to the principal the collection made, and that, the agent bank having failed before the payment of its check on the presentation thereof in due course of business for payment, the drawer was entitled to the proceeds of the collected draft out of the defunct bank's cash going into the hands of the receiver, in preference to the general creditors.

It will be remembered that it appears from the agreed statement of facts and the stipulation filed herein that the items were forwarded to the People's Bank "for collection and remittance" of the proceeds collected; that the drawers of the items here involved had sufficient balances with the People's Bank to authorize the items to be charged to the account of the respective drawers, and this was done, thus paying them, and that, at the time these charges were made, the People's Bank had sufficient funds available to honor the drafts, and that sufficient of its funds went into the hands of the Bank Commissioner, as receiver, to pay them, and that at no time between the collection and the time the Bank Commissioner took charge of the People's Bank were its funds less than the items involved.

The case of *Federal Reserve Bank of St. Louis* v. *Millspaugh,* 282 S. W. 706, arose out of an agreed statement of facts which does not differ in any material respect from the facts in the instant case, and the Supreme Court of Missouri held that the Reserve Bank was entitled to have its claim against the defunct bank paid as a preferential one, for the reason that the receiver took the funds of the defunct bank impressed with a trust. In so holding the court cited as authority therefor our case of *Darragh* v. *Goodman, supra.*

Other courts, in announcing the same conclusion under similar facts, which have cited the case of *Darragh* v. *Goodman* as authority for so holding, are: *In Re Messenger* v. *Carroll Savings & Trust Co.,* 193 Iowa 608, 187 N. W. 545; *Goodyear Tire & Rubber Co.* v. *Hanover State Bank,* 109 Kans. 772, 204 Pac. 992; *Kesl* v. *Hanover State Bank,* 109 Kans. 776, 204 Pac. 994; *Federal Reserve Bank of Richmond* v. *Peters,* 139 Va. 45, 123 S. E. 379; *Federal Reserve Bank of Richmond* v. *Bohanan,* 141 Va. 285, 127 S. E. 161; *Federal Reserve Bank of St. Louis* v. *Quigley* (Mo. App.) 284 S. W. 164; *Bank of Poplar Bluff* v. *Millspaugh* (Mo. App.), 275 S. W. 579; *Hawaiian Pineapple Co., Ltd.,* v. *Brown,* 69 Mont. 140, 220 Pac. 1114; *In Re City Bank of Dowagiac,* 186 Fed. 250 (S. D.).

It is insisted for the reversal of the decree of the court below that it was an act of negligence on the part of the Reserve Bank to constitute as its agent for the collection of the items the People's Bank, the bank upon which they were drawn, and that authority was only conferred to collect and remit for those items in money, and not in exchange.

In the Darragh case the remittance for the collection was made in exchange, and not in cash, and on that feature of the case the court, after stating that it is uniformly held that an agent having for collection obligations due to his principal can receive only money in payment, unless otherwise directed, and that this principle applied to banks holding drafts for collection, said:

"The payment by the drawee of the draft of the amount thereof by the delivery of its check therefor against his account in the collecting bank, and the charging of the amount against his account, constituted, to all intents and purposes, a payment in cash of the drafts, the check being merely the vehicle of transfer of the cash."

Continuing the discussion of this feature of the case, it was said: "Certainly there is no necessity for the drawee of the drafts to take its check to its bank, the collector, and present it and receive the money and hand it back to the bank in payment of the draft."

It is stated in one of the briefs, and conceded to be true in the other, that the 1925 report of the Federal Reserve board's statistical department shows that the Federal Reserve banks collect on an average each month approximately 65,000,000 items, amounting to $20,500,000,000, in items drawn on or payable at 26,000 different banks and trust companies. It is quite apparent therefore that, if all remittances were required in cash, the entire volume of the currency would not suffice, even though all of it were kept in transit.

It may be said that the rule announced by this court, that it was negligence for a bank receiving for collection a check or draft payable in another city or town, to send it for collection to the bank upon which it was drawn, has been changed under § 14 of act No. 496, Acts 1921, page 514. *Farmers' & Merchants' Bank* v. *Ray,* 170 Ark. 293, 280 S. W. 984.

This act was passed prior to the transaction out of which this litigation arose, but our holding would not be different if there were no such statute, if it be true that the relation between the Reserve Bank and the People's Bank was that of principal and agent, and not that of debtor and creditor. The cases which have followed the Darragh case make no such distinction in determining whether there is a preference. The controlling question is not how the item was forwarded and presented, but whether the drawer had sufficient balance against which the items were charged, and whether the

bank so charging them had sufficient funds which went into the hands of the receiver, upon its failure, to pay these and other similar items.

In the case of *Federal Reserve Bank of St. Louis* v. *Millspaugh,* to which we have already referred as being identical with the instant case, the court said: "When the relation existing between two banks, as in the case at bar, is that of principal and agent, the funds collected by the collecting bank for the forwarding bank become impressed with a trust in favor of the owner of the item collected. This is true, although the item collected be one drawn on the collecting bank, and it is collected by charging the item against the drawer's account, or if it be an item payable at the collecting bank and it is collected by a check drawn on it. The trust in either case follows the funds into the hands of the receiver—in this instance the Finance Commissioner—although the collecting bank may fail before remitting the proceeds collected, provided the following conditions exist: (1) That the item was forwarded for collection and remittance of the collected proceeds; (2) that the drawer of the check had a sufficient balance with the collecting bank to authorize the charging of the item to his account; (3) that, at the time the charge was made, the collecting bank had sufficient funds available to honor the check; (4) that the bank which failed had, at the time the receiver took charge of same, sufficient funds on hand to pay the amount it had collected (citing authorities)."

It is stipulated that the conditions there recited exist in the instant case. If, when the items here involved had been accepted and charged to the respective drawers, the People's Bank had shipped currency, instead of issuing exchange, but had closed its doors before the money was actually delivered to the Reserve Bank, the right of the latter to receive and appropriate the money would hardly be questioned, not alone because the delivery to the carrier was a delivery to the consignee, but for the reason also that the consigning bank had segregated so much of its assets to the discharge of its agency—had

thus designated the sum remitted as a trust fund belonging to its principal. In the Millspaugh case, from which we have quoted, the court said:

"Further than this, the creation of the relation of principal and agent, under the original agreement, by the terms of which the proceeds of the funds collected were to be forwarded to the principal, in currency or acceptable exchange, did not change the relation to that of debtor and creditor by reason of an attempted remittance in uncollectable paper. The sending therefore of exchange drafts by the Bank of Oran on the First National Bank, as an attempted remittance for the collection made, was indicative of a purpose to segregate or set apart, out of the funds in the First National Bank, the amount represented in the drafts, under an assignment for the benefit of the Federal Reserve Bank, the respondent [citing cases]."

So here, the People's Bank had, by accepting the items, assumed the trust relation of an agent, and was bound, as an incident to the agency, to remit either in cash or exchange the sum collected. It would have been a serious breach of trust not to have remitted. The money was not remitted. It remained either in the vault of the bank or in the hands of its correspondents, and was taken over by the Bank Commissioner as receiver, as appears from the stipulation set out above.

The court below was therefore correct in holding that the claim of the Reserve Bank should be allowed as a preferential one, and that decree is affirmed.

MANUFACTURERS' FURNITURE COMPANY v. READ.

Opinion delivered January 10, 1927.

1. BROKERS—CONTRACT NOT WITHIN STATUTE OF FRAUDS.—A contract by which plaintiff was to obtain a lease on a building for a period of three months with an option to renew for a period of more than a year, in consideration of a cash payment and of further payments each month during the period of the lease and renewal,

held not within the statute of frauds, where the contract was completely executed on plaintiff's side within a year and nothing remains on the other side but the payment of compensation during a period of more than a year.

2. BROKERS—COMPENSATION—MISREPRESENTATION AS DEFENSE.—In an action to recover compensation for obtaining a lease, testimony as to plaintiff's misrepresentations concerning the use of a switch track on the leased property was properly excluded where the right-of-way for the track was secured by defendant without cost, and where the alleged misrepresentation was not pleaded in answer.

3. APPEAL AND ERROR—ISSUE RAISED AT TRIAL.—The court had the discretion to refuse to permit an issue to be introduced into a lawsuit for the first time during the progress of the trial.

4. CONTRACTS—BREACH—MEASURE OF RECOVERY.—The rule that, where one party to a contract incapacitates himself from performing or unequivocally refuses to perform, the other party may sue for the whole of the anticipated damages resulting from the breach, does not apply to contracts to pay money at specified times.

5. CONTRACTS—PAYMENT OF MONEY IN INSTALLMENTS—BREACH.—Where a contract or the unperformed part of it was merely to pay money at specified times, the refusal to pay does not accelerate the maturity of unmatured installments.

6. COURTS—JURISDICTIONAL AMOUNT.—In an action for breach of a contract, where the allegations of the complaint stated a cause of action within the jurisdictional amount, the court had jurisdiction to render judgment for less than the jurisdictional amount, according to the proof in the case.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; judgment modified.

Abner McGehee, for appellant.

Edward Dillon and *Robinson, House & Moses,* for appellee.

McCULLOCH, C. J. This action was instituted by appellee's testator against appellant to recover compensation alleged to have been earned under verbal contract between him and appellant, and in the trial below there were a directed verdict and judgment, from which an appeal has been duly prosecuted. The plaintiff died after the appeal was perfected, and the cause has been revived in the name of the present appellee as executor.

It was alleged, in substance, that the defendant entered into a verbal contract with the plaintiff, whereby the latter was employed to negotiate a lease from the owner of a certain building in Little Rock for a term and period of three months, with an option to renew the lease for a further definite term, and that the defendant would pay the plaintiff fifteen dollars per month during the rental period of three months and the further sum of ten dollars per month, payable monthly, for the remainder of the rental period, if defendant renewed the lease; that plaintiff performed the service by securing a written lease contract from the owner of the building, and that, after the expiration of the fixed period of three months, defendant renewed the lease contract with the owner of the building, and that the plaintiff thereby earned the full compensation specified in the verbal contract. It was further alleged that the sum of $535 was earned under the terms of the contract, of which $45 was paid by defendant, but that the balance was due and owing, for which there was a prayer for judgment.

The answer contained a plea of the statute of frauds, and also contained a denial that there was any contract for the payment of compensation in the event of renewal of the contract.

It appears from the uncontradicted testimony that the plaintiff, A. C. Read, was employed by appellant to secure for the latter a rental contract with Kress & Company, the owner, for the lease of a building in the city of Little Rock, and that Read performed the contract by securing a lease contract with Kress & Company. The lease contract was in writing, and specified that the lessee should have the use of the premises for ninety days for the sum of $600, with an option to extend the lease for the balance of a term fixed in the lease contract between Kress & Company and Sawyer, its lessor.

It is also uncontradicted that appellant was to pay Read $45 as compensation for securing the contract, which was, in fact, paid; and also that appellant was to

pay Read the sum of $10 per month, payable monthly, during the period of the renewal contract, if appellant should elect to exercise the option of renewal.

Appellant offered to prove by witness Jacobs that there was a misrepresentation made by Read concerning the presence of a railroad switch, or spur, which could be used in connection with the building. The court excluded this testimony, and the ruling of the court is assigned as error.

It is undisputed that the term of the renewal contract was for more than one year, and it is earnestly contended on behalf of appellant's counsel that this brought the contract between Read and appellant within the statute of frauds. We do not agree with that contention, for the contract between Read and appellant was one which could have been, and in fact was, completely performed by Read in much less than a year's time, and all that was left of the performance was the payment of compensation by appellant. This took the original contract between the parties out of the operation of the statute of frauds, for the rule seems to be quite well settled that the statute applies only to contracts not to be performed on either side within a year, and it does not apply to contracts which may be completely performed on one side and nothing remains on the other side but the payment of compensation during a period of more than a year. *Reed Oil Co.* v. *Cain,* 169 Ark. 309, 275 S. W. 333, 25 R. C. L. 37.

It is next contended that the court erred in excluding the testimony of witness Jacobs with reference to the alleged misrepresentations of Read concerning the use of the switch track. The court's ruling on this question was correct, for two reasons: One is that, according to the testimony of this witness, no injury was sustained by appellant, inasmuch as the right-of-way for the track was secured without cost by appellant; and the other reason is that the alleged misrepresentations were not pleaded in the answer as a defense. We cannot say that

there was any abuse of the court's discretion in refusing to permit the issue to be introduced for the first time during the progress of the trial.

The most serious question raised in the case is whether or not there can be a recovery for immature installments of the compensation earned under the contract. According to the uncontradicted proof, the compensation of ten dollars for each month after the renewal contract was payable monthly, and at the time of the commencement of the action there were only four payments, aggregating forty dollars, matured. Counsel for appellee invoke the rule that, where one party to a contract incapacitates himself from performance or unequivocally refuses to perform, the other party may sue for the whole of the anticipated damages resulting from the breach. Counsel cite authorities in support of that rule, but the rule does not apply to contracts, either written or verbal, to pay money at specified times. *Roeha* v. *Horst,* 178 U. S. 1; *Moore* v. *Security Trust & Life Ins. Co.*, 168 Fed. 496. Where the contract or the unperformed portion of it is merely to pay money at specified times, the refusal to pay does not accelerate the maturity of installments which are not due under the contract. We do not overlook the recent case of *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335, where the action was treated and found to be one to recover damages for a breach of contract. Our conclusion is that the trial court erred in rendering judgment for the immature installment of compensation under the contract. However, the court had jurisdiction to render judgment for the aggregate amount of installments due under the contract, even though the amount was below the jurisdictional amount. The jurisdiction of the court is determined by the allegations of the complaint and not by the proof in the case adduced during the trial. Therefore, if the allegations of the complaint are sufficient to give the court jurisdiction over the amount involved in the controversy, the court has jurisdiction to render a judgment for a less

amount, according to the proof in the case, even though the amount is below that over which the court has jurisdiction. The complaint in this case stated a cause of action within the jurisdiction of the court, for it was alleged that there was the sum of $490 due and payable under the contract.

It results from what we have said that the judgment must be modified by reducing it to the sum of $40, without prejudice to the right of appellee to sue for future installments as they mature. It is so ordered.

PETTIGREW v. PETTIGREW.

Opinion delivered January 17, 1927.

1. DIVORCE—RIGHT TO FILE CROSS-COMPLAINT.—In an action by a wife for divorce, the husband may file a cross-complaint for divorce on the ground of cruel treatment, though his cause of action accrued since the commencement of her suit.
2. DIVORCE—FILING CROSS-COMPLAINT—PREJUDICE.—As a husband's cause of action for divorce could have been the basis of an independent action by him and consolidated with a prior suit by her against him, under Crawford & Moses' Dig., § 1081, it was not prejudicial error to permit him to assert it by a cross-complaint in her suit.
3. DIVORCE—EVIDENCE.—Evidence *held* to sustain a finding against a wife on her prayer for divorce, and in favor of the husband on his cross-complaint.
4. LIMITATION OF ACTIONS—AMENDED PLEA.—It is within the court's discretion to permit an amendment of the pleadings so as to bring in an additional defense, such as the plea of the statute of limitations.
5. LIMITATION OF ACTIONS—LAW APPLICABLE.—Questions arising upon the statutes of limitation are governed by the law of the forum.
6. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of facts is conclusive on appeal where the evidence is evenly balanced or where it is not clearly against the preponderance of the testimony.

Appeal from Union Chancery Court, Second Division; *Neill C. Marsh*, Special Chancellor; affirmed.

Powell, Smead & Knox and *J. W. Warren,* for appellant.

Allyn Smith, for appellee.

McCULLOCH, C. J. The plaintiff, Mabel Pettigrew, and defendant, R. L. Pettigrew, intermarried, at Shreveport, Louisiana, in September, 1920, and lived together until March, 1924, when the plaintiff left the defendant for causes which she set forth as grounds for divorce. Each of the parties had been married before, and each had children. The plaintiff has two daughters, who were approaching womanhood, but who were yet schoolgirls during the time that these parties lived together. They resided at Shreveport for a time after the intermarriage, and afterwards moved to Union County, and resided at Smackover until the separation.

The defendant built a hotel at Smackover, in conjunction with a man named Moore, and the same was operated by defendant, he and his wife and her two daughters residing at the hotel, and were there up to the time of the separation. In April, 1924, just about a month after the separation, plaintiff instituted this action against the defendant for a divorce and for alimony and suit money, and also to recover sums of money alleged to be due her by her husband for money loaned prior to their intermarriage. These sums were alleged to have been loans in the early part of the year of 1914, and evidenced by promissory notes falling due at various times up to the autumn of 1914. Plaintiff exhibited with the complaint four of these notes, aggregating $3,875.

The grounds set forth in the complaint for a divorce were that defendant had been "guilty of such cruel and barbarous treatment as to endanger the life" of the plaintiff, and that he offered such indignities to the person of the plaintiff as to render her condition intolerable. The complaint alleged acts of cruel conduct and various indignities, such as abusive language and physical violence.

It was also alleged in the complaint that the defendant had made indecent proposals to the plaintiff's daugh-

ters. The complaint was answered by defendant with denials of all the allegations with respect to misconduct on his part, and there was also a denial of any indebtedness to the plaintiff. He admitted that he had borrowed small sums from the plaintiff before their intermarriage, but asserted that he had paid the same in full.

The complaint also set forth a list of items comprising, in part, furniture in the hotel, which plaintiff claimed to be her property, and in the answer of the defendant it was conceded that certain items in the list constituted property owned by plaintiff, but there was a denial of plaintiff's ownership of other items.

On February 2, 1925, the plaintiff filed an amended complaint, reiterating the allegations of the former complaint and containing others with respect to misconduct of the defendant, also alleging that the plaintiff had, subsequent to the intermarriage with defendant, made loans of money to him aggregating $3,100, which sums remained unpaid, and for which there was a prayer for recovery. It was also alleged that the loans made at Shreveport in 1914 aggregated the sum of $6,000, and that evidences of the indebtedness, in the form of promissory notes, were executed to plaintiff by defendant, but that some of these had been lost, only those exhibited with the original complaint remaining in possession of plaintiff. It was also alleged that defendant had, by threats and violent conduct, secured from plaintiff a diamond ring and a diamond stud of the aggregate value of $500, which he was wrongfully withholding, and there was a prayer for the recovery of those items.

Defendant's answer and cross-complaint denied all the allegations with respect to misconduct on his part toward plaintiff or her daughters, and all allegations with respect to the indebtedness and the ownership of the diamond ring and stud, and the statute of limitations was pleaded against the notes and other alleged indebtedness for money loaned in the year 1914. This plea of defendant was also made a cross-complaint against the plaintiff, alleging gross misconduct of plaintiff which amounted to

such cruel and barbarous treatment as to endanger his life, and there was a prayer for divorce from the bonds of matrimony.

It was alleged that, on March 22, 1925, plaintiff came to the hotel in Smackover, which the defendant was operating, and made a murderous assault upon him with a pistol, firing several shots at him. This last plea was objected to by plaintiff, and the objection was overruled, whereupon the parties stipulated that answer to the cross-complaint be waived and the allegation treated as denied.

The court heard the evidence, and rendered a decree against the plaintiff on her prayer for divorce, but granted a divorce on the cross-complaint of defendant. The court found for the plaintiff for the recovery of the sum of $3,100, alleged to have been advanced or loaned after the intermarriage, and for the recovery of $500, the value of the diamonds, and also for the recovery of the hotel furnishings set forth in exhibit to plaintiff's complaint, and an allowance was also made by the court for attorney's fees. The court found against the plaintiff on the prayer for recovery of money loaned at Shreveport, on the ground that the claim was barred by the statute of limitations. Each party has duly prosecuted an appeal to this court.

It is insisted by counsel for plaintiff, in support of her appeal from the decree for divorce rendered on the cross-complaint, that a cause of action which accrued to the defendant and cross-complainant after the institution of the action could not be pleaded, and that the court erred in overruling plaintiff's objection and in granting the divorce on the cross-complaint. This contention is not well founded, for the cause of action set forth in the cross-complaint was a separate one, in favor of the defendant against the plaintiff, which was mature at the time the cross-complaint was filed, and the defendant had the right to assert it against the plaintiff in this action, even though it had accrued since the commencement of the original action. Nelson on Divorce and Separation,

§ 744; *Martin* v. *Martin,* 33 W. Va. 695, 11 S. E. 12; *Wilson* v. *Wilson,* 40 Iowa 230; *Armstrong* v. *Armstrong,* 27 Ind. 186.

Mr. Nelson, in the section cited above, says: "It is convenient and practical to adjust all the marital rights of the parties in one proceeding and thus avoid a multiplicity of suits. No useful purpose could be subserved by compelling the defendant to prosecute separate proceedings for divorce or annulment of marriage when the issue in the first proceeding will involve the validity of the marriage and the causes for divorce set up in recrimination, and must be proved by substantially the same evidence." And in the same section the author gives his approval to the statement of law contained in the authorities cited above.

In the case of *Slocum* v. *Slocum,* 86 Ark. 469, 111 S. W. 806, we cited with approval the section above cited from Mr. Nelson, but the question of right to set up in a cross-complaint a cause of action which arose subsequent to the commencement of the original action was not involved. In that case we said:

"It is recognized and permissible practice for the defendant to file a cross bill and ask independent relief in divorce suits. When he does so, his suit is as separate and distinct from that of his wife as if the wife had brought no suit, and the finding of the court should be upon each separately."

But, even if it were not permissible to embrace such cause of action in a cross-complaint, it could have been made the subject-matter of an independent action instituted by the defendant against plaintiff, and, under the statute (Crawford & Moses' Digest, 1081), the two actions could have been consolidated and tried together. Hence there could have been no prejudice in permitting the plea to be made by way of cross-complaint.

After careful consideration of the evidence we have reached the conclusion that the chancellor was correct in his finding against plaintiff in her prayer for divorce and in his finding in favor of defendant on his cross-com-

plaint. No useful purpose would be served in discussing the testimony in detail. The plaintiff and her two daughters testified as to numerous instances of misconduct on the part of defendant in his relations with the plaintiff, and the girls also testified in regard to alleged improper conduct of defendant toward them. There was also some corroboration with regard to the charge that the defendant was at times quarrelsome in his dealings with plaintiff, but this was all denied by defendant, and he was corroborated by a number of witnesses, who were in position to have had information as to misconduct on his part if it had occurred as claimed by plaintiff. The testimony of the girls, in regard to certain misconduct of defendant toward them, is without any corroboration at all, and is denied by defendant. In addition to that, he is supported by the fact that the undisputed evidence shows that he took an interest in the girls and furnished money to educate them—conduct on his part which is wholly at variance with the charge that he had at times been guilty of such reprehensible conduct toward them as they described in their testimony.

The defendant relied, in seeking a divorce on his cross-complaint, on the single charge that plaintiff made a murderous assault upon him. It was shown by undisputed evidence that plaintiff walked into the hotel lobby, armed with a pistol, and, after roughly accosting defendant, fired several shots at him. She testified that she had no recollection of the incident, though it was, as before stated, proved by undisputed testimony, and occurred just a short time before the trial. She relied, in defense against the charge, that she was laboring under mental incapacity at the time of the alleged assault. But the testimony warranted the chancellor in finding against her on that feature of the case. Her conduct on the occasion, as described by many witnesses, indicated uncontrolled wrath instead of mental aberration. Physicians testified that, after the assault, her condition indicated a nervous breakdown. This could be true and yet she could have been mentally responsible when she made this

assault. We think the chancellor's finding on this question should be sustained.

The principles of law governing this feature of the case were announced in *Crabtree* v. *Crabtree,* 154 Ark. 401, 242 S. W. 814, 24 A. L. R. 912, and the facts of the present case fall within that decision.

The next contention of plaintiff is that the court erred in sustaining defendant's plea of limitations against recovery on the debt for money loaned in 1914, at Shreveport. It is insisted that the court erred in permitting defendant to plead the statute of limitation for the first time in his amended answer. This contention might be disposed of by saying that plaintiff, in filing an amended complaint varying the allegations of the original complaint, invited the amended answer with any defense which would have been permissible under the original complaint; but the contention is otherwise unsound, for the obvious reason that it was in the discretion of the court to permit amendment to the pleadings so as to bring in additional defenses.

It will be observed from the above recital that, according to the pleadings, and also according to the testimony in the case, the loans of money which formed the basis of this feature of plaintiff's case were made in the year of 1914, in the State of Louisiana, and matured more than six years before the intermarriage between the parties. Therefore, if the statute bar attached at all, it was complete before the intermarriage. The parties resided in the State of Louisiana from the time the alleged indebtedness accrued up to the time of their intermarriage in the year 1920. No question relating to the running of the statute as between husband and wife is involved in this case. As before stated, the indebtedness accrued and the statute bar attached, if at all, prior to the intermarriage.

It is a rule of universal application that questions arising upon the statutes of limitations are governed by the law of the forum, and the doctrine has been often announced by this court. *Blackburn* v. *Morton,* 18 Ark.

384; *Chisholm* v. *Crye,* 83 Ark. 495, 104 S. W. 167; *Rock Island Plow Co.* v. *Masterson,* 96 Ark. 446, 132 S. W. 216; *Rock Island Railroad* v. *Lena Lumber Co.,* 99 Ark. 105, 137 S. W. 562.

There is what may appear to be an exception to this rule where both parties have resided in the State where the cause of action arose for the full period of the statute of limitations of that State, so that the cause of action there was extinguished by operation of the statute, and the laws of that State control. *Moores* v. *Winter,* 67 Ark. 189, 53 S. W. 1057; *Finnell* v. *Southern Kan. Ry. Co.,* 33 Fed. 427.

This case involves, however, not a question where the cause of action was extinguished in another State, but is one where the right of action is asserted in this State, and it falls within the rule that the law of the forum controls. It may be said, however, that it is conceded that, under the Louisiana statutes, the right of action was barred, but counsel seeks to avoid that by relying on the provision of the Louisiana statute excepting husband and wife from its operation. The answer to this is, the parties were not husband and wife when the statute bar attached. The statute bar had attached, unless something had been done to interrupt its operation, and the only thing claimed by plaintiff is that there was a payment of $1,000 made by defendant to her on the notes which she held, in the year 1922. This feature of the case, of course, turns on the disputed question of fact whether or not the defendant made payment to the plaintiff on the notes. She and her two daughters testified that defendant paid plaintiff $1,000 on the notes. This is denied by defendant. He admits, in his testimony, that he delivered to plaintiff, at the time claimed, two checks aggregating $1,500, but that no part of those funds was intended to be a payment on the indebtedness, but, on the contrary, both sums were delivered to plaintiff for the purpose of buying furnishings to install in the hotel, and it was so used, except a small part of it, which he told plaintiff she could use for her personal

expenses and those of her daughters. In this contention defendant is corroborated by witness Moore, who was joint owner with defendant in the construction and operation of the hotel. Moore testified that he sold out his interest to defendant, and that they had a full settlement, in which the question arose concerning the cost of the furnishing of the hotel, and in the conversation which occurred between him and defendant, and at which the plaintiff was present, the defendant made the statement and claimed that he had furnished $1,500 to his wife for the purpose of purchasing furnishings for the hotel, and that she had spent all of the money, except about $120, in that manner, and that he was entitled to a credit in the settlement. Moore testified positively that plaintiff was present and acquiesced in the statement, and, upon the strength of it, he allowed credit to defendant for $1,500, without deducting the small amount which had been used by plaintiff for her own personal expenses. The chancery court decided this issue of fact in favor of defendant, and we cannot say that the finding is against the preponderance of the evidence.

This disposes of the question based on the statute of limitation, for it is not contended that any other payments were made or anything else done to interrupt the running of the statute.

The defendant has appealed from that part of the decree which awarded recovery to plaintiff of $3,100 and interest for borrowed money during the marriage. The contention is that this claim is not supported by the evidence. The decision of this question turns upon the weight of testimony given by the parties themselves. Plaintiff testified that she advanced this amount of money to defendant for his use in a second-hand automobile business in which he was engaged. Defendant admitted that he had, a few times, borrowed very small sums of money from plaintiff, but in each instance had repaid the amounts within a short time, and that he owed her nothing. He claimed that he had paid everything he had borrowed, both before and after the marriage,

but the chancellor has found against him on that question of borrowing money after the marriage, and we are unable to discover that the finding of the chancellor, in this regard, is against the preponderance of the testimony.

The same may be said with reference to the finding of the chancery court concerning the two diamonds. The decision of this feature turns upon the conflict in the evidence of the parties, and we cannot say that the testimony is against the court's finding on both those issues. The testimony appears to us to be about evenly balanced, depending upon which one of the parties is to be believed, and, under those circumstances, it is our duty to leave the findings of the chancellor undisturbed.

Our conclusion therefore is that the decree of the chancery court should be affirmed upon each appeal, and it is so ordered.

DUNBAR v. STREET IMPROVEMENT DISTRICT NO. 1 OF DARDANELLE.

Opinion delivered January 17, 1927.

1. MUNICIPAL CORPORATIONS—ATTACK ON IMPROVEMENT DISTRICT—BURDEN OF PROOF.—In a direct attack upon the organization of a street improvement district, the burden was on the plaintiffs to show that the ordinances creating the district and providing for the improvement were invalid.
2. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—PRESUMPTION.—The finding of a city council that a petition for a street improvement contained a majority in value of the real property owners in the district is *prima facie* correct.
3. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—EVIDENCE.—Evidence *held* to show that the valuation of nontaxable school property in a street improvement district was extended by the assessor on the assessment roll filed by him with the county clerk, before the city council determined whether a petition for the improvement was signed by a majority in value of the owners of real property in the district.
4. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—IRREGULARITY.—Where a list of exempt property and its value was extended by the county assessor on the regular assessment roll, his failure to

file a separate list at the time of filing the roll with the county clerk, under Crawford & Moses' Dig., § 9936, was a mere irregularity which did not avoid the assessment roll as a guide to the city council in determining whether a petition for a street improvement was signed by a majority in value of the property owners.

5. MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—EVIDENCE.—Where the city recorder testified that an initial petition for creation of a street improvement district was duly filed, and the ordinance creating the district recited that more than ten owners of real property within the bounds of the district petitioned for its creation, a finding that the petition was filed will be upheld.

Appeal from Yell Chancery Court, Dardanelle District; *W. E. Atkinson,* Chancellor; affirmed.

Ward & Caudle, for appellant.

Louis M. Robinson, Herbert C. Scott, and *Hays, Priddy & Rorex,* for appellee.

WOOD, J. By ordinance No. 266 the town council of the city of Dardanelle, Arkansas, on September 29, 1925, created Street Improvement District No. 1 in the town of Dardanelle for the purpose of paving certain streets. On the 29th of October, 1925, the council repealed ordinance No. 266 and passed ordinance No. 270, creating an improvement district in the town of Dardanelle designated as Street Improvement District No. 1. This district was created for the purpose of paving certain streets in the town of Dardanelle. On November 6, 1925, a petition was presented to the council, purporting to contain a majority in value of the real property within the bounds of the district, and praying that the improvement be made. At the same meeting a number of citizens, property owners, presented their petition protesting against the improvement and asking that their names be stricken from the petition praying for the improvement to be made. The town council, at this meeting, by resolution directed that notice to property owners in the district be given by publication, once a week for two weeks, of the filing of the petition praying for the improvement, and fixing November 27, 1925, as the day for hearing the petition. On November 27, 1925, the council met pursuant to the notice, and adjourned until November 28,

1925. Upon reconvening, the council granted the prayer of the protesting property owners who had petitioned that their names be stricken from the petition praying for the improvement to be made, whose property values, as shown by the assessment, amounted in the aggregate to the sum of $16,850. The council thereupon, by resolution, declared that they had examined the remaining signatures on the petition and found that it contained a majority in value of the owners of real property in the district. On December 21, 1925, certain citizens and property owners in the district, hereafter called appellants, filed their complaint against the district and its commissioners, hereafter called the appellees. The complaint alleged, first, that the original petition, required to be signed by ten or more property owners within the proposed district, did not contain a description of the property as appeared in the ordinance creating the district. Second, that the petition purporting to contain a majority of the real property owners was circulated and signed by a great majority before an ordinance was passed creating the district. Third, that ordinance No. 270, attempting to create the district, did not describe the boundaries as the same were described in the original petition signed by ten real property owners. * * * Eighth, that the petition for the improvement did not contain a majority in value of the property owners of the real property in the district, as shown by the last county assessment. Other grounds were alleged in the complaint, but these have been abandoned.

The answer denied all the material allegations of the complaint. The decree recites that the cause was heard upon the pleadings and the depositions of the witnesses; a list and description of the property, and the value thereof, located within the district as shown by the last county assessment; the petition purporting to contain a majority in value of the real property in the district; a plat of the town of Dardanelle showing the boundaries of the district; a copy of ordinances Nos. 266 and 270; the minutes of the meeting of the town council showing the

names of the property owners stricken from the petition purporting to contain a majority of the property owners praying for the improvement, and showing that, after these names were stricken, the town council found that the petition praying for the improvement contained a majority in value of the real property owners within the district, and that the list of these persons signing the majority petition was presented to the court, alphabetically arranged.

The county clerk of Yell County was called as a witness for the appellant. According to his testimony, the assessment record of property owners in the district, the description of their property and the valuation thereof in 1925, were delivered to him by the county assessor September 20, 1925. The extension of churches and schools was not made at that time. Such extension was made the latter part of December. Witness made some kind of a certificate to the town council of Dardanelle, on the 27th of November, at the request of Lewis Robinson. He certified that the petition before the town council praying for the improvement contained a majority in value of the property owners. He did not check to find out. Robinson presented the certificate to witness. The record had been checked and the totals estimated, and witness certified to those totals. When the books were turned over to witness by the assessor, in September, everything was extended on the list except church and school property. The value of church and school property was extended on the list by the county assessor of Yell County. Witness then made another list and made another certificate about the 12th of January. Witness testified, in answer to questions as to how he arrived at the valuations which he certified to the town council as containing a majority, "Well, I took the valuations extended—I don't recall whether I totaled that or they had been totaled, I simply took the totals that had been made of the signers of this petition, and saw that it was more than the other figures. Whether I made them I don't recall, or whether they were checked over by Mr.

Robinson or some one else." Witness further testified that the valuation of the school district property on which the public school building was located is $35,000. That was extended either by witness or by Howard, the county assessor, before the taxbooks were given to the sheriff. Also an additional school item of $2,500 was put on at the same time.

Violet Coleman testified for the appellants that she was the deputy county clerk, and made the list of the property attached as an exhibit to the deposition of Chester O. Hill, county clerk. Another witness, McCray, testified that he identified the assessment list of real property situated within the corporate limits attached as an exhibit to the deposition of Chester O. Hill. He extended the value of the property on the list within the limits of the district, and also the value of the property of all persons who signed the petition for the improvement as their names appeared on the list. He did not include in the totals the value of church and school property, but did include all other real estate shown on the list. The total value of the real property as shown by the list was $227,310. In making this assessment, witness was guided by the list of the persons who signed a petition for the improvement, and extended the value of their property as it appeared on the assessment list. That was the only property they gave the owner credit for.

Another witness testified substantially to the same effect. These two witnesses didn't make any investigation to find out who were the actual owners of the property appearing on the list made an exhibit to Hill's deposition. Unless the name or initial on the majority petition was on the list furnished by Chester Hill, witness did not count it. The witness said they did the best they could without hunting anybody up.

Lewis Robinson testified that he had made an investigation and checked the signers of the purported second petition for the improvement. He prepared a list showing the names of the signers and the property owned by

each of them. His list was made from the last assessment list on file with the county clerk of Yell County. The total amount of property shown to have been owned by the property owners was $170,065. He attached a list showing the names of all persons signing the petition for the improvement, with the valuation of all the property owned by each individual set opposite his name. The testimony of this witness shows that he examined the assessment record to see if the schoolhouses were assessed, and found that they were assessed by the assessor at $35,000, before the council passed on the question as to whether the petition contained names of a majority in value of the property owners embraced in the district.

The testimony of the assessor and of his assistant, and the testimony of the president of the school board at Dardanelle, tended to show that the value of school property, $37,500, was extended on the assessment record prior to November 28, 1925, the date on which the town council made its finding that the petition contained a majority in value of the property owners in the district.

1. The appellants contend that the trial court erred in finding that the petition for the improvement was signed by a majority in value of the real property owners in the district. This action was a direct attack upon the proceedings creating the district and providing for the improvement. The burden was upon the appellants to show that the ordinances creating the district and providing for the improvement were invalid. The finding of the city council that the petition for the improvement contained a majority in value of the real property owners in the district is *prima facie* correct, and we are unable to say, from the above testimony, that the finding of the council and of the trial court, to the effect that the petition for the improvement contained a majority in value of the real property owners in the district, is against the clear preponderance of the evidence.

In *Henry* v. *Board of Improvement of Paving District No. 3,* 170 Ark. 673, among other things, we said:

"The statute provides how the ownership shall be ascertained, and, in the absence of direct testimony showing that the petitioners were not the owners of a majority in value of the property in the district, we must indulge the presumption that the city council heard evidence and correctly determined, upon the basis prescribed in the statute, that the petitioners constituted a majority in value of the owners of property in the district. There is no requirement in the statute that the proceedings before the city council shall be reduced to writing, and it is not proper to permit an inquiry in this action as to how the city council arrived at the conclusion. Until the *prima facie* effect of the findings of the city council is overturned by evidence, we must, as before stated, indulge the presumption that only legal evidence was heard and that the finding was made upon the basis prescribed by the statute." Learned counsel for the appellants contend that the assessor did not comply with the provisions of the law.

The statute provides that, in determining whether those signing the petition for the improvement constitute a majority in value of the owners of real property within the district, the council and the chancery court shall be guided by the record of deeds in the office of the recorder of the county, and shall not consider any unrecorded instrument. Section 5652, C. & M. Digest. There is no testimony in the record tending to prove that the council and chancery court, in determining the value of the property, did not follow the above provisions.

Learned counsel for the appellants contend that the town council should not have considered the value of the nontaxable school property in the district in determining whether the petition for the improvement was signed by a majority of the owners of real property in the district, because, as they assert, the assessor did not file a separate list of same at the time he filed the original assessment roll with the clerk of the county, in compliance with § 9936, C. & M. Digest. But we are convinced that the preponderance of the testimony shows that the valuation

of such property was extended by the assessor on the assessment roll filed by him with the county clerk before the council determined the question of whether the petition for the improvement was signed by a majority in value of the owners of real property; and this was sufficient to meet the requirements of the law with reference to filing a list showing the nontaxable property in the district and its value.

Since the list of nontaxable property and its value was in fact extended on the regular assessment roll, the fact that the assessor did not file a separate list of said property was wholly immaterial and is a mere irregularity which would not avoid the assessment roll as a guide to the council in determining the question of whether or not the petition for the improvement was signed by a majority of the owners of real property in the district. To hold otherwise would be magnifying form above substance. According to three witnesses (the assessor and his assistant, and Robinson) the council, at the time it determined that the petition for the improvement was signed by a majority in value of the real property owners in the district, had before it the assessment roll that had been filed with the county clerk, containing a list of names of owners of all taxable property, and likewise the list of all nontaxable property in the district and its value. The testimony of the county clerk tends to prove that the nontaxable property was extended on the assessment roll after the council acted on the petition for the improvement. But the preponderance of the testimony is to the contrary. There was a decided conflict in the testimony. But a decided preponderance of the evidence shows that the council, at the time it determined that the petition for the improvement was signed by a majority of the owners of real property in the district, had before it an assessment roll which complied substantially with the requirements of the law, and the finding of the council and of the trial court, that a majority in value of the property owners in the district had signed the petition for the improvement, is sustained by

a preponderance of the evidence. At least, such finding of the trial court is not clearly against the preponderance of the evidence. It was purely a question of fact as to whether the petition for the improvement was signed by a majority of owners of real property in the district. The finding of the council and of the trial court was in conformity with the statutes applicable in such cases as construed by this court in *Improvement District* v. *Railway,* 99 Ark. 508, 139 S. W. 308, and *Malvern* v. *Nunn,* 127 Ark. 418, 192 S. W. 709.

2. A more serious question in the cause, and which has given us the greatest concern, is whether or not ordinance No. 270 creating the district was bottomed on an initial petition signed by ten resident property owners asking for the establishment of the improvement district and designating the boundaries of the district as prescribed in ordinance No. 270 creating it. The first and third paragraphs of the complaint alleged in substance that ordinance No. 270 creating the district does not describe the boundaries of the district as they were described in the original petition signed by ten resident property owners of the district. The answer denies these allegations as specifically as they are set forth. The testimony on this issue is substantially as follows: Albert Rorex testified that he was the city recorder of the city of Dardanelle, Arkansas. He identified the record containing the minutes of the meetings of the city council. He testified that ordinance No. 266 was passed creating a paving district in the town of Dardanelle on September 28, 1925. At that time there had been a petition, known as the initial petition, presented to the council, praying for the passage of such an ordinance. On October 29, 1925, ordinance No. 266 was repealed, and on that date ordinance No. 270 was passed. There was a difference in the boundaries of Street Improvement District No. 1 as created by ordinance No. 266 and as created by ordinance No. 270. Witness was asked this question: "After the repeal of ordinance No. 266 was there another initial petition presented to the council?" He answered, "Yes."

The witness was then handed a petition purporting to be signed by a majority of the owners in Street Improvement District No. 1 designated as "second petition." He testified that this petition was circulated both under ordinance No. 266 and ordinance No. 270; that that petition had the same description as the first petition. They copied the second from this one; that the description in the second petition is the same as that in ordinance No. 270. Two or three dozen petitions were circulated. The original petition signed by ten resident property owners, upon which ordinance No. 266, creating the district, was passed, which was afterwards repealed, is not in the record. Neither do we find in the record the original petition signed by ten resident property owners upon which ordinance No. 270, creating the district in controversy, was passed. The city recorder, however, testified that, after the repeal of ordinance No. 266, there was another initial petition presented to the city council. The minutes of the meeting of the city council at which an ordinance was passed repealing ordinance No. 266 and at which ordinance No. 270 was passed, creating Improvement District No. 1 of the town of Dardanelle, Arkansas, do not show that an initial petition containing ten resident property owners in the district created by ordinance No. 270, was before the council when ordinance No. 270 was passed. Ordinance No. 270, however, recites as follows: "Whereas, more than ten owners of real property within the bounds herein mentioned have petitioned the town council of the incorporated town of Dardanelle, Arkansas, to take steps toward the making of local improvements:

"Now therefore be it ordained by the town council of the incorporated town of Dardanelle:

"Section 1. That Street Improvement District No. 1 be and the same is hereby created, laid out and established for the purpose of making local improvements therein by grading and paving the following streets." Here follow a description of the streets and a description of the boundaries of the district. In the absence of a peti-

tion signed by ten resident property owners describing the boundaries of the improvement district and the real property to be embraced therein, it cannot be determined by a comparison of the initial petition that the ordinance No. 270 creating the district describes the property and boundaries embraced in the district the same as the property and boundaries were described in the initial petition. But the testimony of the city recorder shows that, after ordinance No. 266 was repealed, another initial petition was presented to the council, and the recitals of ordinance No. 270 above show that:

"More than ten owners of real property *within the bounds herein mentioned* have petitioned the town council of the incorporated town of Dardanelle, Arkansas, to take steps toward the making of local improvements therein and designating the nature of said improvement."

The above testimony, we believe, is sufficient to show that an initial petition was filed (after the repeal of ordinance No. 266) for the creation of an improvement district describing the property embraced therein and boundaries of the district as same were described in ordinance No. 270 creating the same. We have held that "a special limited jurisdiction is conferred on the city council to lay off the district as designated by the property owners in the first petition, and the council must conform strictly to the authority conferrred upon it. The filing of such a petition is mandatory and jurisdictional. * * * The city council has no authority to establish a district the boundaries of which are not in conformity with the territory as described and set up in the petition." *Riddle* v. *Ballew,* 130 Ark. 101, 197 S. W. 27.

The burden, as we have stated, was upon the appellants who are attacking the validity of the district to prove that ordinance No. 270 creating the district is not valid. It occurs to us that there is testimony in the record tending to prove that ordinance No. 270 was based upon an initial petition describing the property embraced therein and the boundaries thereof the same as they are described in ordinance No. 270. The testimony of the

city recorder and the recitals of the ordinance itself tend to prove that such was the case and are sufficient for that purpose, in the absence of the initial petition itself or other proof to the contrary. The appellants have not brought into the record any such proof. We conclude therefore that the decree of the chancery court is in all things correct, and it is affirmed.

HART, J., dissents.

SCHWEITZER v. CRANDELL.

Opinion delivered January 17, 1927.

1. APPEAL AND ERROR—OBJECTION TO PARTIES.—In a suit to cancel a deed, where plaintiff died and the suit was revived in the names of certain persons as his heirs, the objection, raised by answer, that these persons were not plaintiff's heirs was waived by not insisting on it at the trial.
2. FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM.—A memorandum of an agreement to deed land is sufficient if, in connection with the attendant circumstances, a surveyor could locate the land.
3. VENDOR AND PURCHASER.—CONSTRUCTION OF CONTRACT.—In construing an ambiguous contract for the sale of land the court will put itself in the position of the contracting parties as nearly as possible, and interpret the language used in the light of the attendant circumstances.

Appeal from Boone Chancery Court; *Lee Seamster*, special Chancellor; affirmed.

STATEMENT BY THE COURT.

H. A. Crandell brought this suit in equity against Robert Gaston, as administrator with the will annexed of the estate of L. H. Schweitzer, deceased, and the minor heirs at law of said L. H. Schweitzer, who were specifically named in the complaint, to cancel a deed to certain land in the town of Harrison and vest the title to said land in said H. A. Crandell. Among other defenses introduced was that of the statute of frauds.

On December 31, 1912, L. H. Schweitzer and his wife executed a deed to H. A. Crandell, conveying to him one and one-quarter acres of land in the town of Harrison, Boone County, Arkansas. The deed specifically describes the land conveyed and also recites that, if the grantor or his heirs should sell or convey the land south of the tract described, there should be left open a street, fifty feet wide, along the south side of the land conveyed. On the 2d day of June, 1913, L. H. Schweitzer conveyed to H. A. Crandell the tract of land in Boone County which is specifically described by metes and bounds in the deed. The conveyance also recites that the grantor will keep and maintain an open street not less than fifty feet in width upon the north, south and west sides of the land conveyed. Both of these deeds were duly acknowledged and filed for record.

On the 7th day of September, 1922, the death of H. A. Crandell was suggested and proved, and the cause was revived in the names of his heirs at law, who are named in the order, and leave was given to them to file an amended complaint. On the 12th day of July, 1923, Mae H. Schweitzer, wife of said L. H. Schweitzer, deceased, filed her answer.

Upon the trial of the case, the parties agreed that, after executing the deed in which L. H. Schweitzer agreed to open the streets and alleys above referred to, he did convey other property adjacent to said land, and failed to keep open the streets as provided in said deeds.

The following memorandum in writing was introduced in evidence.

"Harrison, Arkansas, July 6, 1920. Memorandum of agreement. I will deed you 2½ acres, block 4, including south street and alley, in satisfaction of all claims for damages to date.

"L. H. Schweitzer.

"I accept the above offer if deed sent at once. This July 6, 1920.

"H. A. Crandell."

This agreement was written across what purported to be "Schweitzer Addition to the Town of Harrison," as shown on a printed plat prepared by said L. H. Schweitzer. He issued a circular containing a plat of the land which he proposed to dedicate, which contained the following: "This addition is laid out on the nearest tract of land available for residence purposes, being platted on the east, south and north. It is only two blocks north and three blocks west of the public square."

It was proved that the signatures to the memorandum copied above were the genuine signatures of said L. H. Schweitzer and H. A. Crandell.

On the 9th day of November, 1920, L. H. Schweitzer conveyed to his wife, Mae Schweitzer, the land in controversy.

The chancellor found the issues in favor of the plaintiffs, and it was decreed that the contract between L. H. Schweitzer and H. A. Crandell was a valid and binding contract and that the deed from L. H. Schweitzer to Mae Schweitzer to the land in controversy should be annulled.

Shouse & Rowland, for appellant.

Woods & Greenhaw, for appellee.

HART, J., (after stating the facts). It is first insisted that the decree should be reversed because there is no proof that H. A. Crandell died intestate and that the persons named in the amended complaint are his sole heirs at law. It is true that the answer denies that the plaintiffs in the amended complaint are the heirs at law of H. A. Crandell, deceased, but the answer contains a caption in which the plaintiffs are named as heirs at law of H. A. Crandell, deceased. This answer was filed after the court had entered of record an order in which it had recited that the death of H. A. Crandell was proved and that the cause was revived in the name of his heirs, who are specifically named in the order, and who are the identical persons named in the amended complaint and in the caption to the answer of the defendant, Mae Schweitzer.

In addition to this, the record shows that the defendants did not insist upon this point at the trial. The court was not asked to make any findings on this point, and no reference was made to it throughout the trial. The proof was directed to the ground upon which the defendant predicated her defense. Under these circumstances the defendant, Mae Schweitzer, will be deemed to have waived this point. *Allen-West Commission Co.* v. *People's Bank,* 74 Ark. 41, 84 S. W. 1041. It will be noted that the case just cited was tried in the circuit court, and the case at bar was determined in the chancery court. We think, however, that the principle applied in the law case will apply here under the facts just stated.

Counsel for the defendants rely on the defense that the memorandum in writing relied upon by the plaintiff for recovery is too indefinite, under the rule laid down in *Richardson* v. *Stuberfield,* 168 Ark. 713, 271 S. W. 345, where it was held that an agreement for the sale of land, which is required to be in writing by the statute of frauds, must be certain in itself or capable of being made certain by reference to something else. The memorandum in writing relied upon by the plaintiff is copied in our statement of facts and need not be repeated here.

Extrinsic evidence is admissible to explain the calls of a deed for the purpose of identifying the land described and thus give effect to the deed. It is true that, under our decisions, a deed must so describe land sought to be conveyed that it may be identified, yet it is considered that that is certain which can be made certain, and in construing a doubtful description in a deed the court will put itself in the position of the contracting parties as nearly as possible and interpret the language used in the light of the attendant circumstances. *Scott* v. *Dunkel Box & Lbr. Co.,* 106 Ark. 83, 152 S. W. 1025; *Snyder* v. *Bridewell,* 167 Ark. 8, 267 S. W. 561.

The extrinsic proof in this case locates the land described in the written memorandum set out in our statement of facts as being an addition which Schweitzer had platted into lots and blocks and called "Schweitzer

Addition to the Town of Harrison." The addition, as laid into lots and blocks, was advertised in printed circulars to be sold as lots and blocks by L. H. Schweitzer. The memorandum in question was written upon one of these circulars and upon that part of it upon which Schweitzer had specifically described the lots and blocks in his platted addition. The circular contains an advertisement by Schweitzer in which it is referred to as being platted into lots and blocks. Under the rule announced in the cases cited, with the information contained in the written memorandum, in connection with the attendant circumstances, a surveyor could locate the ground described in the memorandum. Hence the memorandum is a valid and binding one, and is not void under the statute of frauds above referred to.

It follows that the decree of the chancery court was correct, and should be affirmed. It is so ordered.

WOODLEY PETROLEUM COMPANY v. WILLIS.

Opinion delivered January 17, 1927.

1. APPEAL AND ERROR—PRESUMPTION—REFUSAL TO DIRECT VERDICT.—In determining whether the trial court erred in refusing to direct a verdict for appellant, the facts must be weighed in the light most favorable to the appellee, and the judgment will be affirmed if there is any substantial evidence to sustain it.
2. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION.—Generally, the question whether an employee assumed the risk of an injury is one for the jury, and is always so where a servant is acting under instructions of a superior, unless he appreciates the danger incident to obeying the order, or unless such danger is so obvious that a reasonably prudent person would refuse to obey the order.
3. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION.—Evidence *held* not to establish that the risk of obeying an order of plaintiff's foreman was so obvious that a reasonably prudent person would have refused to obey such order.
4. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—Where, in an employee's action for personal injuries, the evidence justified submission of the issue of assumed risk, it was not

error to submit a correct instruction on contributory negligence where there was evidence tending to establish that defense.

5. MASTER AND SERVANT—ASSUMED RISK—INSTRUCTION.—An instruction to the effect that an employee is in duty bound to obey his employer, and has the right to rely upon the superior knowledge of his employer as to the danger involved in obeying him, unless he knows of the danger himself and appreciates it, or unless the danger is so obvious and imminent that a man of ordinary prudence would not encounter it, *held* correct.

6. TRIAL—ABSTRACT INSTRUCTION.—An instruction, in an action by an employee for personal injuries, that the defendant was not negligent because plaintiff was obeying the orders of his foreman at the time he was injured, was properly refused, where neither party contended that the employer was negligent simply because the employee attempted to obey orders.

7. APPEAL AND ERROR—INVITED ERROR.—Any prejudice resulting from testimony elicited on direct examination of a witness was waived where appellant subsequently elicited the same testimony on cross-examination.

8. APPEAL AND ERROR—IMPROPER ARGUMENT—NECESSITY OF OBJECTION.—An alleged erroneous remark of an attorney will not be considered on appeal where no objection was made at the time and no exceptions were saved.

9. DAMAGES—WHEN NOT EXCESSIVE.—An award of $20,000 for a fractured skull, debarring the plaintiff from work and constituting permanent injuries, when he had previously earned $5 per day, *held* not excessive.

Appeal from Union Circuit Court, Second Division; *W. A. Speer,* Judge; affirmed.

Roscoe R. Lynn, Marsh & Marlin, and *Buzbee, Pugh & Harrison,* for appellant.

Powell, Smead & Knox and *C. E. Wright,* for appellee.

HUMPHREYS, J. Appellee instituted this suit against appellant in the circuit court of Union County to recover damages in the sum of $50,000 for injuries received by him on account of the alleged negligence of the foreman of appellant in ordering appellee into a dangerous place to perform his work and in failing to provide a reasonably safe place in which said work could be performed. The gist of the complaint is that he received permanent injuries, which entailed great pain and suffering, in

attempting to obey the order of appellant's foreman to ascend a beam inclined to an unusual angle, and which was covered with fresh oil and mud, for the purpose of slipping a sand-trap hanging to a cable in an oil well derrick over a standing-valve in order to put tubing and piping back which had been pulled out of said well to clean it.

Appellant filed an answer to the complaint, denying the material allegations therein relative to the negligence and injury, and interposing the further defenses of contributory negligence and assumption of the risk.

The cause was submitted to a jury upon the pleadings, testimony adduced by the respective parties, and the instructions of the court, resulting in a judgment in favor of appellee in the sum of $20,000, from which is this appeal.

The first and main contention of appellant for a reversal of the judgment is that the undisputed facts reflected by the record show that appellee assumed the risk of whatever injuries he received, and that the trial court erred in refusing to peremptorily instruct a verdict in its favor.

In analyzing the testimony to ascertain whether appellant is correct in its contention, the settled rule of this court requires that the facts be viewed by the court in the most favorable light to appellee, and to affirm the verdict and judgment if there is any substantial evidence to sustain them.

Reviewing the evidence responsive to the issue of the assumption of risk in the most favorable light to appellee, the facts are about as follows:

The accident occurred eight months before appellee attained his majority. He quit school at the age of fourteen years, having reached the eighth grade; he then worked at almost anything around sawmills for four years. He then moved from Texas, his native State, to Louisiana, where he engaged for two years in the oil business, doing nearly every kind of work connected with drilling oil wells, except the work of a derrick-man. In

December, 1921, he came to the Arkansas oil-fields, and commenced to work for appellant in the capacity of a roustabout. The duties of a roustabout were to pull rods and tubing in an oil well. About two months before the injury occurred he was promoted to the position of derrick-man, when it became his duty to do all of the work up in the derrick, which required that he walk, crawl, and climb from one place to another. Appellant was pumping four wells on its lease, and appellee was serving as derrick-man on all four of the wells. When the wells clogged or sanded up, in order to clean them it was necessary to pull the tubing and piping out of them, and, in replacing it the quickest way, it was necessary for the derrick-man to climb up the samson-post and go out on the walking-beam to slip the sand-trap, or large pipe hanging to the cable in the derrick, over the standing-valve or smaller pipe, in order to connect them. There was a safer but slower way of replacing the tubing and pipes by disconnecting the standing-pipe on the floor of the derrick and inserting it in the trap before pulling the trap up and hanging same to the cable in the derrick. The walking-beam is a heavy piece of timber, 14 inches across the top, 22 inches thick in the middle, but tapering towards the ends, and 26 feet long, supported in the center by the samson-post, which is a strong piece of timber 15 feet long, standing firmly in an upright position. The inside end of the beam is directly over the well, to which the rod is attached that goes to the bottom of the well and operates the pump when the walking-beam works up and down, by a timber called a "pitman" connecting the outside end thereof to an eccentric wheel turned by an engine. On April 19, 1922, the well on which appellee was working as derrick-man, under the direction of O. C. Willis, foreman for appellant, clogged with sand, and, in order to clean it, the tubing and piping was pulled out and disconnected about every 60 feet. The sections were about 20 feet long. The tubing and piping were covered with oil and mud, which dripped onto the floor and other parts of the derrick. After the tubing and piping had

been pulled out, they began bailing the sand out of the well, and continued this work at intervals for about two and one-half hours. The bailing line was saturated with oil and mud, which dripped on the walking-beam continuously and covered it with oil and mud, making it slick and dangerous. The pitman had broken through the floor and rested on the ground, causing the walking-beam to incline to the dangerous angle of 45 degrees. A short time after the bailing was finished, and before the oil and mud had dried, or dripped off the walking-beam, the foreman and employees cleaned out the sand-trap, pulled it up in the derrick, and started to put the tubing and piping back into the well by the quickest method in order to get through without having to work overtime. They made an effort to pull the trap down over the standing-valve, but could not get it stabbed in without sending a man out on the beam to hold and slip the trap over the standing-valve, so the foreman told appellee to go up on the beam and stab the large pipe over the small one in order to finish the work up, and call it a day. Appellee attempted to obey the order by climbing the samson-post and crawling out on the walking-beam on his hands and knees. He had gone only a few feet when he slipped off the beam, on account of its slick condition and the angle at which it stood, and fell to the floor on the tubing and piping, resulting in a fracture of his skull and three of his ribs. The injuries rendered him unconscious for fifteen or twenty minutes. After being restored to consciousness by dashing water into his face, he was taken to a hospital, where a trephine operation was performed upon his head by removing the pressure of the skull from his brain. He remained in the hospital for treatment for about a month, during which time he endured much pain and suffering. At the time of the injury he weighed 180 pounds, and thereafter lost 27 pounds, weighing only 153 pounds at the time of the trial, some three years after the injury. As soon as the wound healed he began to work at intervals, but could not do so long at a time, on account of pains in his head, dizziness, and nervousness.

There is testimony in the record tending to show that his injuries are permanent.

Appellee testified that he had gone out on the walking-beam frequently to perform his duties incident to his employment, but had never done so when the beam was covered with fresh oil and mud, or when it was inclined to an angle of 45 degrees; that he went up on the samson-post and out on the beam in obedience to the order of his foreman, without realizing the danger; that he was going out hurriedly because the foreman wanted to get the tubing and piping back into the well without working overtime, and that he did not take time to examine the condition of the beam or take into consideration the danger of crawling out on it at the angle at which it was inclined; that, had he taken time to observe the beam, he could have seen its condition and discovered the danger incident to climbing it, but that he had his eyes upon the pipe and was thinking about the performance of his duties.

The foreman testified that appellee had never been directed, during his employment, to go out on the beam while it was covered with fresh oil and mud, or when it was inclined to an angle of 45 degrees; that, although he (the foreman) knew at what angle the beam was inclined and that oil and mud had dripped off of the bailing line onto the beam, completely covering it, he did not himself realize the danger entailed by his order until appellee slipped and fell.

Generally the question of whether an employee assumes the risk of an injury is one for the jury, and is always so where a servant is acting in obedience to the instructions of a superior, unless he knows and appreciates the danger incident to obeying the order, or unless the danger incident to obeying the order of his superior is so obvious and patent that a reasonably prudent person would refuse to obey the order. We cannot say as a matter of law, in the instant case, that appellee knew of the danger, or that the danger was so obvious or patent that he should have known it. The evidence shows that he

exposed himself to the danger in an effort to obey the order of his foreman. The order of the foreman carried an implied assurance that appellee could perform the work without danger to life or limb. Appellee had never before attempted to climb a walking-beam which was covered with fresh oil and mud and standing at an angle of 45 degrees. The order was a hurry-up one for the purpose of replacing the tubing and piping in the well so that the crew would not have to work overtime. Appellee attempted to obey the order in the spirit in which it was given, without taking time to observe the condition of the beam or the angle at which it was inclined. It is clearly portrayed by the evidence that he acted without knowledge or appreciation of the danger, and that the danger was not so obvious or patent that a reasonably prudent person would have refused to obey the order. Even the foreman, with years of experience, did not realize that his order entailed danger to life or limb, although he knew that the beam was covered with fresh oil and mud which had dripped on it from the bailing line, and that it was tilted to an acute angle. The facts in the instant case bring it within the rule announced and applied in the following cases decided by this court: *A. L. Clark Lumber Co.* v. *Northcutt,* 95 Ark. 291, 129 S. W. 88; *Dickinson* v. *Mooneyham,* 136 Ark. 606, 203 S. W. 840; *Central Coal & Coke Co.* v. *Fitzgerald,* 146 Ark. 109, 225 S. W. 433; *St. L. Sw. Ry. Co.* v. *Gant,* 164 Ark. 621, 262 S. W. 654; *Western Coal & Mining Co.* v. *Burns,* 168 Ark. 976, 272 S. W. 357; *Choctaw, O. & G. Ry. Co.* v. *Jones,* 76 Ark. 367, 92 S. W. 244; *Griffin* v. *St. L. I. M. & S. R. Co.,* 121 Ark. 433, 181 S. W. 278.

Appellant next contends for a reversal of the judgment because the court gave appellee's requested instruction No. 2, which is as follows: "You are instructed that it was the duty of the defendant company to use reasonable care to provide the plaintiff with a reasonably safe place in which to work, and, if you find from a preponderance of the evidence that it failed to do so, and the plaintiff was thereby injured, while he was in the exercise

of ordinary care for his own safety, and had not assumed the risk, then your verdict will be for the plaintiff."

The instruction is assailed because it submitted the issue of an assumed risk to the jury. Under our interpretation of the evidence, heretofore expressed, the assumption of the risk was a jury question, and properly submitted by this instruction, together with others upon the same subject.

Appellant next contends for a reversal of the judgment because the court gave appellee's requested instruction No. 3, which told the jury, if appellant and appellee were both guilty of negligence, this would bar a recovery by appellee. The instruction is assailed because it is said, under the facts reflected by the record, that contributory negligence is swallowed up by the doctrine of assumed risk. The testimony in the instant case does not show that appellee was aware that the walking-beam was covered with fresh oil and mud and that the danger was so imminent and obvious that a person of ordinary prudence would not continue in the work. It is only where the record reflects such to be the fact that the doctrine of contributory negligence and assumed risk become indistinguishable. Appellee, in the instant case, may have been guilty of contributory negligence in failing to observe the condition of the walking-beam, but he could not be held to an assumption of the risk if he did not know of the defect, or if the defect was not so obvious and patent that a reasonably prudent person would refuse to perform the labor. No prejudice resulted to appellant on account of a correct declaration of law relative to the doctrine of contributory negligence.

Appellant next contends for a reversal of the judgment because the court gave appellee's requested instruction No. 4, which is as follows:

"You are instructed that, when an employee is directed by his superior to do a certain work or peform service in a certain place, he is justified in relying upon the superior knowledge and judgment of his employer as to his ability to perform the work with safety under the

circumstances. He has the right to suppose that his superior will not expose him to unnecessary danger. If, when acting under the direct commands of his superior, he is required to go into a place of danger, he does not assume the risk of such danger unless he knew of the danger and appreciated it, or unless the danger was so obvious and imminent that no servant, in the exercise of ordinary care and prudence, would have encountered it, notwithstanding the directions of his superior so to do. So, if you find from a preponderance of the evidence in this case that the plaintiff was specifically directed by defendant's foreman to climb upon the walking-beam, then you are told that plaintiff did not assume the risk incident to the use of said beam in such manner, unless he knew of and appreciated the danger arising from his going thereon, or unless the danger was so open and obvious that no person in the exercise of ordinary care and prudence would have undertaken the task, notwithstanding the directions so to do."

The instruction is assailed on the alleged ground that its effect was to relieve appellee from an assumption of the risk if he acted under the order of his foreman. We do not so interpret the instruction. We think it a correct declaration of law to the effect that an employee is in duty bound to obey his employer, and has the right to rely upon the superior knowledge of his employer as to the danger involved in obeying him, unless he knows of the danger himself and appreciates it, or unless the danger is so obvious and imminent that a man of ordinary prudence would not encounter it.

Appellant next contends for a reversal of the judgment because the court erred in refusing to give its requested instruction No. 19 as follows: "You are instructed that, under the facts in this case, you cannot find that the defendant was negligent because plaintiff was obeying the orders of the foreman at the time he fell."

This instruction, we think, is abstract, as neither party contended in the trial that appellant was negligent

merely because appellee attempted to obey the order of the foreman. The court did not err therefore in refusing the instruction.

Appellant's next contention for a reversal of the judgment is that the court erred in allowing O. C. Willis, in his direct evidence, to testify that the pipe could have been broken up and slid into the sand-trap before it was pulled up into the derrick. We think the evidence is responsive to the issue of negligence, but, if not, any resulting prejudice was waived, because the same information was elicited from said witness by appellant itself, on cross-examination, as evidenced by the following question and answer:

"Q. And you did that the usual and ordinary way you had done all other operations of that kind out there on this lease while he was employed there? A. No sir; we had put them in laying down on the floor; we have broken them up and laying down on the floor—we put them in that way."

This question and answer had reference to the method in assembling the sand-trap and standing-valve preparatory to replacing the tubing and piping in the well.

The appellant also contends that the attorney for the appellee made a remark in the presence of the jury prejudicial to its rights at the time he elicited said information in the direct testimony of O. C. Willis. It is unnecessary to set out the remark of the attorney, because there was no objection made and no exception saved thereto at the time.

Appellant's last contention for a reversal is that the verdict was excessive. At the time of the injury appellee was a young man in good physical condition and earning $5 per day. His skull was fractured and he was compelled to submit to a trephine operation. At the expiration of three years he was 27 pounds under weight, and could only work at intervals of short duration without suffering from headache, dizziness, nervousness and insomnia.

Dr. Mayfield testified that, if the headaches, dizziness and nervousness still existed after a lapse of three years, such symptoms indicated a permanency of the injury. When it is remembered that the verdict is intended to compensate appellee for both mental and physical suffering in the past as well as the future, and for his decreased earning capacity on account of permanent injury, we cannot say that $20,000 is excessive.

No error appearing, the judgment is affirmed.

GOSNELL SPECIAL SCHOOL DISTRICT NO. 6 *v.* BAGGETT.

Opinion delivered January 24, 1927.

1. JUDGMENT—COLLATERAL ATTACK.—A decree which recites that it was entered by consent is not open to collateral attack upon the ground that no such consent was given.
2. JUDGMENT—RES JUDICATA.—A decree restraining plaintiffs from teaching a certain school *held res judicata* of their subsequent action for damages for breach of their contract to teach, where the former decree necessarily implied a finding that plaintiffs had no contract to teach, and it is unimportant that plaintiffs asked no affirmative relief for breach of the contract in the prior suit.
3. JUDGMENT—RES JUDICATA.—The judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which could have been interposed in the former suit.
4. EQUITY—GRANTING COMPLETE RELIEF.—Where the chancery court assumed jurisdiction to restrain parties from teaching a certain school, it could grant them affirmative relief in damages for breach of their alleged contract to teach in the school, if the testimony warranted it.
5. JUDGMENT—RES JUDICATA.—Where it is doubtful whether a second suit is for the same cause of action as the first, the two actions will be considered the same if the same evidence would sustain both, and the judgment in the former is a bar to the subsequent action, although the two actions are different in form.

Appeal from Mississsippi Circuit Court, Chickasawba District; *G. E. Keck,* Judge; reversed.

Crowder & Cooper, for appellant.

Harrison, Smith & Taylor, for appellee.

SMITH, J. Two sets of school directors assumed to act for Gosnell Special School District No. 6 of Mississippi County, and each set of directors employed teachers to teach the school of the district. These conflicting claims led to the case of *Stafford* v. *Cooke,* reported in 159 Ark., page 439, 252 S. W. 597.

C. S. Baggett and his wife had been employed by one set of directors to teach the school, but they were denied the right to do so by the other directors, who were installed as a result of the decision of this court in the case just referred to. Baggett and his wife brought suit to recover damages for the breach of their contract, and from a judgment in their favor in this appeal.

A number of defenses were interposed by the school district, but we will discuss only one of them, as we find it decisive of the case.

It appears that, before the institution of the present suit, the directors who prevailed in the litigation involving the title to the office brought suit in the chancery court against Baggett and his wife to enjoin them from teaching the school under the contract which forms the basis of the present suit. It was alleged in that suit that the plaintiffs were the directors of the school district, and, as such, were in charge of its affairs, and had employed teachers who were ready to begin the school, but that Baggett and his wife had unlawfully and wrongfully taken charge of the schoolhouse and were asserting the right to possession thereof for the purpose of teaching school. There was a prayer that Baggett and his wife be enjoined from interfering with the school.

An answer was filed by Baggett and his wife, in which all the allegations of the complaint were denied. It was there also denied that the plaintiffs were school directors, or had employed other teachers, or that the defendants there (the plaintiffs here) were unlawfully or wrongfully in possession of the school.

A temporary restraining order was granted in that case, which was later made permanent, wherein Baggett and his wife were enjoined from teaching the school or

otherwise interfering with it. The decree of the chancery court granting this relief was offered in evidence.

Objection was made to the introduction of this decree in evidence upon the ground that it appeared to have been rendered by consent of the attorneys who then represented the directors who had employed Baggett and his wife, when such consent was not given. But the decree cannot be thus collaterally attacked. It must be taken at its face value and given such effect as it purports to have.

It is also insisted that the decree does not sustain the plea of *res judicata*, for the reason that the defendants in the injunction suit (the plaintiffs here) did not seek in that suit to recover compensation for the breach of their contract to teach the school, the contract here sued on, and the case of *Gardner* v. *Goss,* 147 Ark. 178, 227 S. W. 25, is cited in support of that contention.

We think the plea of *res judicata* is well taken, and that the case of *Gardner* v. *Goss, supra,* does not decide to the contrary. In that case the *de facto* directors had discharged Gardner, a teacher, and we held that the directors had the power and authority to do this, whether that authority had been properly exercised or not, and that, having discharged him, they were entitled to an injunction against him to restrain him from interfering with the school. In a suit at law Gardner later recovered damages for the breach of the contract between himself as teacher and the district, which was affirmed on appeal to this court. *Gardner* v. *North Little Rock Special School Dist.,* 161 Ark. 466.

We held on the first appeal in the Gardner case, in which an injunction issued by the lower court was sustained, that the acts of school directors who held office by virtue of a fraudulent election are valid as to third parties, though performed during the pendency of a contest which later resulted in their ouster, as they were *de facto* officers, and that, even though the discharge of a teacher was a breach of his contract of employment, this did not justify the teacher in refusing to surrender possession of the property and affairs of the district to the

directors, as the teacher's remedy was in an action at law for the breach of the contract. The validity of Gardner's contract was not an issue in that case. We assumed that it was valid, but held that the directors had the power to discharge him notwithstanding that fact.

Unlike the Gardner case, the issue in the chancery court, in which Baggett and his wife were defendants, was whether they had authority to teach the school. It was alleged that the Baggetts did not have this authority, and they answered that they did. Their defense would have been sustained, had it been shown that they had a valid contract, even though the contract had been made by *de facto* officers. The chancery court granted the relief prayed, which involved and necessarily implied the finding that the Baggetts had no contract to teach the school. There was no allegation that Baggett and his wife had been discharged. On the contrary, injunctive relief was prayed and granted upon the theory that they had no contract authorizing them to teach, and, as we have said, a sufficient defense to this suit would have been that they had a contract giving them that right.

In the case of *Taylor* v. *King,* 135 Ark. 43, 204 S. W. 614, it was said that:

"The rule has been often announced in this court that the judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which could have been interposed in the former suit" (citing cases).

The defense that appellees were not unlawfully and wrongfully teaching school would have been sustained had the showing been made in the chancery court that they had a contract authorizing them to teach, and, as this defense could have been interposed there, it cannot be interposed here where the same issue is involved—that of the legality of appellee's contract.

It is unimportant that appellees did not ask the affirmative relief of damages for the breach of the contract in the chancery case. As the chancery court had

assumed jurisdiction for one purpose, it might have granted appellees that relief had the testimony warranted it; but the chancery court decided, and adversely to appellees, under pleadings which raised that issue, that they had no lawful right to teach school, and that adjudication having been made, it follows that they cannot in another suit litigate that question again. In other words, they cannot recover damages if they had no contract, and the chancery court has adjudged that they did not have a contract.

At § 439 of the chapter on Judgments, in 15 R. C. L., page 964, it is said that:

"If it is doubtful whether a second suit is for the same cause of action as the first, it has been said to be a proper test to consider whether the same evidence would sustain both. If the same evidence would sustain both, the two actions are considered the same, and the judgment in the former is a bar to the subsequent action, although the two actions are different in form."

So here, appellees are not entitled to recover damages for a breach of a contract unless they had a valid contract, and, if they had such a contract, it should have been pleaded in the cause wherein injunctive relief was prayed and granted under the allegation that appellees were wrongfully in possession of the school.

It follows therefore that the plea of *res judicata* should have been sustained, and the judgment of the circuit court must therefore be reversed, and, as the case appears to have been fully developed, it will be dismissed.

ROSE v. BRAY.

Opinion delivered January 24, 1927.

1. MORTGAGES—FORECLOSURE—INADEQUACY OF PRICE.—Gross inadequacy of price coupled with any slight circumstances of unfairness in the party benefited by a foreclosure sale will justify the court in refusing to confirm such sale.
2. MORTGAGES—FORECLOSURE—INADEQUACY OF PRICE.—A foreclosure sale under a first mortgage will be set aside where the price paid was inadequate, and the purchaser had promised the second mortgagee and the mortgagor to furnish the money to the second mortgagee to purchase the property at the foreclosure sale, but notified them of the refusal to furnish the money too late for them to secure the money elsewhere.
3. MORTGAGES—FORECLOSURE—ESTOPPEL.—Where a lawyer, employed to collect a second mortgage on land, promised his client to furnish the money to purchase the land at foreclosure of the first mortgage, and failed to notify his client of his refusal to furnish the money until it was too late to secure the money elsewhere, and the client, being unable to procure the money elsewhere, was compelled to assign his certificate of purchase to his lawyer, *held* that the client was not estopped by assignment of the certificate of sale from seeking to set aside the sale.

Appeal from Mississippi Chancery Court, Chickasawba District; *J. M. Futrell,* Chancellor; reversed.

Shane & Batten, for appellant.

Block & Kirsch, for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Mississippi County, Chickasawba District, confirming a commissioner's sale of certain real estate in said county and ordering the commissioner to make a deed to the purchaser thereof, in a foreclosure proceeding wherein B. C. Land Company was plaintiff and appellees herein were defendants. L. W. Rose, one of the appellants, owned the east half of the fractional southeast quarter of section 21, township 16 north, range 8 east, in said district and county, worth between $5,500 and $6,500. He executed a first mortgage thereon to B. C. Land Company for $2,000, and a second mortgage to Mr. Ellis Goodrich for $1,500. He failed to pay the first mortgage at maturity, and the B. C. Land Company

foreclosed same, making L. W. Rose, the owner, and Mrs. Alice Goodrich, the second mortgagee, parties defendant in the proceeding. Pursuant to order, the land was sold on April 11, 1925, to Mrs. Alice Goodrich for $2,246.86, which was about $100 more than was necessary to satisfy the first mortgage, interest and cost. She was unable to give security or bond for the first payment of the bid, and assigned her certificate of purchase to W. G. Bray for W. F. Shelton, Jr., in consideration of $100 cash and the release by W. G. Bray of his claim for an attorney's fee against her. On September 25, 1925, the first day of chancery court subsequent to the sale, appellants filed exceptions to the sale, praying that same be set aside upon the alleged ground that they had been misled and defeated in the protection of their rights at the said sale through misrepresentations and fault of W. G. Bray, who purchased the land either for himself or W. F. Shelton, Jr., at said sale, for a grossly inadequate price, who took possession of the land by force a short time after the sale. They tendered into court a sufficient sum to redeem the land from the sale.

W. F. Shelton, Jr., filed an answer, denying the allegations set out in the exceptions to the sale, and praying for a confirmation thereof and a deed for same.

Appellants contend that the court erred in confirming the sale and ordering the commissioner to make a deed to W. F. Shelton, Jr., under the testimony introduced by them and the rule of law applicable thereto. The rule of law invoked by appellants as applicable to the facts in the instant case is that gross inadequacy of price, coupled with any slight circumstances of unfairness in the conduct of the party benefited by the sale, will justify a court in refusing confirmation thereof. The rule thus announced is supported by the cases of *Wells* v. *Knox,* 108 Ark. 366, 159 S. W. 1099; *Stevenson* v. *Gault,* 131 Ark. 397, 199 S. W. 112; *Hawkins* v. *Jones,* 131 Ark. 478, 199 S. W. 1099; *Moore* v. *McJudkins,* 136 Ark. 292, 206 S. W. 445; *Chapin* v. *Quisenberry,* 138 Ark. 68, 210 S. W. 341.

Appellee introduced no testimony responsive to the issue joined, so the facts revealed by the record must be treated as undisputed. We shall only attempt a summary of the facts bearing upon the integrity of the sale, in announcing our conclusion. W. G. Bray was an active vice president of the bank of Senath, and its attorney. W. F. Shelton, Jr., was a stockholder in said bank. Quite a while before the sale B. A. Goodrich, acting for his wife, Mrs. Alice Goodrich, employed W. G. Bray to collect her second mortgage, and turned the note and mortgage over to him for that purpose. Goodrich contracted with him for an agreed fee of $100 to either get enough money from the bank or to advance enough to purchase the land at the sale and thereby protect his wife's interest until they could borrow the necessary amount from a loan company to repay him. Bray and Goodrich went together to J. C. Chapin to negotiate a loan, and he referred them to his associate, Mr. Kirscher, to whom an application was made for a loan of about $2,500. They informed J. C. Chapin that their plan was for Bray to loan the money to Goodrich, buy the land at the sale, and, after securing the title, to obtain a loan through Kirscher and Chapin. Kirscher and Chapin viewed and appraised the land at $5,500 to $6,000. In February before the sale, Bray or his partner wrote to L. W. Rose to the effect that they had Mrs. Goodrich's note and mortgage for collection. In response to the letter, he called on Bray, who proposed to represent his interest also at the sale, saying that he was going to furnish the money to Mrs. Goodrich to take care of the first mortgage if Rose would renew the second mortgage to Mrs. Goodrich. About ten days before the sale Bray informed Rose that he had decided not to lend Mrs. Goodrich the money to take care of the first mortgage at the sale. Rose then tried to get a loan to take up the first mortgage, but did not have time to complete same before said sale. He was informed by an agent of the B. C. Land Company that he would have a right to redeem the land until court convened in September. He did nothing further, counting on redeeming it at

that time. Having ascertained that he had been misinformed with reference to the redemption of the land, he joined Mrs. Goodrich in filing the exceptions herein to the sale. About ten days or two weeks before the sale Bray informed Goodrich that he had decided not to advance Mrs. Goodrich the money to take care of the first mortgage at the sale, and advised him to buy it in himself for as small an amount as possible, and give a bond to secure the bid. He accepted the advice, believing that Bray was still acting for them in the collection of Mrs. Goodrich's note and mortgage. He bid the land in at the sale for $2,246.86, and produced two bondsmen that he regarded as responsible, but the commissioner refused to accept them, and Bray made no effort to induce him to do so. Being unable to secure his bid to the satisfaction of the commissioner, and coming to the conclusion that he had lost any chance to protect the interest of his wife, he agreed to transfer his certificate of purchase to Bray for $100 in cash and the relinquishment of any claim by him of an attorney's fee. The certificate was transferred to Bray for W. F. Shelton, Jr. Bray told Rose, immediately after the sale, that he had bought the land for himself. Appellants called Bray as a witness, and interrogated him relative to the purchase of the land at the sale for W. F. Shelton, Jr., as follows: "Q. You came over here that day of the sale representing him, didn't you? A. No, sir. Q. Didn't you wire for the money to conduct this sale? A. Yes sir. Q. When you bought the land, you immediately wired Mr. Shelton to get the money to pay for it, didn't you. A. Yes sir. Q. You say to the court that you did not come over intending to buy the land for Mr. Shelton? How did you know he would want it if you didn't? A. We had had more or less dealings since 1902. Some time prior we had a sort of understanding that if I found a bargain in land, to buy it and draw on him for the money and he would pay it. Q. In other words, to buy up all the cheap land you could get, and he would furnish the money to pay for it?

A. There was nothing said about cheap land, about buying up cheap land."

Shortly after the sale, and before the confirmation thereof, Bray took possession of the land in question by force, and put a man by the name of Coffee in charge thereof.

We think it fairly inferable from the testimony detailed above that Mr. Bray was, in fact, the real purchaser at the sale, notwithstanding the certificate was assigned to him for W. F. Shelton, Jr., without his knowledge and without any specific understanding that he would do so. He had the certificate assigned for the benefit of Shelton on the strength of an old understanding that he would buy land for him if it could be bought at a bargain. Immediately after the sale he told Rose that he had bought the land for himself. He took possession of the land before the confirmation of the sale, by force, and put his own man in charge of it. Treating him, then, as the real purchaser of the land, we do not think he should be permitted to profit by the sale. He bought it for an inadequate consideration from his client, who was in financial distress and who had contracted with him and depended upon him for financial assistance until ten days before the sale. In fact, on the day of the sale, Goodrich followed Bray's advice and bought the land in for a little more than enough to pay the first mortgage. The men he got to secure the bid were refused, and Bray made no effort to get the commissioner to accept them. In trying to arrange matters, Bray had promised Rose to assist him, who relied upon his promise until about ten days before the sale.

We do not think Bray gave Goodrich and Rose sufficient notice that he would not assist them, after promising aid to Rose and contracting to lend Goodrich a sufficient amount of money to protect his wife's interest against the first mortgage. They were unable to make other arrangements in the short time intervening between the notice and the sale. There can be no question about Rose being able to raise a sufficient amount to take up

the first mortgage, had he been given a reasonable time to negotiate a loan. Goodrich should have been given more notice, under the circumstances, to protect his wife's interest, and we do not think he should be estopped on account of the assignment of his certificate of purchase to his lawyer. It is quite clear that he made the assignment on account of financial distress, which could have been avoided, had his attorney given him ample notice that he did not intend to carry out his contract with him.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

GENERAL MOTORS ACCEPTANCE CORPORATION v. SALTER.

Opinion delivered January 24, 1927.

1. BILLS AND NOTES—NEGOTIABLE PAPER.—An instrument, to be negotiable under Crawford & Moses' Dig., § 7767, must be payable to order or to bearer.
2. BILLS AND NOTES—NON-NEGOTIABLE PAPER—DEFENSES.—A purchaser of non-negotiable instruments takes them subject to all defects or infirmities available to the maker against the payee.
3. APPEAL AND ERROR—INSTRUCTED VERDICT—EFFECT OF COURT'S FINDING.—Where both parties requested an instructed verdict, whereupon the court took the case from the jury and rendered a judgment, such judgment was the same as the verdict of a jury, and must stand on appeal if supported by substantial evidence.
4. PRINCIPAL AND AGENT—APPARENT AUTHORITY.—Apparent authority of an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing, which he appears to have by reason of his actual authority, or which reasonably prudent men, using diligence and discretion in view of the principal's conduct, would naturally suppose the agent to possess.
5. PRINCIPAL AND AGENT—APPARENT AUTHORITY OF SALES AGENT.—Where an agent took an order for a pumping and a lighting plant, delivered and supervised the installation of them, and took notes for their purchase, a reasonably prudent purchaser would naturally suppose that the agent had authority to agree to take the plants back if they did not prove to be satisfactory.

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

Raymond Jones, for appellant.

R. W. Robins, for appellee.

HUMPHREYS, J. Appellant instituted suit in the circuit court of Faulkner County against appellee to recover $381.61 upon a conditional sales contract for a Delco light plant, and $117.84 upon a similar sales contract for a pumping plant, alleged to have been executed by appellee to W. P. Galloway Company, Little Rock, Arkansas, in payment of the balance of the purchase money for said plants, and assigned to it (appellant) in due course, before maturity and for value, by the said W. P. Galloway Company. The substance of the title-retaining notes or conditional sales contracts was set out and incorporated in the complaint, and copies thereof were attached as exhibits to the complaint. In order to impress a lien upon the property, a summons and writ were issued upon the complaint, directing the sheriff of said county to take the property into his possession and hold same subject to the order of court. The summons and writ were properly served, and the property was left by the sheriff with appellee.

Appellee interposed the defense that the title-retaining notes or conditional sales contracts were not negotiable instruments purchased by appellant in due course before maturity for value, that the light plant and pump did not operate satisfactorily, and that, in reality, there was no complete sale, because, at the time the machinery was left at his home, the salesman who was representing W. P. Galloway Company, and who delivered the outfits, signed an agreement, written on the stationery of W. P. Galloway Company, to the effect that, in the event that appellee should become dissatisfied with the outfits, or if he should not be in shape to meet the payments, the outfits would be removed from his premises without charge or cost to him, and that, in pursuance of this agreement, he notified the appellant, as well as W. P. Galloway

Company, that the outfits were not satisfactory, and that the same should be removed.

The cause was submitted upon the pleadings and testimony, at the conclusion of which both appellant and appellee asked peremptory instructions, whereupon the court withdrew the case from the jury and rendered judgment in favor of appellee, from which appellant has duly prosecuted an appeal to this court.

Appellant introduced in evidence the original orders signed by appellee for the lighting and pumping plants which were accepted by W. P. Galloway Company several days before the title-retaining notes or conditional sales contracts sued upon were signed. It also introduced a statement, signed by appellee, relative to his financial condition, which was made at the time the orders were signed. It also introduced the title-retaining notes or conditional sales contracts made the basis of the suit. It also introduced its assistant secretary and sales manager as witnesses, who testified, in substance, that it purchased the two title-retaining notes or conditional sales contracts from W. P. Galloway Company before maturity, paying $315 in cash for the one covering the Delco light plant and $97 in cash for the one covering the pumping plant; that, in the acceptance of said instruments, the only information appellant had concerning them was the provisions contained in the instruments themselves, the contents of the two orders for said plants, and the financial statement submitted by appellee to W. P. Galloway Company when he signed the orders.

It also introduced John V. Tedford as a witness, who testified, in substance, that he was the secretary of W. P. Galloway Company; that the orders, notes or contracts presented to him were the ones W. P. Galloway Company assigned to appellant before maturity for a valuable consideration; that E. H. Puryear was the salesman for W. P. Galloway Company, and that the only authority he had was to solicit orders for the Delco light products on the company's regular order blanks; that he

had no authority to make any agreements not embraced in the order blanks; that, when he went out to collect from appellee, he claimed to have a contract written on the company's letterhead and signed by Mr. Puryear, to the effect that he might return the plants if they did not give satisfaction, or in case he was not able to pay for them; that he refused to show the contract to him; that appellee said in the course of conversation that the lighting plant was working fine, but that the pump was not working right.

Appellee testified in his own behalf, in substance, to the effect that both plants were left with him by Emmett H. Puryear, as the representative of W. P. Galloway Company, for purposes of demonstration only, under a written agreement that they should be removed without expense to him in case he should become dissatisfied with them, or was unable to meet the payments; that the instruments sued upon were represented to him by said agent as receipts to show the company where the plants had been left; that they were long, and that he signed them without reading them, relying upon the statement of the agent as to their contents; that the written contract to remove the plants if he became dissatisfied with them was written upon a letterhead of the W. P. Galloway Company; that he never paid anything on the plants, although the instruments recite that he did; that the plant did not prove satisfactory; that the lighting plant would not carry the light the agent said it would, and that the pump would not work at all; that he notified the company to come and get the plants.

Appellant first contends for a reversal of the judgment because the undisputed evidence shows that it was an innocent purchaser for value before maturity of negotiable instruments made the basis of the suit. In support of its contention that the instruments sued upon were negotiable, appellant cites § 7767 of Crawford & Moses' Digest, defining negotiable paper. The fifth requisite of a negotiable instrument under that section is that it must be payable to order or bearer. The instru-

ments sued upon are lacking in that essential, and are not negotiable instruments. Since the instruments were not negotiable, but assignable only, appellant took them subject to all defects or infirmities available to the maker as a defense against the payee therein.

Appellant next contends for a reversal of the judgment because E. H. Puryear had no authority to enter into a written contract to the effect that the plants would be removed without expense to appellee in case they did not prove satisfactory. This contention is based upon the evidence of John V. Tedford, who testified that the authority of E. H. Puryear was restricted and limited to soliciting orders upon blanks of the company, subject to the approval of said company. Of course, if this was the extent of his actual or apparent authority, his subsequent written agreement would not be binding upon the company. The testimony introduced by appellee, however, tended to show that, in addition to soliciting the order, E. H. Puryear delivered and installed the plants and received the title-retaining notes or conditional sales contracts. It also appears that the agreement to take the plants back, if not satisfactory to appellee, was written upon a letterhead of W. P. Galloway Company.

These facts and circumstances are sufficient to sustain the verdict and consequent judgment fixing liability upon appellant, under the doctrine of apparent authority. Both parties asked for an instructed verdict, whereupon the court took the case from the jury and rendered a judgment in favor of appellee. The judgment is therefore the same as the verdict of a jury, and must stand on appeal, if supported by substantial evidence under any view of the law. The law of apparent authority is as follows:

"Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume, or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably

prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess." 2 C. J. 573.

Where an agent, as in the instant case, took the order for pumping and lighting plants, delivered and supervised the installation of same, and took notes or contracts for the purchase therefor, a reasonably prudent purchaser, in the exercise of diligence and discretion, would naturally suppose that the agent had authority to agree to take the plants back if they did not prove satisfactory.

No error appearing, the judgment is affirmed.

WATKINS v. WALLS.

Opinion delivered January 24, 1927.

1. LANDLORD AND TENANT—LIEN FOR RENT.—A landlord has a lien upon all the crops grown on the demised premises in any year for the rent accruing for that year, whether raised by the tenant or not, and regardless of any agreement between the tenant and a subtenant for rent.
2. LANDLORD AND TENANT—LIABILITY OF SUBTENANT.—Under Crawford & Moses' Dig., § 6892, a subtenant and his crops are responsible to the landlord only for payment of the rent for the lands occupied by him.
3. MORTGAGES—LIEN ON SUBTENANT'S CROP.—A mortgage on all crops given by a tenant for supplies furnished him by the landlord constitutes no lien on crops raised by the subtenant on land sublet to him.

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

STATEMENT OF FACTS.

This appeal is prosecuted to reverse a decree denying appellant the right to a lien, either as landlord or mortgagee, upon cotton raised by a subtenant on a portion of the land rented by appellant to one Spellman and sold to Topf & Ivy.

It is undisputed that appellant rented about one hundred and sixty acres of land to Spellman for one-fourth of the cotton and seed raised during the year 1924, and furnished certain money and supplies to him during the period to enable him to farm the lands, and that Spellman was indebted to appellant for a balance due thereon of $800 and interest when this suit was commenced. Appellant also took a chattel mortgage, which was duly recorded, on certain other personal property of Spellman, for all crops grown on the land rented for the year 1924, to secure payment for advances made.

About April 15 defendant, A. Wells, subleased a part of the land from the defendant, J. L. Spellman, appellant's tenant, upon which he raised nine bales of cotton, which he sold to the other defendants, Topf & Ivy, for $1,203, and the defendant, A. Wells, paid the plaintiff $301, which is one-fourth of the amount received for the cotton as rent for the land rented from Spellman, appellant's tenant. Topf & Ivy had no actual knowledge of the mortgage on the crop executed by Spellman, and no knowledge of any claim or lien of appellant on the cotton purchased by them.

The other personal property included in the mortgage by Spellman to appellant, with the exception of a crop to be grown on the lands during 1924, was incumbered by mortgages and vendors' lien notes for more than the value of the property, having priority over appellant's mortgage, and rendering it worthless as a security except as against the crops grown on the lands. Appellant furnished no supplies to A. Wells, the subtenant, for the land on which the cotton in controversy was raised.

McMillen & Scott, for appellant.

W. R. F. Paine, for appellee.

KIRBY, J., (after stating the facts). It is not claimed that appellant furnished any supplies to appellee Wells, the subtenant, to enable him to make or gather the crop raised on the lands sublet to him by Spellman, appellant's tenant, and the testimony shows that the sub-

tenant paid to appellant the rent due for the lands cultivated by him.

The landlord has a lien upon all the crops grown on the demised premises in any year for the rent that shall accrue for such year, without regard to whether the crop is to be raised by the tenant or not, and regardless of any agreement between the tenant and subtenant for rent. A person subrenting lands from the tenant, however, can only be held responsible for payment to the landlord for rent of such lands as are cultivated and occupied by him. Section 6892, Crawford & Moses' Digest; *Jacobson* v. *Atkins,* 103 Ark. 91, 146 S. W. 133; *Storthz* v. *Smith,* 109 Ark. 552; *Embry* v. *Neighbors,* 139 Ark. 313, 213 S. W. 741.

It is not claimed that appellant, the landlord, furnished any supplies to appellee, the subtenant, to enable him to make the crop, nor is it disputed that the subtenant paid the rent due the landlord from the tenant for the lands occupied and cultivated by him, which discharged his entire liability to the landlord and released his crop from the landlord's lien.

Neither could the chattel mortgage given by appellee, Spellman, on all the crops to be produced on the lands rented by him from appellant, constitute a lien on the crops raised by the subtenant on that portion of the lands sublet to him, for supplies furnished by the landlord to the tenant, the tenant having no interest in such crop for more than the *pro rata* amount of the rent due the landlord therefor, which it is unlawful for him to collect even before final settlement with the landlord. Sections 6894-96, Crawford & Moses' Digest.

It follows therefore that no error was committed in the rendition of the decree, which is affirmed.

PARKER v. WILLIAMS.

Opinion delivered January 24, 1927.

JUDGMENT—RES JUDICATA.—Where heirs did not perfect an appeal from a judgment of the circuit court reversing the judgment of the probate court requiring an executrix to make an inventory and file accounts in a proceeding instituted by them, they cannot relitigate the same question in a subsequent proceeding instituted by the probate clerk to which the heirs became parties on their own motion.

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

STATEMENT BY THE COURT.

This appeal is prosecuted from the judgment of the circuit court of Logan County, reversing a judgment of the probate court requiring Mrs. Georgia R. Williams, executrix, to file an inventory of the estate of M. A. Williams, deceased, and a settlement showing the disposition.

It appears that appellee's husband, the deceased, made a will disposing of all of his property, real and personal, to her, appointing her executrix thereof. She procured letters from the probate court of Logan County, but never filed any inventory of the estate nor settlements as executrix. No debts were probated against the estate. On petition of some of the collateral heirs of her husband, the appellants herein, stating that she had only a life interest in the property, under the terms of the will, and had not filed an inventory or any statement as executrix, she was cited to appear and show cause why she should not be required to do so. She responded, stating that these heirs had no interest whatever in the estate, which all belonged to her under the terms of the will, setting it out, and that, under its terms, she was not required to file an inventory or make a settlement; and stating also that all debts of the estate and expenses incident to its administration had been paid by her.

The court, after the hearing, then made an order requiring her to file an inventory and account, from which she appealed to the circuit court, and, upon a hearing

there, agreed to the statement of facts in the court below being also presented; and the court held that the petitioners, the heirs of M. A. Williams, Sr., deceased, had no such interest, at the present, in the personal property of said estate as will permit them to call on said executrix to file an inventory of the personal property of same, or make settlement of her affairs as such executrix; that the petitioners and other heirs of M. A. Williams, Sr., would probably be entitled to any portion of personal property, if any, of the estate remaining at the death of the executrix, "but that they cannot require, and the court will not require, the said executrix to file an inventory of the property of said estate, or to file a settlement of the affairs thereof," and adjudged the said executrix would not be required to file such inventory or make settlement.

The heirs filed a motion for new trial, which, being overruled, they prayed and were granted an appeal to the Supreme Court, which, however, was not perfected. A *nunc pro tunc* order was later entered to the judgment as follows: "The court does not decide the question as to the title of the personal property after the death of the respondent, Georgia Ann R. Williams, nor to whom said personal property will go by virtue of said will, or by inheritance, that question not being passed upon or being decided by the court."

On March 4, 1925, a citation was issued against the executrix, requiring her to present an account for settlement at the next term of court and show cause why an attachment should not be issued for not having presented her accounts according to law. Citation was served, and the court by order approved it on March 7, 1925. Mrs. Williams filed response thereto, reciting that she had been cited by the probate court before to appear and make settlement, and had been ordered to do so, but had taken an appeal from such order to the circuit court, where the order of the probate court was reversed and judgment entered that she was not required to make such inventory and settlement; that a motion for new trial was filed and overruled, and the petitioners given time to pre-

pare the bill of exceptions, but that they failed to perfect the appeal to the Supreme Court, and she pleaded the judgment of the circuit court as final and *res judicata* of the question raised. This response was overruled by the probate court, which again entered an order requiring the executrix to make settlement, and adjudged her guilty of contempt and ordered an attachment requiring her to appear on the 11th day of May and file settlement as executrix and submit to examination with reference to accounts as such, and to show cause why she should not be punished for failure and refusal to file settlement as executrix, as required by law and the citation and orders of this court.

The appellant was present in court in person and by counsel, and, in response to this order directing her to appear and file settlement, stated: "That all of the personal property belonging to said estate, under the terms of said will, became the property of this respondent, and that she has paid all the debts and obligations of said estate." That at a previous term of the court citation was issued directing her to file settlement as executrix, and, upon the issues raised and the citation and petition therefor in response, copies of which were attached, a judgment was rendered by the court ordering and directing her to file a settlement of said estate; that, upon appeal therefrom to the circuit court, the judgment of the probate court was reversed, and the circuit court adjudged that she was not required to file a statement of said estate. A copy of this judgment was also attached. Respondents allege that all the matters and things involved in this proceeding are *res judicata,* the issues being the same as in the former proceeding, all having been determined by the judgment of the circuit court between the same parties hereto; that the said judgment had not been appealed from, and was still in full force and effect. This response was overruled by the probate court, which again directed the executrix to file settlement, and from the order she appealed to the circuit court, where, upon the hearing, the court held that the matter was *res*

judicata, having been determined by it in the former decision, further found that the will did not require the executrix to file an inventory or settlement, and adjudged that she be not required to file an inventory or settlement.

The probate court was denied authority to require her to do so, and no other question was decided. Then appellants, the same persons who were parties to the first proceeding for a citation, applied to be made parties and allowed to file a motion for new trial and prosecute an appeal to the Supreme Court from the order and judgment of the circuit court, which application was granted, and, the motion being overruled, this appeal is prosecuted therefrom.

Evans & Evans, for appellant.

Hill & Fitzhugh and *Kincannon & Kincannon,* for appellee.

KIRBY, J., (after stating the facts). It is contended by appellant that the court erred in allowing the plea of *res judicata* to be made and in deciding that the matters in controversy had been fully adjudicated. The law requires executors or administrators of estates, immediately after receiving their letters, to collect and take into possession the property, goods and chattels of the testator or intestate, make a true and perfect inventory thereof, and file additional inventories of any other personal property discovered after the first inventory is made, and to make annual accounts current to the probate court showing the administration of the estate.

This executrix was cited to appear, upon the petition of the heirs of her deceased husband, and make an inventory of the estate, it being alleged that she only had a life estate in the property, and also that she be required to file her account showing the disposition of the property. In her response she claimed to own the property, under the terms of the will, setting out a copy thereof, and alleged that said heirs had no interest in it, and that she was not required to make either an inventory or accounts current showing the disposition of it.

The probate court held otherwise, but, on appeal, the circuit court reversed the order of the probate court and held that she was not required to file such inventory or accounts under the law and the terms of the will. The heirs prayed an appeal from this judgment, claimed to be erroneous, but it was never perfected.

This proceeding was begun by the citation issued by the clerk of the probate court on his own motion, and afterwards approved by order of the court, to require the executrix to make an inventory of the property of the estate coming into her hands and file accounts current showing the administration of it. The executrix denied that she was required, under the law or the terms of the will, to make such inventory or account for the property, since all the debts against the estate had been paid by her, and since she was entitled to the estate under the terms of the will, which made no provision requiring the filing of inventory or account, and also pleaded *res judicata,* alleging the question had been determined and concluded by the above mentioned judgment of the circuit court, from which no appeal had been taken, reversing the order and judgment of the probate court requiring the filing of such inventory and account.

The plea was not sustained, and the order requiring the filing of the inventory and account was appealed from to the circuit court, where the plea of *res judicata* was again made and sustained on the trial. Whereupon some of the heirs of M. A. Williams, the deceased, the same persons who had instituted the first proceeding to compel the making of an inventory and filing accounts by the executrix, were made parties, upon their own application, and permitted to file a motion for new trial and appeal from the judgment of the circuit court, upon its being overruled.

It can make no difference, in legal effect, that these parties, who began the first proceeding and failed to take an appeal from the judgment of the circuit court against them, did not initiate this proceeding for the same purpose as the first was commenced, since they were, on their

own motion, made parties to it in the circuit court and permitted to appeal from the judgment adverse to their interests. They thereby adopted it as fully, and are bound as conclusively, by the judgment of that court as though they had begun the proceeding in the first instance. Their motion for a new trial discloses that the parties to both proceedings are the same, and they were not entitled to become parties to the suit, save to protect their rights by appealing from a judgment adverse to their interest and refusing to compel the executrix to file an inventory and account of the estate on which they claim an interest. No error was committed in sustaining the plea of *res judicata,* the issue being practically the same and the parties really the same in both cases. *Davies & Davies* v. *Patterson,* 137 Ark. 184, 208 S. W. 592; *Butts* v. *Butts,* 152 Ark. 399, 238 S. W. 600; *Williams* v. *M. D. & G. R. Co.,* 133 Ark. 188, 202 S. W. 228; *Brookfield* v. *Jonesboro Trust Company,* 131 Ark. 356, 198 S. W. 697; *Black* v. *Lenderman,* 156 Ark. 476, 246 S. W. 876; *Coleman* v. *Mitchell, ante* p. 619.

It is not necessary to undertake to construe the will under which the executrix is acting, which has already been passed upon in *Williams* v. *Williams,* 167 Ark. 348, 268 S. W. 364. Nor do we determine what the rights of any of the parties may be upon termination of the estate bequeathed by its terms to the widow of the testator, the executrix herein. We find no error in the record, and the judgment is affirmed.

WARD *v.* McILROY.

Opinion delivered January 24, 1927.

1. EVIDENCE—PAROL EVIDENCE TO EXPLAIN WRITING.—In a suit to enforce a written contract for the purchase of land, where the contract does not describe the land intended to be conveyed, parol evidence is admissible to show what land was intended to be sold.
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—On appeal in chancery cases, the Supreme Court tries the issues *de novo,* and the chancellor's findings are treated as persuasive,

and will be reversed only when they are clearly against the preponderance of the evidence.

Appeal from Washington Chancery Court; *Lee Seamster,* Chancellor; affirmed.

Pryor, Miles & Pryor, for appellant.

Walker & Walker, for appellee.

MEHAFFY, J. This suit was begun in the Washington Chancery Court, the plaintiff, J. N. Ward, stating that, on the 25th of February, he entered into an agreement for the purchase of lot 11, block 6, in the town of Fayetteville, Arkansas, and attached to the complaint is a copy of the agreement relied upon by plaintiff. The complaint further states that the agreement has been confirmed and approved by defendants, but that they have refused to convey lot 11, in block 6, and that said lot was the property of the Arkansas Cold Storage & Ice Company at Fayetteville, and that, under the terms of said agreement, plaintiff is entitled to said lot. That the defendants are trustees for the Arkansas Cold Storage & Ice Company, and have conveyed all the property of said company except this lot, and that the plaintiff is entitled to have a decree of specific performance directing defendants to convey to him said lot 11, block 6, in Fayetteville, Arkansas. The defendants answer, admitting that they entered into a written agreement, but deny that they sold to the plaintiff lot 11, block 6, in the city of Fayetteville, and deny that the lot was owned by the defendants or the Arkansas Cold Storage & Ice Company at the time they made the sale. The answer further states that they sold and placed plaintiff in possession of all the real estate sold by them to the plaintiff, and that they did not sell or contract to sell lot 11. The agreement referred to, and which was attached to the complaint, is as follows:

"Mr. J. H. McIlroy, Trustee,

"Arkansas Cold Storage and Ice Co.

"Fayetteville, Ark.

"Dear sir: Confirming my proposition relative to buying the property of the Arkansas Cold Storage & Ice Company at Fayetteville and Springdale, Arkansas,

we will buy the same and pay you eighty thousand dollars ($80,000) for the two properties, on approval of abstracts of the real estate and you making me a deed to J. N. Ward, trustee, you paying all bills of indebtedness and giving me a clear title to same, with the exception of grooving and tubing the cans, which contract is $600, which I will pay. Me retaining all old salvage on all machinery and pumps taken out of the Fayetteville plant, and I will allow you the option of buying twenty-five per cent., or $20,000 worth of the interest in the two properties sold, on the same basis of value that you sell same to me. This option good for 15 days.

"I will assume the payrolls account for the erection account for the workmen and labor on the Fayetteville plant from February 23, 1925, excepting the payroll of your regular employees and night engineer, which you will pay. We will allow you the use of the rooms in which your apples are stored at Fayetteville and Springdale plants until April 1, 1925, you furnishing your fuel and paying your crew to operate the refrigerating machines to take care of the apples, we to take charge and complete plant at Fayetteville, beginning Monday, February 23, 1925, at our own expense. You to assign and transfer to me your contract with the Southwest Power Company, dated December 17, 1924, which I will assume and agree to carry out.

"I understand that the Springdale property, consisting of plant and equipment and the size of the lot, to be that part now occupied by the main building and 60 feet additional on the south side from the brick wall of said building, said 60 feet being of equal width across said lot, from east to west. In case there are any lawsuits pending affecting the title to said property, I agree that you may have the privilege of prosecuting said suits and perfecting the title of said real estate in whatever way is necessary to make good title, provided that you will give me a personal guarantee of yourself and F. P. Hall that you will hold me harmless by reason of any such liens or defect of title, until same are released or title perfected.

"This contract and agreement consists of two pages, executed in duplicate this February 25, 1925.

"J. N. Ward.

"We hereby acknowledge receipt of $1,000 paid by J. N. Ward on the above contract, which we have accepted and signed, on behalf of the Arkansas Cold Storage & Ice Company, this 25th day of February, 1925.

"J. H. McIlroy, Trustee.

"Approved, F. P. Hall, Trustee."

The testimony in this case shows that, after a survey was made and the controversy arose with reference to lot 11, the parties went ahead with the transaction and entered into an agreement and bill of sale to close the trade and to litigate the question as to the title to lot 11. The agreement and bill of sale is as follows:

"Whereas, the proposition of J. N. Ward to J. H. McIlroy, trustee, under date of February 25, 1925, relative to buying property of Arkansas Cold Storage & Ice Company at Fayetteville and Springdale, Arkansas, was accepted by J. H. McIlroy, trustee, and approved by F. P. Hall, trustee, and $1,000 was paid on said proposition.

"And whereas, by a warranty deed, the trustees under the agreement and declaration of trust dated May 15, 1922, and recorded in volume 207, at page 478 of the deed records of Washington County, Arkansas, have conveyed to J. N. Ward, trustee, lots 7 and 10, in block 6, in Fayetteville, Arkansas, and a part of lot 1 in block 7, in Fayetteville, Arkansas, more particularly described in said deed; also parts of lots 1 and 6 in block 1 of Holcomb's Addition to the town of Springdale, particularly described in said deed.

"And whereas it is the contention of the said J. N. Ward that he is entitled to have conveyed to him lot 11 in block 6 in the town of Fayetteville under the terms of said proposition made by him and accepted by the said McIlroy and Hall, trustee:

"It is agreed between the said J. N. Ward and J. H. McIlroy, William J. Hamilton, F. P. Hall, W. H.

McIlroy, Luke Powell and C. G. Dodson, trustees, that the said J. N. Ward may accept said warranty deed and pay the purchase price of the said property without waiving in any way his right to litigate his claim to said lot 11 under the terms of said proposition of February 25, and the said trustees hereby ratify and approve the acceptance of the said McIlroy and Hall of said proposition of February 25, 1925, and hereby agree that, by payment of the purchase price, said J. N. Ward shall not waive any of his rights to insist upon a conveyance from the trustees aforesaid of said lot 11, and said trustees shall not waive any of their rights under said contract of February 25, 1925, by acceptance of the payment, except that they shall not insist upon a repayment of the amount.

"And we, J. H. McIlroy, W. H. McIlroy, W. T. Hamilton, F. P. Hall, Luke Powell and C. G. Dodson, trustees, doing business under the name of Arkansas Cold Storage & Ice Company, by virtue of an agreement and declaration of trust, dated May 15, 1922, hereby transfer, assign and sell to the said J. N. Ward, for and in consideration of the sum of one dollar and other good and valuable consideration, the personal property of every kind and character belonging to us as trustees or to the Arkansas Cold Storage & Ice Company, located on the real estate conveyed by the said warranty deed, and also all personal property which was contracted for by us prior to February 23, 1925, and which has since been delivered and placed on said real estate so conveyed.

"And it is agreed between parties hereto that in all things said proposition of J. N. Ward, as accepted by J. H. McIlroy and F. P. Hall, is confirmed and made a part of this contract, a copy of which proposition and acceptance is hereto attached and marked Exhibit A.

"It is further agreed that, in the event the said J. H. Ward shall bring a suit on said contract of February 25, 1925, for lot 11, we will enter our appearance to said suit, and that said suit may be tried on the merits as to whether or not, under said contract, he was entitled to

said lot, without any claim or waiver on his part by paying the purchase price of said property, or any waiver on part of trustees by accepting it.

"In testimony whereof we have hereunto set our hands this 28th day of March, 1925.

"J. H. McIlroy,
"W. H. McIlroy,
"F. P. Hall,
"Wm. J. Hamilton,
"C. G. Dodson,
"Parties of the first part.
"J. N. Ward,
"Party of the second part."

The only controversy in this case is as to whether appellees conveyed lot No. 11. The testimony on the part of the appellees tends to show that, before any action looking to the sale of the property was made by appellees to appellant, appellees had sold lot 11 in block 6 to Sanford. They not only testified to this, but testified that this fact was stated to J. N. Ward, appellant, when he was on the deal for the property. Witnesses for appellant deny this. The testimony is in hopeless conflict, and it would serve no useful purpose to set it out at length.

The appellant's first contention is that the contract between the parties was in writing, and that parol evidence is inadmissible to vary or contradict the terms of the written contract. But does the oral testimony in this case vary or contradict the terms of the written contract? The contract says: "Confirming my proposition relative to buying the property of the Arkansas Cold Storage & Ice Company at Fayetteville and Springdale," etc. It would certainly require oral testimony to show what property the seller had, and oral testimony as to this does not vary the terms of the contract.

This court has recently said: "Parol evidence to vary the terms of a written contract is one thing, such evidence to enable the court to say what the parties to the contract intended to express by the language adopted in making it is quite another thing. The former is not per-

missible. The latter is permissible, and is often absolutely essential to show the real nature of the agreement. Both rules are elementary, and do not conflict in the slightest degree with each other. One prevents a written contract from being varied by parol evidence, either in regard to what was said at the time it was made or prior thereto; the other aids in determining what the contract is when its language, either in its literal sense or as applied to the facts, is obscure. The one rule is to preserve the contract as expressed in writing; the other is a rule of construction to determine what the contract, as expressed, is, it being kept in mind that the mutual intention of the parties, so far as the same can be ascertained, governs within the reasonable meaning of the language they chose to express it, and that rules of construction to discover it are not resorted to unless there is some ambiguity to be cleared up. A failure to keep in mind the wide distinction between varying a contract by parol evidence and resorting to such evidence in aid of its construction, often leads to error." *Brown & Hackney* v. *Daubs,* 139 Ark. 53, 213 S. W. 4.

If the appellant went to Fayetteville and looked at the property, and it was pointed out to him, and he was told that lot 11 had already been either conveyed or contracted and he knew that this was not included in the property which appellees were offering to sell, then certain parol evidence would be admissible to show the particular property pointed out to him, and, when he made his proposition in writing for the purchase of the property of appellees, it would necessarily mean the property pointed out to him and the property both parties had in mind. We therefore think the court did not err in permitting oral proof to enable the court to say what the parties to the contract intended to express by the language used.

Appellant's next contention is that the finding of the chancellor is clearly against the preponderance of the evidence. On appeal in chancery cases this court tries the issues *de novo,* and the findings of the chancellor are

always treated as persuasive, and his findings will be reversed only when this court can be convinced that they are clearly against the preponderance of the evidence. *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160; *Langston* v. *Hughes,* 170 Ark. 272, 280 S. W. 374.

This court has also said in determining the issues of fact by this court in chancery causes: "No weight is given to the findings of fact by the trial court unless the evidence is so conflicting as to leave the minds of this court in doubt as to where the preponderance lies. Where the evidence is evenly poised, or so nearly so that we are unable to determine in whose favor the preponderance lies, then the findings of fact by the chancellor are persuasive. * * * The rule was early announced, and has been consistently adhered to, that the findings of the chancellor will not be set aside by this court unless they are clearly against the preponderance of the evidence." *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160.

The testimony in this case was conflicting, and, after a careful consideration of the same, we are unable to say that the findings of the chancellor are clearly against the preponderance of the evidence. The judgment is therefore affirmed.

Mr. Justice HUMPHREYS did not participate in this case.

FENTRESS v. CITY NATIONAL BANK.

Opinion delivered January 24, 1927.

1. APPEAL AND ERROR—FORMER APPEAL—LAW OF CASE.—Where a case has been to the Supreme Court and been reversed, the law announced on the former appeal is the law of the case when it comes up on second appeal.

2. BILLS AND NOTES—BLUE SKY LAW.—In an action by the holder of note executed in violation of the Blue Sky Law (Crawford & Moses' Dig., § 751 *et seq.*) evidence that the holder knew of the condition of the corporation for whose stock the note was given was immaterial, since the only issue was whether the holder knew

that the note was given for stock sold in violation of the Blue Sky Law.

3. LICENSES—BLUE SKY LAW.—Where a corporation issued and sold stock in violation of the Blue Sky Law (Crawford & Moses' Dig., § 751, *et seq.*), and took the buyer's note, such note was void in the hands of an assignee with knowledge.

4. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Where there is any substantial evidence to sustain a verdict of the jury on question of fact properly submitted to it, the verdict will not be disturbed on appeal.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; affirmed.

Roy Gean, for appellant.

Cravens & Cravens and *James B. McDonough,* for appellee.

MEHAFFY, J. This is the second appeal in this case. When the case was in this court on appeal first (*City Nat. Bank* v. *Baum,* 166 Ark. 18, 265 S. W. 648), this court held that the note was void, and a recovery could not be had unless the bank was an innocent holder thereof. The court stated: "It follows therefore, from the decision in the Randle case, *supra,* that the payee in a note executed in violation of the Blue Sky Law cannot recover; but it also follows, from the case of *German Bank* v. *DeShon, supra,* that the right to recover on such a note will not be denied an innocent holder because the Blue Sky Law does not contain the declaration that contracts executed in violation thereof are void. The judgment of the court below will therefore be reversed, with directions to submit to the jury the issue whether the bank is an innocent holder thereof."

When a case has been in this court and reversed, the law announced in the former appeal is the law of the case when it comes here on the second appeal.

"Propositions of law once decided by an appellate court are not open to reconsideration in that court upon a subsequent appeal or writ of error." *Brown* v. *Zinc Co.,* 179 Fed. 309; *Hunt* v. *Illinois Ry. Co.,* 184 U. S. 77.

"An actual decision of any question settles the law in respect thereto for further action in the case." *Mutual Life Ins. Co.* v. *Hill,* 193 U. S. 551.

"Where the facts appearing upon a second appeal are the same as those upon a former appeal, the legal effect of the facts is determined by the decision on a former appeal, which is the law of the case for the second appeal." *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475, 96 S. W. 393.

The facts in the present case are substantially the same as the facts in the case heretofore decided by this court. It therefore follows that the law as announced in 166 Ark. 18, 265 S. W. 648, is the law of this case on this appeal.

It would be useless to set out the testimony at length. There was no dispute about the fact that the notes were given for stock issued by the corporation without having complied with the Blue Sky Law, and were therefore uncollectable, according to the opinion of this court, unless the plaintiff was an innocent holder. This was really the only issue in the case. Appellant offered to introduce evidence tending to show that the holder of the note had knowledge of the condition of the corporation selling the stock when appellee took the note. We think this was immaterial because, whether the corporation was solvent or insolvent, in good condition or bad condition, the note was uncollectable if the holder knew that it was given for stock which was issued and sold in violation of the Blue Sky Law. Appellant did not have to prove the condition of the corporation, did not have to prove any representations inducing him to purchase the stock. Even if the corporation had been solvent, and no matter how prosperous it may have been, if it issued and sold the stock in violation of the Blue Sky Law and took the note for said stock, the note was void, and, if the appellee knew these facts, it could not recover. It was admitted that the stock for which the note was given was sold in violation of the Blue Sky Law, and the court

instructed the jury that the burden was upon the appellee to show that it was an innocent holder.

The only thing necessary for appellant to show, in order to entitle him to a verdict, was that the appellee knew that the note was given for stock of the corporation which had been sold in violation of the law. Appellant offered no proof tending to show that the appellee knew of any fraud, or knew that the note was given for stock. On the contrary, the appellee's testimony tended to show that it was an innocent holder, and the question was submitted to the jury under instructions from the court telling the jury that the burden was on the appellee to show that it was an innocent holder. It was a question of fact submitted to the jury under proper instructions, and the jury found in favor of the appellee.

The appellant offered to show that he was approached by the secretary and treasurer of the Crystal Glass Company, solicited to buy stock, and that false representations about others purchasing stock and about the condition of the company were made to him, and that he took these statements into consideration when he bought the stock, but he did not offer any proof tending to show that the appellee knew that the notes were given for stock issued in violation of the statute.

There was also some proof that the president of the bank advised one witness to not purchase the stock, but this does not tend to prove that he knew that the note which the bank held was issued for stock. It would be useless to prolong the discussion, for, as we have said, it was a question of fact properly submitted to the jury, and, if there is any substantial evidence to sustain the verdict of a jury, it will not be disturbed on appeal. It therefore follows that the case must be affirmed.

NATIONAL LIBERTY INSURANCE COMPANY *v.* SPHARLER.

Opinion delivered January 24, 1927.

1. INSURANCE—WARRANTY CLAUSES—SUBSTANTIAL COMPLIANCE.—Under Crawford & Moses' Dig., § 6148, a substantial compliance with the fireproof iron safe and the unconditional ownership clauses of a fire insurance policy is sufficient.
2. INSURANCE—IRON SAFE CLAUSE.—Evidence *held* to show substantial compliance with the fireproof iron safe clause in a fire insurance policy where the insured's books were kept in an iron file lined with asbestos, if any ordinarily prudent person under like circumstances would have believed that it was fireproof.
3. INSURANCE—SOLE AND UNCONDITIONAL OWNERSHIP.—The sole and unconditional ownership of property, for the purposes of insurance, is in those upon whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real *bona fide* rights in the property insured.
4. INSURANCE—SOLE AND UNCONDITIONAL OWNERSHIP.—A condition in a policy of fire insurance that insured is the sole and unconditional owner of the property is substantially complied with where, of personal property insured for $2,100, a single item was subject to the vendor's reservation of title on which $20 was due, especially in view of the fact that insured did not know that the seller retained title.
5. APPEAL AND ERROR—INSTRUCTION—HARMLESS ERROR.—Where undisputed proof showed that the insured was entitled to recover on a fire policy, the giving of an erroneous instruction on the question of plaintiff's unconditional ownership was not prejudicial.

Appeal from Jefferson Circuit Court; *T. G. Parham,* Judge; affirmed.

McMillen & Scott, for appellant.

Rowell & Alexander, for appellee.

MEHAFFY, J. The appellees filed suit in the Jefferson County Circuit Court, alleging, among other things, that, on the 5th day of December, 1924, defendant executed and delivered to the plaintiff, Herbert S. Spharler, its policy of insurance for the sum of $2,100, wherein it agreed to insure the plaintiff for the space of one year from date, against loss or damage by fire, to the personal property located in building known as 2402 West 13th Avenue, Pine Bluff, Arkansas; $1,200 was on the general stock of merchandise, $800 on the store and office fur-

niture and fixtures, etc., and $100 on household goods. That the plaintiff paid the defendant a premium of $57.96; that the policy was a regular standard form. That, on December 26, 1924, the property was destroyed by fire; that plaintiff complied with the terms of the policy with reference to notice and proof of loss; that plaintiff, after the fire, had assigned his interest to H. H. Ferguson, trustee.

The answer admits the issuance of the policy; that it was a regular standard form; denies that the property was totally destroyed, and denies that plaintiff complied with the terms of the policy with reference to the notice or proof of loss. Defendant pleads especially the record warranty clause, and states that the plaintiff had not complied with the clauses mentioned in its answer.

The appellant, in its brief, says:

"We will discuss the issues raised on this appeal under the following heads:

"1. Was the assured required to comply with the record warranty clause in the policy?

"2. Was there a waiver of the sale and unconditional ownership clause in the policy?"

No other questions are argued in appellant's brief, except the appellant complains of instruction No. 3, requested by plaintiff and given by the court.

In determining the question as to whether the assured complied with the record warranty clause in the policy, it is important to keep in mind that a strict compliance is not required, but the statute itself provides that proof of a substantial compliance with the terms and conditions shall be deemed sufficient and entitle the plaintiff to recover in any such action.

The undisputed proof in the case shows that Mr. Tracy Mills, who had been in the insurance business for twenty-five years, went to plaintiff's place of business for the purpose of getting plaintiff to take insurance. Mr. Mills went back a second time and looked around, went into the feed-room, looked the stock over, asked and was told what it averaged. Plaintiff said: "After

looking the stock over and talking with me, he said $2,100 would be all he could write, and I told him the place would run much more than that." Mr. Mills, the experienced insurance agent, had made two trips to the place of business, had looked over the property to be insured, himself, and of course looked over it for the purpose of determining its value and how much insurance he could write, and then concluded, not from any representations made by the plaintiff, but from the examination of the stock himself, that he would insure it for $2,100. The proof also shows that the National Credit File was made of some kind of heavy iron, lined with asbestos, guaranteed to keep any set of books. It was purchased by the plaintiff with the understanding and belief that it was fireproof. While Mr. Mills, the insurance agent, says in his testimony that it was not, he also says that it might be called a fireproof safe, just as some light safe might be called fireproof. The testimony shows that plaintiff's safe or file was made of heavy iron and lined with asbestos. Fireproof does not mean that the safe would resist heat of any particular duration, but it means, at best, that it is constructed of fireproof materials, such as iron, lined with asbestos, as in this case. The insurance agent who sought and obtained the contract of insurance, as we have already said, inspected the goods to be insured on two different occasions. He was in the business, and had been for twenty-five years. The assured, of course, knew nothing about insurance. He made an honest effort to comply with the terms of the policy. He used a safe or file made of iron and lined with asbestos. He thought it was fireproof, and any ordinary person would have believed that it was a fireproof safe in the meaning of the policy. The testimony in this case shows that there was a substantial compliance with this provision of the policy. A substantial compliance is all that would be required, even without our statute, but the statute expressly provides that a substantial compliance only is necessary. Crawford & Moses' Digest, § 6148.

Not only that, but the insurance agent inspected the stock and everything he insured, and he evidently knew what sort of safe he had. Plaintiff testified that he kept a merchandise account, a list of his cash sales, and kept them in the National Credit File. He also testified that he kept his charge tickets in the same file; that this file is so constructed that you can keep a general set of books in it, and it is sold generally for that purpose.

Keeping the books in a fireproof safe or some secure place does not necessarily mean a place absolutely secure against fire, and, where the assured selects a place to keep his books and acts in good faith, and with such care as prudent men would exercise under like circumstances, this clause in the policy is not violated. A fireproof safe is one which is within the fair meaning of this clause if it is such as is commonly used, and such as, in the judgment of prudent men in the locality of the property insured, is sufficient, as it cannot be intended that an absolutely perfect safe shall be kept. In this case there was a substantial compliance with the record warranty clause, and, in addition to this, the insurance company's agent was present on two occasions and examined the property, and fixed the value of the property himself, and the policy was afterwards written and delivered to the assured. The assured never saw the policy, he states, until after he had signed the papers.

The appellant contends, in the second place, that there was no waiver of the sole and unconditional ownership clause in the policy. This court has several times held that this provision in the policy is valid, but, like the record warranty clause, a strict compliance is not required, only a substantial compliance.

"The just and reasonable purpose in requiring the insured to have the unconditional and sole ownership of the property insured is to give protection only to those upon whom the loss insured against would inevitably fall but for the insurance, and to avoid taking risks for those whose lack of interest or whose contingent interest in the property insured might tend to encourage care-

lessness or wrongdoing in the use or preservation of the property. By fair construction and intendment the 'unconditional and sole ownership' of property for the purposes of insurance is in those upon whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real *bona fide* rights in the property insured." 14 Ruling Case Law, p. 1052.

This court has held that, in case of conditional sale of personal property in which the title is reserved in the vendor until the purchase price has been fully paid, the vendee is not considered the sole and unconditional owner, although he would be liable for the price in the event of the loss of the property. Some authorities hold that the vendee in possession is the sole and unconditional owner in the sense of the provision in the policy, since, if destroyed by fire, the loss would fall on the vendee and not on the vendor, but, even taking the view that the vendor is the owner, and that the vendee is not the sole and unconditional owner, still we think the provision in the policy in this case was substantially complied with. When the insurance company, in response to plaintiff's motion to make its answer in this particular more specific, filed an amendment to its answer, it stated, "the plaintiff was not the sole and unconditional owner of the following property, included in his proof of loss, to wit: National Cash Register, National Credit File, Stimson Scales, Toledo Scales, bedstead and springs, 4 chairs, window curtains and shades, mattress and bed." Now, except those items, there is no contention that the plaintiff was not the sole and unconditional owner, and the undisputed proof shows that he was the sole and unconditional owner of most of the articles mentioned in defendant's amendment to its answer. The plaintiff, when the insurance contract was made, did not know that he was not the sole and unconditional owner of the others. The agent of the furniture company testified that the furniture company had a contract-retaining title, but that there was only a balance of $20.85 due. The plaintiff knew

he owed the furniture company something, but did not understand that the company retained title. There seems to be no question about the title to any other property, except the cash register. There was no controversy about the value of the property. The value of the property is shown by the proof at something over $3,000, and we think it would be unreasonable to hold that, when an insurance company writes a policy insuring a stock of merchandise and fixtures, the policy would be void because there might be one or two articles in the store which the assured had bought on conditional sale, the vendor retaining title, and especially in view of the fact that the assured did not know that the seller retained title. The insurance agent inspected all the stock and had an opportunity to know about it.

The object of the stipulation in the policy with reference to sole and unconditional ownership is to protect the company against taking risks on property for an amount disproportionate to the value of the interest of the insured.

Since, under the statute, strict compliance is not required, the unintentional error as to a very small portion of the property, as we have said, does not make the policy void. In this case there is no charge or evidence of any fraud or intention to deceive, but the only thing complained of, under this clause of the policy, is that there were one or two articles in the store to which the seller had retained title, and even this, it seems, was not known to the plaintiff.

The only other contention of appellant is that plaintiff's instruction No. 3, given by the court, was erroneous. Since we have held that there was a substantial compliance with the provision of the policy with reference to the sole and unconditional ownership clause of the policy, and the undisputed proof showing that the plaintiff is entitled to recover, the giving of an erroneous instruction by the court on the question of unconditional ownership was not prejudicial error. It therefore follows that the case must be affirmed.

ARKANSAS CONSTRUCTION COMPANY v. PIDGEON-THOMAS IRON COMPANY.

Opinion delivered January 31, 1927.

TRIAL—TRANSFER OF CAUSE—DISCRETION OF COURT—Whether to transfer a cause in chancery to the law court is a matter within the court's discretion where the motion was made after the cause was submitted and a decree had been pronounced but not entered.

Appeal from Jefferson Chancery Court; *H. R. Lucas,* Chancellor; affirmed.

Rowell & Alexander, for appellant.

McCULLOCH, C. J. Appellant, Arkansas Construction Company, under contract with Special School District of Pine Bluff, constructed additions and improvements to two separate school buildings in the city of Pine Bluff, and the other appellant, the Ætna Casualty and Surety Company, became surety on the bond of the contractor. Appellee, a foreign corporation, doing business in Memphis, Tennessee, furnished the structural iron and steel building material used by the Arkansas Construction Company in the performance of the contract, and this is an action instituted by appellee to recover the amount of balance alleged to be due. The total bill of the material furnished by appellee was $1,428.08, and, after allowing certain credits, not now in dispute, appellee recovered below the sum of $607.69. The action was instituted and tried in the chancery court. Appellants filed an answer, and went to trial without objection to the cause having been instituted in the chancery court, but, several days after the cause had been submitted to the court and decree had been pronounced, but before entry of the decree, appellants filed a motion to transfer the cause to the law court, on the ground that the court of equity had no jurisdiction. This was overruled, and decree entered, and an appeal duly prosecuted.

It is first contended that the court should have sustained the motion to transfer, even though it was filed after the court had announced its decree. We cannot

agree with counsel, for the motion came too late. It should have been presented before the submission of the case to the court, and especially before judgment had been pronounced. Of course, the court, even after pronouncing decree, could have set aside the same and granted the motion, if proper, but it was a matter of discretion with the court whether it would entertain the motion at that late date, hence we cannot say there was any abuse of discretion, after permitting the case to go to judgment. It is unnecessary to say whether or not the motion should have been granted if presented in apt time.

The only other question involved on the appeal relates to the amount of recovery. There is a dispute as to the terms of the contract between the parties and as to the prices to be paid for the material. Appellee contends that the aggregate contract price was $1,428.08, but appellants contend that the total price was $1,099.65, and admitted liability for a balance of $390. Appellants made a tender of that amount, which tender was refused. The inquiry therefore turned on questions of fact, and there was a conflict in the testimony. The testimony adduced by appellee was to the effect that the agent handling the matter for appellee, as salesman, entered into an agreement to furnish the material at reasonable prices, it being impossible to specify, in advance, the quantity of material and the prices. On the other hand, the contention of appellants was that appellee agreed to furnish the material "as low as anybody in Pine Bluff," and not exceeding a bid which the construction company had already received from a dealer in Pine Bluff, who had offered to furnish the material at an aggregate price of $1,099.65.

The court found in favor of appellants, that the contract was that appellee was to furnish the material for prices not exceeding the bid therefor which the construction company then had from the Pine Bluff Iron Works.

The court also found from the testimony that the bid of the Pine Bluff Iron Works "was incomplete, in that

it did not include all of the iron and steel which was used in the buildings."

It appears from the testimony also that, after the buildings were completed, or rather, after all the material had been furnished, appellee's agent presented a bill, specifying all the items, with prices extended on the bill, to the manager of the construction company, and that the latter agreed to pay the bill, and placed his O. K. thereon. The manager testified on behalf of appellants, and admitted that he placed his O. K. on the bill, stating that the prices were not marked thereon, and that he only approved the list of material furnished. There is a sharp conflict on this point between the agent of appellee and the manager of the construction company. But we are unable to say that the findings of the chancery court were against the preponderance of the evidence.

Decree affirmed.

WILLIAM W. COHEN & COMPANY v. AUSTIN.

Opinion delivered January 31, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S FINDINGS.—In an action to recover money advanced on cotton contracts and for fees for executing orders, where the issue as to the intention of the parties in the transactions was submitted to the jury, their findings on that issue, supported by evidence that the transactions were wagering contracts, are conclusive.
2. GAMING—RECOVERY ON GAMBLING CONTRACTS.—There can be no recovery on contracts which constitute gambling transactions.
3. EVIDENCE—PAROL EVIDENCE TO EXPLAIN WRITING.—In a suit to recover money advanced on cotton contracts and for fees in executing orders, the defense being that the contracts were gambling transactions, where the terms of the orders did not disclose the real intention of the parties, it was not error to admit testimony as to conversations and oral agreements prior to giving the orders, to show the intention of the parties in the dealings.

Appeal from Phillips Circuit Court; *E. D. Robertson*, Judge; affirmed.

A. D. Whitehead, for appellants.

W. G. Dinning, for appellee.

McCULLOCH, C. J. Appellants are copartners, members of the New York Cotton Exchange, and engaged in the brokerage business, buying and selling, for their customers, cotton and other products for future delivery. Appellee is a citizen and resident of Phillips County, Arkansas, and, in November and December, 1924, appellants executed for appellees, on the Cotton Exchange of New York, and in accordance with its rules, numerous orders for purchases of cotton for future delivery. The orders were given by telegraphic messages sent by appellee from Helena, Arkansas, to appellants in New York. Appellants charged certain schedule of fees for executing the orders, and also advanced considerable sums of money for appellee to cover margins, and the cotton so purchased by appellants for appellee was finally sold at a loss. Appellants instituted this action in the circuit court of Phillips County against appellee to recover the money advanced on the contracts and also unpaid fees for executing the orders. Appellee answered, alleging that the contracts were for purchases and sales of cotton futures on margin, without any intention to deliver or to receive the cotton. There is no controversy as to the amount due if the contracts were free from the taint of wager, and the sole question in the case is whether or not the evidence was legally sufficient to support the finding that the transactions were based upon wagering contracts—contracts involving purely deals in futures, as that term is ordinarily understood. The brief telegraphic communications between the parties disclose nothing more than orders for the purchases of cotton for future delivery, but appellee testified that he was in New York a few months before these transactions occurred, and called to see appellants, and arranged with them to carry out contemplated deals in the purchasing of futures. He testified that, in this conversation with appellants, the latter disclaimed carrying on any business in the handling of spot cotton, and declared they were solely "in the

contract business," and that it was agreed between appellee and appellants that, when orders should be sent in, they would be executed solely as contracts for purchases of cotton on margin and not for actual delivery. This testimony was contradicted by one of appellants, who stated that they had no conversation or communications with appellee other than those disclosed in the telegraphic messages.

The issue as to the intention of the parties in carrying on these transactions was submitted to the jury, and the evidence was legally sufficient to support the findings on that issue in favor of appellee, hence we must treat it as settled. If the testimony of appellee be accepted as true, there can be no doubt that the contracts were those which the law denounces as gambling transactions and void, and there can be no recovery based upon such contracts. The law is so well settled on that subject that discussion is entirely unnecessary. *Fortenberry* v. *State,* 47 Ark. 188, 1 S. W. 58; *Phelps* v. *Holderness,* 56 Ark. 283, 19 S. W. 921; *Barnes* v. *State,* 77 Ark. 124, 91 S. W. 10; *Clews* v. *Jamieson,* 182 U. S. 461; *Huff* v. *State,* 164 Ark. 211, 261 S. W. 654; *Mullinix* v. *Hubbard,* 6 Fed. (2d) 109; *Browne* v. *Thorn,* 272 Fed. 950.

It is contended, however, that the court erred in allowing appellee to testify concerning conversations and oral agreements or undertakings between him and appellants prior to the giving of the orders. The orders for the purchase of cotton were brief, and couched in such customary terms as would not disclose the real intention of the parties, and, if antecedent or contemporaneous oral agreements are inadmissible, there might not be any other way of proving the invalidity of the contracts. Such proof is not in conflict with the terms of the contract evidenced by the telegraphic messages, for those messages did not disclose the real intention of the parties in carrying on the transactions. It is clear, we think, that such testimony is competent, not for the purpose of contradicting the messages, but to show what the intentions

of the parties were in the dealings between them. *Clews* v. *Jamison, supra; Browne* v. *Thorn, supra.*

The case was properly submitted to the jury, and the evidence was sufficient to sustain the verdict.

Affirmed.

PHILLIPS v. BAKER.

Opinion delivered January 31, 1927.

SCHOOLS AND SCHOOL DISTRICTS—AUTHORITY TO ISSUE BONDS.—Acts 1925, p. 742, authorizing the board of directors of special school districts to borrow money and issue bonds "for the purpose of purchasing a school site or sites and building, erecting, constructing, repairing and equipping a school building or buildings and for other necessary purposes," *held* to authorize directors of a special school district to issue bonds for the purpose of making extraordinary repairs arising from some emergency such as damage by fire or storm, but not for the purpose of making ordinary repairs which merely constitute maintenance; the words "for other necessary purposes" relating to things embraced in the preceding enumeration under the doctrine of *ejusdem generis.*

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

Avery M. Blount, Golden Blount and *Grace M. Blount,* for appellant.

John E. Miller and *Cul L. Pearce,* for appellee.

McCULLOCH, C. J. Appellees are directors of the special school district designated as Higginson Special School District of White County, Arkansas, which was created by act No. 88 of the legislative session of the year 1907. Appellants are owners of property in the district and patrons of the school, one of them being a director. Appellees, as directors of the district, are about to issue and sell negotiable bonds in the sum of $20,000, and this is an action instituted by appellants to restrain the issuance of the bonds. A temporary injunction was issued at the commencement of this action, but, on final hearing, the complaint of appellants was dismissed for want of equity.

It appears from the pleadings and from the proof in the case, which was brought into the record partly by stipulation, that there are outstanding bonds of the district in the sum of $15,000, issued in the year 1917 for the purpose of erecting a school building, and there is also the sum of $900 unpaid interest on those bonds. It is conceded that the new issue of bonds is to be for the purpose of refunding the former issue, and it is alleged in the complaint of appellants that the remainder of the sum to be raised by the new bond issue is to be used as a maintenance fund for the operation of the schools in the district. There is a denial in the answer that any of the fund is to be used for the purpose of operating schools, and an allegation that the excess fund is to be used for the purpose of repairing the buildings. There are no specifications in detail as to what the repairs consist of or to what extent the buildings are out of repair.

There was an attack on the regularity of the proceedings looking to the issuance of the bonds, it being alleged that the resolution of the board of directors authorizing the bonds was not adopted at a regular meeting of the board, or at any special meeting of which the directors were notified. These questions were tried out on conflicting testimony, and it is unnecessary to discuss them—in fact, this attack seems to be abandoned here, and it is practically conceded that the only point sought to be raised here is that the bond issue is for an excessive amount and cannot be allowed over and above the amount necessary to retire the old bonds and interest.

We are of the opinion that this attack of appellants is well founded, and that there is no authority under the law to effect a bond issue in a greater amount than that stated above. The statute, which both parties concede is the governing one, is act 252 of the Acts of 1925, page 742, and reads in part as follows:

"The board of directors of any special, rural special or consolidated school district in the State of Arkansas shall have the power, and they are hereby authorized, to

borrow money for the purpose of purchasing a school site or sites and building, erecting, constructing, repairing and equipping a school building, and for other necessary purposes, including the issuance and sale of bonds for the purpose of extending the maturity of any indebtedness evidenced by outstanding bonds and interest coupons, and funding such outstanding bonds and interest coupons * * *."

Counsel for appellees endeavor to sustain the bond issue under the authority conferred in the statute, for "repairing" school buildings, but our conclusion is that, under proper interpretation of this word, as used in the statute, and under the facts of this case, there is no justification for issuing bonds for that purpose. We interpret the word "repairing" not to include ordinary repairs, which merely constitute maintenance, but it refers to substantial and extraordinary repairs arising from some emergency, such as damage by fire or storm. It does not include necessary repairs on account of ordinary depreciation. Counsel for appellees also rely on the use, in the statute, of the words "and for other necessary purposes," and they contend that these words should not be construed to relate to things of a like kind as those enumerated in the preceding words of the statute, for the reason that the preceding enumerated words embrace all the things capable of being classed as of that kind, and that the words "other necessary purposes" should be construed to relate to things of a different kind than those enumerated. *Mason* v. *Inter-City Terminal Railway Co.*, 158 Ark. 542, 251 S. W. 10.

We cannot say, however, as a matter of law, that the enumeration embraces all the things of their kinds, therefore the doctrine of *ejusdem generis* applies. We construe the words "for other necessary purposes" to relate solely to things of like kind as those embraced in the preceding enumeration.

The decree of the chancery court is therefore reversed, with directions to enter a decree restraining

appellees from issuing bonds in excess of the amount necessary to refund the old bonds and unpaid interest, which will include, of course, necessary expense of issuance of the bonds. It is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BARRY.

Opinion delivered January 31, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The Supreme Court will not set aside the verdict of a jury if there is substantial evidence to sustain it.
2. APPEAL AND ERROR—VERDICT—SUFFICIENCY OF EVIDENCE.—In determining the sufficiency of evidence to sustain a verdict, the Supreme Court must give the evidence its strongest probative force in favor of the verdict.
3. TRIAL—FUNCTION OF JURY.—The jury are the sole judges of the evidence and of the credibility of the witnesses.
4. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE AS DEFENSE.—Proof that plaintiff employee, injured while engaged in interstate commerce, was guilty of contributory negligence will not debar recovery by him where there was evidence that other employees were guilty of negligence which proximately concurred in causing the injury.
5. MASTER AND SERVANT—EMPLOYMENT IN INTERSTATE COMMERCE.—Evidence *held* to warrant a finding that an engine hostler taking an engine from the roundhouse to haul a train carrying interstate shipments was engaged in interstate commerce.
6. EVIDENCE—EXPERT TESTIMONY.—In an action by an employee for injuries resulting from a collision between locomotives, expert testimony as to the manner in which the collision occurred was incompetent, since the facts of the occurrence were not beyond the knowledge and experience of an ordinary man to understand and draw conclusions from them, when detailed by eye-witnesses.
7. TRIAL—INSTRUCTION—WAIVER OF OBJECTIONS.—Where specific objections were taken to an instruction, an objection not thus pointed out will be deemed waived.
8. DAMAGES—WHERE NOT EXCESSIVE.—$5,500 as damages for intense personal suffering, with permanent injury to the pelvis, *held* not excessive.

Appeal from Saline Circuit Court; *Thomas E. Toler,* Judge; affirmed.

E. B. Kinsworthy, for appellant.

Mehaffy & Mehaffy, for appellee.

WOOD, J. M. Barry instituted this action against the Missouri Pacific Railway Company, a corporation, to recover damages for personal injuries. He alleged in substance that, on August 20, 1924, he was employed by the Missouri Pacific Railway Company, a corporation, engaged in interstate commerce, and, as such employee, was engaged in interstate commerce in operating an engine and cars of the railroad company; that, while so engaged, another employee of the company operating another engine in defendant's yards near North Little Rock, negligently and wrongfully caused that engine to run against the engine operated by the plaintiff; that the collision thus caused by the other employee broke the steam-pipe on that engine, and plaintiff was thrown from his engine and scalded on his back from his neck to his feet, and thereby permanently injured, to his damage in the sum of $15,000, for which he prayed judgment.

The defendant answered, admitting that it was a corporation engaged in interstate commerce, but denied that plaintiff, at the time of his injury, was engaged in interstate commerce, and denied the allegations of negligence as specifically as they were alleged, and admitted that the plaintiff was in the employ of the defendant, and alleged that plaintiff was operating an engine in defendant's yards at North Little Rock, and that plaintiff negligently ran his engine against another engine, when plaintiff could have avoided the same by the exercise of ordinary care. The defendant alleged therefore that the plaintiff was injured by his own negligence, and that the plaintiff assumed the risk. The defendant also admitted that the plaintiff was injured, but denied that he was injured to the extent alleged in his complaint. The trial resulted in a verdict and judgment for the appellee in the sum of $5,500, from which is this appeal.

1. It is first contended by the appellant that the evidence is not sufficient to sustain the verdict. The facts are substantially as follows: A blue-print of a

plat was prepared by a civil engineer showing the location of appellant's tracks at Baring Cross, from the north abutment of its bridge over the Arkansas River to a point 1,500 feet north, which embraced appellant's roundhouse tracks and shop tracks. The blue-print shows all the tracks as they are located. It is impracticable to bring into this record a copy of this blue-print, which the jury had before it and which was used by the witness who prepared it, and others at the trial, in explaining the location of the tracks, roundhouse, bridge, switches, and showing the points, directions and distances incident to the occurrence under investigation. A copy of this blue-print is attached to the appellant's brief, and has been found useful to the court in considering the testimony of the witnesses concerning the movements of the engines and their collision, which resulted in the injury of which appellant complains.

The appellee was in the employ of the appellant as a hostler, whose duty it was to operate a switch engine on appellant's tracks in its North Little Rock yards. He had been in appellant's employ about twelve years, and had been engaged in hostling at the time of the accident sixteen months. He was thirty-four years of age. The appellee, at the time of the accident, had in charge engines numbered 9320 and 1505. These engines were fastened together at their front ends, and appellee was backing No. 9320 and pulling No. 1505, taking the same to the Fort Smith crossing to be hooked onto a train for Fort Smith. Both engines were ready for service. Coming out of the roundhouse, appellee went down to what is known as the "cross-over," where he would have to throw a switch to get on the cross-over track. After he got there, he would have to throw another switch to get on the south main line, and then, before he could get from the south main line to the north main line, he had to throw another switch. Appellee was going in a southerly direction. There was nothing to obstruct the view of the appellee in passing over the cross-over track on to the south main line, unless the engine itself obstructed

it. The switch stands at all the switches had lights on them, red on one side and green on the other. The green light indicates that the main line is open and the red light indicates that the switch is open. A man coming out, as the appellee was, when he looked at the switch lights could tell whether the track was open for him or not. The train that engine No. 1505 was to take out of the yards to Fort Smith was bound for Kansas City. It was an interstate train. The accident occurred at 8:55 P. M. August 20, 1924. The appellee had a helper named Dean, whose duty it was to take coal and water, and line (that is, throw) the switches for the hostler so that appellee could pass from one track to another. When appellee was about ready to start from the roundhouse with the engines, he told his helper that the passenger train was due pretty soon, and they would have to hurry, and he directed his helper to go line the switches. Appellee looked ahead, and his helper was standing right at the cross-over, and gave the appellee a highball signal to come ahead. Appellee proceeded to the cross-over track, and stopped right on the points. At that time he saw the other man enter on the bridge south. Appellee's helper walked up to the engine and asked if that wasn't the passenger train. Appellee looked ahead, saw it had a lantern on the pilot, and knew it was no passenger train. It was some other man from over the river bringing an engine. When appellee saw this man, he stopped his engine and told his helper it was a hostler coming over the river, and to go up there and throw the switch and flag him so that appellee could get out, and the other man could come in and get out of the way of the passenger train. Appellee knew the other engine was coming—it had a big headlight—but sent his helper to flag it. Appellee's helper did not flag appellee to come ahead, and he didn't flag the other man down. The last time appellee saw the light it was green, but he told his helper to go down there and turn it red. Appellee could see the headlight on the other engine plainly, and the other engineer could also see appellee.

It was the duty of appellee's helper to line up the switches and signal appellee to come on. He generally would go up there and line them all up and signal appellee. It was the duty of the helper, if there was any danger ahead, to tell appellee, but he didn't do so. It was appellee's duty to stop, and he did stop. Appellee saw the other man coming, and tried to beat him across the track. Appellee had a man out there to stop him, and appellee was going real slow—barely moving. Appellee was familiar with the rules of the company. Appellee could see over the end of the engine, except when he got on a curve; then he could not see. In going in these switches appellee had gone in there just as it had been done for the last five years. Other hostlers did the same. Appellee had instructions from his superior to that effect. The helpers, every one of them, got out there and would have to throw these switches. If this were not done, appellee could not get trains out. After this custom had gone on for a long time, they put up a bulletin to give the hostlers more chance to get out.

As soon as appellee's helper stepped off of the step, and, as he was going to the switch, appellee grabbed the whistle and sounded the other man down. As appellee looked out, his helper was stooping down making the switch, and, as appellee saw him do that, the tank of appellee's engine projected, and the switch light was thrown close to the line, and appellee could not see the switch light. As appellee's helper stooped down to throw the switch, the appellee was sure he threw it before he straightened up. Appellee started forward, and saw that the other man, whom he had told his helper to flag, did not stop. Appellee then put on air, reversed his engine, and started getting out of his way. The other man didn't stop. He was coming so fast appellee could not move fast enough to get out of his way, and appellee's tank projected out just enough to stop his engine, which came right by the cab. Appellee was standing in a position (which he indicated) trying to unhook the whistle cord to blow the whistle, but could not do so, and

the cord broke. About that time the other engine came by and broke some part of the pipes, and the steam struck appellee in the back and blew him out of the cab. It knocked appellee unconscious, and, when he came to himself, he was about twenty or thirty feet down the embankment. Appellee could not tell at what rate of speed the other man was coming, but he must have been moving pretty fast. Appellee had reversed his engine and had not had time to get up speed. He had moved his engine about a car-length from the place where he was when he saw the other man. The other engineer had ample time to stop his engine, after he saw where appellee was, if he had had his train under control. The other engineer could see appellee if he was looking out. Appellee could have stopped a 100-car train in that space. If the other man was taking cars to the Cotton Belt, he had to keep going on the northbound track until he got to the Cotton Belt Junction, a mile and a half away from where the accident occurred.

On May 23, 1924, the following bulletin was posted: "Effective May 25, switch tenders will be taken off at roundhouse lead at Little Rock. All trains will approach this cross-over under control." Having a train under control means being able to stop any distance where the engineer could see a rail broken; to have such control that the train could be stopped within the shortest time necessary in an emergency.

There was read to the jury the following rule of the company: "Rule 104A. A switch must not be closed for main track while a train, engine or car is outside of clearance point of the siding. Both switches of a cross-over must be open before a train starts to make a cross-over movement. Neither switch of a cross-over between two main tracks must be closed for a main track while a train, engine or car occupies such cross-over. A train entering a siding or moving through a cross-over between main tracks must not stop to pick up a man at switch while any part of train is between switch and clearance point of siding or between switches of the cross-over."

The bulletin posted on May 23, 1924, said nothing about rule 104, but it supersedes it, because it says, "Effective May 25, switch tenders will be taken off at roundhouse lead." They used to keep some of the old men there to throw the switches for the switch tenders, and the bulletin meant that these were to be taken off and the hostlers would have helpers to throw the switches. In North Little Rock all trains must approach the cross-over under control. The bulletin doesn't say anything about rule 104. The bulletin means that you were to go so slow you wouldn't hit anybody, and that superseded rule 104. Appellee's superior, the switching foreman, never told appellee not to obey rule 104, but he did tell appellee that the bulletin was put up there for the protection of the engineers, and for appellee to go right on out and get on to those switches ahead of other hostlers, all switch engines, and everything except passenger trains. When appellee got in a position where he could not see the switch stand, it was a danger sign, and was a signal for appellee not to come on until his helper flagged him. There was no signal that appellee could not see, but he had sent his helper there for the purpose of throwing the switch, and appellee was positive that he had done it. Appellee went on the main line without a signal from his helper. He expected his helper to throw the switch and flag the other man down.

The above is substantially the testimony of the appellee himself.

Another witness testified for the appellee, among other things, as follows: An engineer operating an engine going across the bridge north, from the time he left the bridge, could have seen an engine in the daytime coming towards the cross-over at the time it left the lead from the roundhouse, and in the night time he could not see so far. If he had his engine under control, he could have seen an engine at the cross-over in time to stop before striking him. This witness further testified: "If I was going along the main line like this party there, taking the cars to the Cotton Belt Junction, and the

switches were lined up for me, I would go ahead, but I would run under control. That would mean that I could stop if some one else got in the way." And further: "According to the rules that have been in force since they changed the helpers to white helpers, they hold the helpers somewhat responsible. That is, for lining up the switches and carrying out the instructions of the hostler. If the hostler told the helper to go in front of him and throw the switches, it would be the helper's duty to obey the hostler. The hostler takes signs and signals from the helper. If the helper flagged a hostler to stop, it would be the hostler's duty to stop."

Another witness for the appellee testified that the train that was to be taken out by the engine operated by the appellee was a train to Kansas City all the way through—it was billed for Van Buren, from there to Coffeyville, and on through. This witness further testified: "If a man is coming along the main line, and the switches show green, that indicates that the main line is open, which means that he can pass on, and if some one was not down there throwing the switch, he would have the right to go ahead. If the other man didn't throw the switch or flag him to stop, he would have the right to proceed. If I were a helper and the hostler told me a train was coming, and for me to go and throw the switch and flag him down, it would be my duty to do it."

H. A. Dean, a witness for the appellant, was asked to tell the jury how the accident occurred, and in answer stated: "We came out of the roundhouse intending to go to the crossing with two engines, with a switch engine and road engine, and we had the switch engine in the lead, and came up to the switches—to the cross-over switches. I lined the first switch and started for the second switch, and I saw this other engine coming across the bridge, and I didn't line the switch. I walked back and asked Mr. Barry if there were any passenger trains due. He said, "No, that is a hostler coming across the bridge," and he said, "Go ahead and throw that switch,

and we will go out ahead of it." So I walked back up a little, and I saw he was coming. I wouldn't give him a signal to come on out, and I wouldn't throw the switch, and he came out, and he came up, and he stopped his engine even with me, and he was at the cross-over at the time, and he told me to go and throw the switch and let's get out ahead of him, and at the time he was going out into the cross-over. I gave him a stop signal, and he stopped the engine even with me. I crawled up in the gangway of the engine and told him that that man wasn't going to stop, and that I wasn't going to throw the switch, and he kept moving on back, and asked me to go ahead and throw the switch; about that time they hit."

Further along in his testimony Dean was asked why he didn't flag the other fellow, and answered, "I flagged Barry, and it was right out there where they could all see it." He was then asked, "Didn't you flag the other fellow?" and answered, "One stop signal—it would have been just the same if I had flagged." He further stated that he was standing between the two main lines—didn't know whether the other fellow could see him or not. There were no obstructions. He gave the stop signals. This did not necessarily signal the other fellow. He was asked why, and answered, "If you are out on the railroad, and a stop signal is given, it necessarily means that any fellow that sees it stops." This witness further testified that it was his duty to obey the hostler's instructions, and that the appellee told him to go out there and line the switch, and he refused to do it. This witness, further on in his testimony, in answer to questions propounded by appellee's attorneys, stated that appellee had told witness to line up the switch and they would get out ahead of the other man. He didn't remember that the appellee told him to flag the other man, but stated, "If I had flagged the other fellow and he had obeyed my signal, I expect that it would have prevented the accident." Witness saw the other fellow coming, and heard what he thought was the appellee reversing his engine when witness jumped off the engine.

We have set out the testimony of the appellee and other witnesses tending to corroborate him and tending to support the verdict, and also excerpts from the testimony of the witness Dean for the appellant, which tends to sustain the verdict. We have set forth the testimony of the appellee and portions of the testimony of other witnesses tending to sustain the verdict and have not set forth the entire testimony in detail of appellant's witness Dean and other witnesses for the appellant, tending to show that the verdict was contrary to the evidence, for the reason that it is the established doctrine of this court not to set aside the verdict of a jury where there is any substantial evidence to sustain it. In determining whether the evidence is sufficient to sustain the verdict, it is our duty to give the evidence its strongest probative force in favor of the verdict. It is likewise a familiar and unvarying rule that the jury are the sole judges of the evidence and the credibility of witnesses. Applying these rules to the testimony above detailed, we are convinced that it was sufficient to sustain the verdict.

It may be conceded, for the moment, that the above testimony and other testimony for the appellant, not set forth in this opinion, was sufficient to prove that the appellee was guilty of contributory negligence, but this is not sufficient, under the Federal Employers' Liability Act, to prevent recovery by the appellee, provided the testimony was sufficient to justify the jury in finding that other employees of the appellant were likewise guilty of negligence which concurred proximately in causing the injury to appellee. Conceding that the testimony in this record is sufficient to warrant a finding that the appellee was guilty of contributory negligence in disobeying the rules of the company above set forth, which were made for the protection of its employees, the testimony was certainly sufficient to prove that the employees operating the engine which collided with the engine operated by the appellee, as well as the appellee's helper, were guilty of negligence which concurred with the negligence of the appellee, and that their concurring negli-

gence was the proximate cause of appellee's injury. The testimony warranted a finding that the hostler operating the northbound engine at the time of the collision was violating the rule of the company, shown by the bulletin, set out above, requiring that "all trains will approach the cross-over under control."

The testimony tended to prove that, if the engineer on the northbound engine had had his engine under control at the time he approached the cross-over, the accident would not have occurred, notwithstanding the contributory negligence of the appellee, if any, in violating the rule of the company set forth in rule of the company No. 104A, above. Likewise the jury might have found that, if the engineer of the northbound engine had kept the proper lookout, he could have seen the flag which appellee's helper had put out for the appellee, as it was "right out where all could see it," and likewise the stop signal given by the appellee, which meant that "any fellow that sees it stops." The appellant contends that the appellee, in going on to the cross-over until his engine got so far on the main line that the northbound engine collided with it, was guilty of contributory negligence, because rule 104A forbade appellee going upon the cross-over as the switch lights were turned against him. But the appellee himself testified that, when he saw the other engine, he stopped his own engine, and looked to see what it was, and told his helper that it was a hostler coming over the river, and for him to go up there and throw the switch and flag him, so that appellee could get out ahead, and the other engine could come in and get out of the way of the passenger train. The appellee saw the other engine entering the bridge and saw that it was not a passenger train, and he contended that he was violating no rule of the company in running his engine over the "cross-over switch" in the manner he was doing at the time of his injury, but that, on the contrary, it was his duty to "go right on out and get on to those switches ahead of other hostlers, all switch engines, and everything except passenger trains." There was testi-

mony tending to prove that, if rule 104A of the company forbade this, it had been abrogated by habitual disregard of the rule in the manner appellee was doing at the time of the accident, so long continued as to justify the inference that appellee's superior officers charged with the enforcement of the rule must have had knowledge of its violation, and that they had consequently acquiesced therein.

Now the testimony shows that it was the duty of the helper to obey the directions of the hostler. The helper, Dean, himself testified that such was his duty. Then, unless some rule of the company forbade the appellee from going upon the cross-over switch, it was the duty of the helper, Dean, to obey the directions of the appellee "to go ahead and line the switches and flag the engineer coming from across the river." The jury might have found that Dean, the helper, failed to discharge his duty in this particular, and that this failure so to do was negligence which concurred with the negligence of the engineer on the northbound engine. Therefore, even if the appellee himself might have been guilty of contributory negligence, the jury were clearly justified in finding from the testimony that the engineer on the northbound engine, and likewise appellee's helper, Dean, were guilty of negligence, which, concurring with the negligence of the appellee, was the proximate cause of the injury. Furthermore, the appellant is in no attitude to complain here that the undisputed testimony shows that the appellee, at the time of his injury, was operating his engine contrary to such rule. The appellant did not take this position in the court below, but, on the contrary, under proper prayers for instruction, asked the court to submit to the jury the issue as to whether this rule of the company had been abrogated, and, if not, whether the same had been violated, which prayers for instructions the court granted. It is therefore wholly immaterial, under the Federal Employers' Liability Act, whether or not the appellee was guilty of negligence which contributed to produce the injury. In § 3 of that act it is

provided, among other things, as follows: "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employees." This statute, says Ritchey, "rejects the common-law rule and adopts another deemed more reasonable. Under this clause, it has been held that contributory negligence does not, in any case, defeat a recovery, but only diminishes the amount of damages." Ritchey on Federal Employers' Liability Act, p. 152, § 64. Numerous Federal and State cases are cited in notes to support the text, among them *St. Louis, I. M. & S. Ry. Co.* v. *Sharp,* 115 Ark. 308, 171 S. W. 95, where we said: "Under that statute, contributory negligence does not bar recovery, whether it be the violation of the rules or some other act of negligence."

As we view the testimony and the above authorities, the appellee is entitled to recover, even though he himself was guilty of contributory negligence. But it occurs to us that the testimony was sufficient to warrant the jury in finding that the appellee was not guilty of contributory negligence.

The appellee testified that he directed his helper "to line the switches and flag the other fellow," and that his helper went forward and was "stooping down making the switch" when appellee's engine went upon the cross-over. The helper passed out of sight of appellee, because the tank of his engine obstructed his view, but the helper was supposed to have thrown the switch. This and other testimony of appellee made it a question for the jury as to whether appellee was guilty of contributory negligence.

The testimony was sufficient to warrant the jury in finding that the appellant, at the time of the injury to appellee, was engaged in interstate commerce, and that the appellee at that time was also engaged in such commerce. He was moving an engine which was to pull a freight train of appellant in which there were cars bound for destination outside of the State. These,

together with the measure of damages applicable in such cases, were issues of fact for the jury, and were submitted under correct declarations of law, which we have carefully examined. It would unduly extend this opinion to set them out and comment upon them.

2. Counsel for appellant asked skilled engineers and an experienced foreman of a wrecking crew questions which elicited their opinion as to the manner in which the collision occurred, from their observation of the cross-over, the marks on the engine, and the blue-print drawing representing the two engines and the cross-over. The subject-matter of these questions did not call for the opinion of experts. The facts of the occurrence were not beyond the knowledge and experience of any ordinary man to understand and draw conclusions from them, when detailed by eye-witnesses. Therefore the expert testimony was not competent, and the court did not err in so holding.

3. The court, in the first instruction given at the instance of the appellee, told the jury, in effect, that, if the appellee was injured while his engine was engaged in interstate commerce, and his injury, in whole or in part, resulted from the negligence of appellant or any of its agents or employees, then the verdict must be in favor of the appellee. The only defect in the instruction is that it omitted the submission to the jury of appellant's defense of assumption of risk by the appellee. But the appellant, while making specific objection to the instruction on various other grounds, did not object to it on this ground. Therefore this objection was waived by the appellant. Furthermore, other instructions correctly submitted this issue, and the court told the jury, in an instruction on its own motion, that all the charge must be taken and considered as a whole; that none of the instructions could be considered singly.

General and specific objections are made to all the instructions that were given by the trial court, and likewise objections were made to the rulings of the court in refusing certain prayers for instructions asked by the

appellant and in modifying and giving certain prayers as modified. We have carefully examined all of these objections, and find no errors in the rulings of the court in its charge to the jury. Taken as a whole, the charge fully and correctly stated all the issues presented by the pleadings and the testimony adduced to sustain the respective contentions of the parties. The charge announced familiar principles of law, and no useful purpose could be subserved in setting out and commenting upon each particular instruction in detail.

4. The verdict was not excessive. The physician who treated the appellee testified that he was burned from his shoulders to his buttock. An X-ray picture showed that one hip was higher than the other, and that there was a deformity of the pelvis—a small callus on the right side—showing that appellee had an injury of the pelvis and backbone. The deformity of the pelvis would always remain. The witness could not say that this injury was caused by the accident. The appellee's testimony, however, showed that, when the pipe on the engine was broken, the steam blew him out of the cab, knocking him unconscious. He could not move for ten days—had to lie on his stomach and chin. His back and right leg still hurt him. He could not do as much now as he did before the accident. He was strong and healthy before the accident—weighed 180 pounds, and now weighed 144 pounds. The jury might have found from the testimony of the appellee that the injury to his back and pelvis was the result of the accident. Appellee's sufferings were most intense. Certainly it cannot be said, under these circumstances, that the amount of the verdict was excessive.

The record as a whole presents no reversible error. The judgment is therefore affirmed.

MEHAFFY, J., not participating.

GORHAM v. HALL.

Opinion delivered January 31, 1927.

1. ABATEMENT AND REVIVAL—INTERVENTION.—One who becomes party to a suit to cancel a note and mortgage, alleging by way of intervention that he purchased same for value and without notice of defects and asking foreclosure, is in effect a plaintiff, and, upon his death, the cause should be revived against his personal representative, as provided in Crawford & Moses' Dig., § 1066.
2. PARTIES—INTERVENTION DEFINED.—Intervention is a proceeding in a suit or action by which a third person is permitted by the court to make himself a party for the protection of some right or interest alleged by him to be affected by such proceeding.
3. ABATEMENT AND REVIVAL—INTERVENER AS PLAINTIFF.—One who, by leave of court, files a complaint or pleading asking for affirmative relief independent from that of the plaintiff or defendant in the original action, or against either or both, is an intervener, and should be classed as a plaintiff rather than a defendant as affecting revival of the action, under Crawford & Moses' Dig., § 1066.

Appeal from Newton Chancery Court; *Sam Williams,* Chancellor; affirmed.

Powell, Smead & Knox and *C. E. Wright,* for appellant.

Goodwin & Goodwin, for appellee.

WOOD, J. This action was instituted by the plaintiff against J. W. Hall to cancel a note and a mortgage given to secure the same, on the ground of fraud alleged to have been perpetrated by the defendant in procuring the note and mortgage by false representations. The defendant denied specifically the allegations of fraud, and set up that he had sold and transferred the note and mortgage to A. Henson. A. Henson filed an intervention in the cause, in which he alleged that he had purchased the note and mortgage from the defendant in the action for a valuable consideration without notice of any defects therein. He set out in his intervention the note and mortgage, alleged that the note had not been paid, that the conditions of the mortgage had been broken, and prayed that, upon final hearing, he have judgment for the

amount of the note and that the mortgage be foreclosed to satisfy the same. The plaintiffs answered the intervention of A. Henson, in which answer they admitted the execution of the note and mortgage, but denied that the same had been transferred to the intervener, A. Henson, for a valuable consideration, and alleged that Henson was not an innocent purchaser of the note and mortgage, and that the assignment to him was made in full knowledge of plaintiffs' rights and in collusion with Hall, with the fraudulent intent to defeat the plaintiffs' action. The plaintiffs prayed that the intervention be dismissed and that they have the relief prayed for in their original complaint.

A. Henson, the intervener, died, and E. W. Henson, administrator of the estate of A. Henson, appeared in court and suggested the death of A. Henson, and moved that the cause be revived and proceed in the name of E. W. Henson as administrator. The court's decree recites that the cause came on to be heard upon its regular call and that, upon the death of A. Henson, the cause was revived in the name of E. W. Henson, his administrator; that the plaintiffs failed to appear, and that the cause was thereupon heard upon the complaint, the answer, and the intervention of A. Henson after revival of the cause in the name of his administrator, and upon the exhibits. A decree was rendered in favor of the administrator of Henson, deceased, against the plaintiffs for the amount of the note, and directing that the mortgage be foreclosed to satisfy the same. From that decree is this appeal.

The only question raised by this appeal is whether or not the court erred in reviving the cause, under the facts stated, in the name of the administrator of the estate of A. Henson, deceased, and in entering a decree in his favor against the appellants.

Section 1066 of Crawford & Moses' Digest provides: "An order to revive an action in the names of the representatives or successor of a plaintiff may be made forthwith," etc. Learned counsel for the appellants con-

tend that this section has no application, because, as they assert, A. Henson, the intervener, should be classed as a defendant in the action rather than a plaintiff, and that the action should have been revived under other sections of the statue, which were not complied with. We do not concur in this view. While A. Henson, in his complaint, designates himself as the "interpleader," his complaint is not technically an interplea and his action an action of interpleader. See 33 C. J. 418 *et seq.* But, while he calls himself the interpleader, he properly designates his pleading as a plea of intervention. "Intervention," in practice, "is a proceeding in a suit or action by which a third person is permitted by the court to make himself a party. In practice an intervention is the admission by leave of court of a person, not an original party to the pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceeding. Literally, an intervention means the act or fact of intervening; any interference that may affect the interest of others—interposition. Webster's International Dict.; 33 C. J. 476. See also 20 R. C. L. 682, where "interpleader" and "intervention" are defined and the distinction drawn between them.

Under the above definitions, A. Henson must be classed as an intervener. We have no statutory definition of "intervention" or "interpleader," but the above definitions indicate that one who, by leave of court, files his complaint or pleading asking for affirmative and independent relief from that of the plaintiff or defendant in the original action, or against either or both of them, is an intervener and should be classed as a plaintiff, rather than a defendant. The complaint of A. Henson shows a plea of intervention in which he sets up that he is an innocent holder for value of the note and mortgage, and asks that the same be foreclosed. He thus, in effect, asks affirmative relief against both the original plaintiffs and the defendant in the action. While he occupied the same adverse position to the plaintiffs as the defendant in the

original action, his alleged purchase for value without notice gave him rights independent and adverse to both the plaintiffs and defendant in the original action, and gave him the right, as intervener and plaintiff, to affirmative relief against both of them, which he sought and obtained in the decree from which this appeal is prosecuted. The position of A. Henson in this case is analogous to that of an intervener in an attachment suit.

In *Jones* v. *Seymour*, 95 Ark. 593-595, 130 S. W. 560, we said: "In the trial of an intervention in an attachment suit, the intervener becomes in effect the plaintiff." So here A. Henson, the intervener, becomes in effect a plaintiff in the action, and the court therefore, upon the suggestion of his death by his administrator, did not err in reviving the action forthwith in the name of his administrator, under § 1066, C. & M. Digest, *supra*.

The decree is in all respects correct, and it is therefore affirmed.

J. B. COLT COMPANY v. PINKERTON.

Opinion delivered January 31, 1927.

BILLS AND NOTES—PATENTED ARTICLE.—In an action on a contract and note given for a patented article, it was error for the court to direct a verdict for defendant if the note did not show on its face that it was executed in consideration of a patented article as required by Crawford & Moses' Dig., § 7956, thereby in effect taking away from the jury the issue whether defendant was indebted to plaintiff on the contract aside from the note.

Appeal from Nevada Circuit Court; *James H. McCollum*, Judge; reversed.

H. E. Rouse and *J. D. Montgomery*, for appellant.

WOOD, J. The original complaint and amendment thereto show that this is an action by the plaintiff against the defendant on a contract and note evidencing the purchase by the defendant from the plaintiff of "one carbide generator and attachments, including fixtures, burners, globes, stovepipes, fittings, and other supplies." The purchase price of the articles listed was $259.75, evi-

denced by a note and contract executed for that amount. The contract was evidenced by an order of the defendant, the purchaser, who lived at Rosston, Arkansas, to the plaintiff, the seller, at New York, New York, which was accepted at New York May 5, 1919. On August 8, 1919, the defendant executed a note in the sum of $259.75, on which there was a payment of $50 on October 13, 1920, and a renewal note taken May 16, 1922. This latter note was the one upon which the original complaint was based, and the complaint was amended, setting up the contract and the renewal note, and praying judgment in the sum of $233.80.

The answer admitted the execution of the note, and alleged that it was invalid because given for a patented article; that the note is not on a printed form, and does not show upon its face that it was executed in consideration of a patented machine, in compliance with § 7956, C. & M. Digest. The answer also alleged that the carbide generator was guaranteed by the plaintiff, and that same proved to be worthless within a short time after it was purchased. By an amendment to his answer the defendant, on July 14, 1925, pleaded that the action was barred by the statute of limitations.

The plaintiff introduced the note and contract upon which the action was bottomed, and testified that the amount was due as alleged in the complaint. The testimony for the plaintiff tended to show that the parts of the carbide generator were patented at one time, but that none of the articles sold were completely covered by patent. The parts of the machine were patented by different people and patents. Witness could not say what articles were patented, or give the number of the patents. As late as August 1, 1922, the appellee promised to pay the balance due, and made no complaint at that time of the generator which had been installed, and was in use and in good condition.

There was a statement in the record to the effect that the generator was installed July 8, 1919, and that the same was complete and satisfactory. The plaintiff was a

New Jersey corporation, having its principal place of business in New York City. It only transacted interstate business in Arkansas. All orders received were accepted outside of the State and the goods were shipped from New York to Arkansas. There was testimony on behalf of the defendant tending to prove that the generator was operated satisfactorily from July 9, 1919, until February, 1920; that it gave satisfaction for seven months. The defendant moved and had it installed a second time, after which it was operated for about three months. The defendant discovered that it was rusty about a month after he moved it. Over the objection of plaintiff, the defendant testified that it states on the generator "fully protected by patent throughout the principal countries of the world." The defendant signed the renewal note May 16, 1922, and paid the plaintiff $50 on the original note and contract.

The plaintiff prayed the court to instruct the jury as follows:

"No. 1. You are instructed to find for the plaintiff.

"No. 2. If you find from the evidence in this case that defendant, more than a year after he received the articles set out in the contract, made payment thereon, and executed a renewal note for the balance due, you are instructed that this was a complete acceptance on the part of the defendant, and that he waived any breach of warranty on the part of the plaintiff, and you will find for the plaintiff."

The court refused the above prayers for instructions, to which ruling the plaintiff duly excepted.

The court, on its own motion, gave the following instruction:

"Gentlemen of the jury: If you find from a preponderance of the evidence in this case that the note that has been introduced in evidence, under which this suit was brought, was executed in consideration of a patented article, and that said note does not show upon its face that it was executed in consideration of a patented

article, machine or implement, then your verdict will be for the defendant."

The plaintiff duly excepted to the ruling of the court in the giving of the above instruction on its own motion. The jury returned a verdict in favor of the defendant. The plaintiff moved for judgment notwithstanding the verdict, which motion the court overruled. Judgment was entered in favor of the defendant, from which is this appeal.

Although the note in controversy was void because not executed in compliance with § 7956 of C. & M. Digest, nevertheless the court erred in instructing the jury, on its own motion, that, if the note was not executed in compliance with the statute, the verdict should be in favor of the defendant. This was, in effect, a peremptory instruction to return a verdict in favor of the defendant if the jury found that the note on its face failed to show that it was executed for a patented article, and, if they so found, had the effect of taking away from the jury the further issue as to whether or not the defendant was indebted to the plaintiff on the contract.

In the recent case of *J. B. Colt Company* v. *Mitchem, ante*, p. 55, after reviewing former decisions of this court reiterating the doctrine therein announced, we said: "This court is committed to the doctrine that the main purpose of the act was to enable the maker of a negotiable instrument, given for patent rights or patented articles, to make the same defense thereto, against any holder thereof, that could be made against the original holder or party to whom it was given. [Citing cases]. Hence it is held in these cases that the failure to comply with the statute does not affect the validity of the sale, but renders only the note absolutely void. It has been held further that, though the note may be void, the vendor may recover whatever may be due him on the contract of sale from the vendee."

In the case of *Brenard Manufacturing Co.* v. *McRee's Model Pharmacy,* 171 Ark. 978, we held that the court erred in giving an instruction similar to the one in the case at

bar. In that case, as in this, the suit was originally brought on the note, but the complaint was subsequently amended, in which amendment a recovery was sought alone upon the contract, and we said: "While a suit upon the note and upon the contract of sale are entirely separate and distinct causes of action, the effect of the defendant's answering the complaint and defending the action entered its appearance."

Therefore it follows in the case at bar that, although the note which was the foundation of the original complaint was void, nevertheless the amendment to the complaint and the answer thereto should be treated as raising the issue as to whether or not the appellee was indebted to the appellant on the contract. While we find no error in the rulings of the trial court in submitting to the jury the separate issue as to whether or not the appellee was indebted to the appellant on the contract of sale, nevertheless it is impossible to determine, under the erroneous instructions of the court, whether the jury's verdict was bottomed on the issue of whether or not the note was void or whether or not the appellee was indebted to the appellant under the contract. The court should have instructed the jury that, if they found that the note was void because it failed to comply with § 7956, *supra,* then their verdict should be in favor of the appellee, unless they found that the appellee was indebted to the appellant on the contract, in which event their verdict should be in favor of the appellant.

We find no other error in the rulings of the trial court, but, for the error in giving the above instruction on the court's own motion, the judgment is reversed, and the cause remanded for a new trial.

ARKANSAS BRICK & TILE COMPANY v. CRABTREE.

Opinion delivered January 31, 1927.

COURTS—AFFIDAVIT FOR APPEAL—WAIVER.—Where plaintiff recovered judgment against defendant in a municipal court, and defendant appealed to the circuit court without filing the affidavit for appeal required by Crawford & Moses' Dig., § 6513, and Acts 1915, p. 347, § 9, and plaintiff *in limine* objected to the jurisdiction of the circuit court, he will be *held* not to have waived the failure to file the affidavit for appeal, and such failure is ground for dismissal.

Appeal from Phillips Circuit Court; *E. D. Robertson,* Judge; reversed.

A. D. Whitehead, for appellant.

W. G. Dinning, for appellee.

WOOD, J. The Arkansas Brick & Tile Company instituted this action in the municipal court of Helena, Arkansas, against G. W. Crabtree to recover the sum of $108.48 on an alleged check given by the defendant to the plaintiff. Judgment was obtained for the above amount in the municipal court. The defendant prayed and was granted an appeal to the circuit court. An order was entered in the circuit court reciting that the cause had been appealed from the municipal court of the city of Helena, Arkansas. The plaintiff moved to dismiss the appeal on the ground that the transcript "sent up from the municipal court does not show that an affidavit for an appeal was filed in the said court, as required by the first paragraph of § 6513 of Crawford & Moses' Digest."

The circuit court overruled the motion to dismiss, and the plaintiff duly excepted to the court's ruling. The cause thereupon proceeded to a hearing, and judgment was rendered in favor of the defendant, from which the plaintiff duly prosecutes this appeal.

The law requires an affidavit for an appeal from a justice court to the circuit court as a prerequisite to the circuit court's jurisdiction to entertain an appeal, and, unless waived, is ground for dismissal. Section 6513, C. & M. Digest; *Merrill* v. *Manees,* 19 Ark. 647; *Billingsley* v. *Adams,* 102 Ark. 511. The appellant *in limine*

objected to the jurisdiction of the circuit court, and therefore did not waive the affidavit for appeal. See *Elder* v. *Crabtree,* 59 Ark. 177; *Lochridge Dry Goods Co.* v. *Daniels,* 115 Ark. 423-429. This is likewise the law as to appeals from municipal courts. Act 87 of the Acts of 1915, § 9, p. 342-347.

We find no affidavit for appeal in this record. This is not a case where a defective affidavit was filed, but where there is no affidavit at all. The judgment is therefore reversed, and the cause is remanded, with directions to the trial court to require the municipal court to amend the transcript so as to show that an affidavit for appeal was made, if it can be done consistently with the truth, and that the cause be tried *de novo.* But, upon failure of the appellee to thus perfect his transcript, the same shall be dismissed by the trial court. See *Merrill* v. *Manees, supra,* at page 649.

NEW UNION COAL COMPANY *v.* SULT.

Opinion delivered January 31, 1927.

1. MASTER AND SERVANT—SAFE PLACE TO WORK.—A mine owner owes to its employees in its mine the duty to use ordinary care to furnish a safe place to work in and keep the place in a safe condition.
2. MASTER AND SERVANT—SAFE PLACE TO WORK.—The owner of a mine is bound to exercise ordinary care, even if props have not been demanded, to discover the condition of the mine, and, even if props have not been demanded, to discover the condition of the roof and to keep same in reasonably safe condition for its employees to work in the mine.
3. MASTER AND SERVANT—SAFE PLACE TO WORK—EXCEPTION TO RULE. —The rule that a mine owner owes his employees the duty to use ordinary care to furnish a safe place to work in is subject to an exception where the injuries result from changed conditions brought about by the servant in the course of his work.
4. MASTER AND SERVANT—SAFE PLACE TO WORK.—In an action by a coal loader in a mine for injuries sustained by a rock falling through a roof of the mine, alleged to have been caused by a crack in the roof or by defective propping, defendant was under the duty to furnish plaintiff a safe place while engaged in his

work; plaintiff not being required to inspect the roof to see if it is safe for him to begin work.

5. MASTER AND SERVANT—SAFE PLACE TO WORK.—In an action by a coal loader against a mine operator for injuries sustained by a stone falling through the roof of the mine, evidence showing that the fall was caused either by an old break in the roof or a defective propping due to negligence of fellow-servants *held* to sustain a recovery by plaintiff.

6. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT.—Where it was the duty of machine operators in a mine, who cut the ground under a vein of coal, to prop the roof to make working conditions safe for loaders who were to follow them, failure of the operators to perform their duty constituted negligence on the master's part.

7. MASTER AND SERVANT—SAFE PLACE TO WORK.—In an action by a loader in a coal mine for injuries from a rock falling from a roof insufficiently propped, the fact that the rule requiring the machine operators to prop the roof was adopted under a contract between the employer and the employees, and not under a rule voluntarily prescribed by the employer, does not relieve the employer from liability for the negligence of the machine operators.

8. MASTER AND SERVANT—DUTY TO MAKE RULES.—The operator of a coal mine owes to its employees the duty of making rules necessary to insure the safety of employees, and to inform the employees of such rules.

9. MASTER AND SERVANT—INDEPENDENT CONTRACTORS.—Machine operators employed by a mine owner, subject to its control as to the manner of doing the work, are not independent contractors.

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

STATEMENT OF FACTS.

This action was instituted by John E. Sult against the New Union Coal Company to recover damages for injuries received by him by a rock falling from the roof upon him while working as a loader in a coal mine.

The negligence alleged is that the defendant permitted its mine roof, in the room where the plaintiff was at work loading coal, to become unsafe. The negligence alleged is that the defendant failed to properly cap, brace and prop the roof of the mine at the place where the plaintiff was working. The defendant denied the allegations of the complaint, and pleaded assumed risk.

At the time of his injury, on October 15, 1923, John E. Sult was an experienced loader and was a member of the United Mine Workers, District 21. There was a contract between District 21 and the New Union Coal Company. The contract provided that the machine crew shall be composed of two men. Another paragraph of the contract reads as follows: "It shall be the duty of the machine crew to undermine the coal, mining same as near bottom of coal as practical; all machine cuttings and other dirt created by the operation of the machine shall be moved by the loader, leaving the place cleaned up ready for the machine, and removing all such dirt to a distance of not less than four feet from face of coal and five feet from the roadbed. If the loader leaves any excess dirt, the company shall clean up same, charging such expense to the loader leaving said dirt. It shall be the duty of the machine crew to set such props and sprag such coal as may be necessary to make the roof reasonably secure and safe immediately after the coal has been cut."

Under the head of "Rules for Loaders," we copy the following: "It shall be the duty of the loader to build packwalls, remove coal sprags to drop the coal, and set such permanent props to make the place safe as shall not impede the operation of the machines. He shall also set temporary props to make the place safe prior to the operation of the machine. He shall also clear his place of all draw slate and clod prior to the operation of the machine.

"Note: In case any loader does not clean up the place in which he is working, as prescribed in the above paragraphs, the company shall clean up the same at the expense of said loader."

The length of the block of coal in the room where the plaintiff was working when injured was fifty feet, and the vein was about twenty-eight inches thick. A machine operated by two men is used to cut away the earth at the bottom of the vein of coal. The idea is to cut as near the bottom of the vein of coal as you can without cutting the

coal itself. When the machine cuts under the coal, it sometimes cuts in the coal and sometimes the earth underneath. Sometimes it cuts a little in both. The ordinary depth of a cut is about thirty inches. The machine cuts the earth and the coal for a depth of from two to four inches, and the machine crew leaves the dirt, muck and coal from the cut on the floor. Sprags are then placed in the opening to hold up the vein of coal. A "sprag" is a piece of timber used as a prop. As soon as the cutting in the face of the coal is made by the machine, props are placed on the floor of the mine extending to the roof to hold it up while the coal is being mined and loaded in the car. It is the duty of the machine operators to set the props about three feet apart and about four or six inches from the face of the coal. They take a capboard and rake away the cuttings and set the props on the solid bottom of the mine. It is made tight with capboards. Sometimes capboards are placed both on top and beneath the props. The props are wedged in tight to hold up the rocks in the roof of the mine and to keep the coal from knocking them over when the sprags are pulled out by the loader for the purpose of allowing the vein of coal to fall down. When the loader goes in the room for the purpose of loading the coal, it is his duty to clean up after the machine crew. He takes the cuttings and piles them up against the props where they had been placed by the machine operators on the previous trip. The "gob" is a space between the face of the coal and where the props had been set by the machine operators on the previous trip. It would be about thirty inches wide and between thirty and thirty-four inches high. When the loader goes into the room, it is his duty to place the cuttings from the machine, which consist of earth, muck, rock and coal, into the part of the gob opposite the face of the coal. In other words, it is piled into a wall on the opposite side of the gob from where the loader is working. So, too, it is the duty of the loader to pile up any props that may have been left by the machine men. When this has been done, he begins his work as loader. He accomplishes this by

pulling out the sprags so that the vein of coal will fall down and break into pieces on the floor of the gob. The loader then puts the coal in a car.

The plaintiff had loaded all the coal on the right-hand side of the room before he was injured. When he commenced to work on the left-hand side, he pulled out the sprags, and this caused the vein of coal to fall down. A large rock in the roof of the mine fell upon the plaintiff, knocking him down and seriously injuring him. He was rendered unconscious for a time. The rock in question was about five feet long, three feet wide and seven inches thick at one end. It tapered off to a feather-edge of the end of the rock near to the gob wall. The thick end of the rock was near to the face of the coal where the plaintiff was working. There was evidence adduced by the plaintiff tending to show that there was an old crack in the rock next to the gob wall. The evidence for the plaintiff also showed that the props where he was working were set in a negligent manner by the machine operators. The evidence on this point will be stated more fully under an appropriate heading in the opinion.

The evidence for the defendant tends to show that there was no negligence on its part whatever.

The jury returned a verdict in favor of the plaintiff in the sum of $1,000. From the judgment rendered the defendant has duly prosecuted an appeal to this court.

White & White and *Evans & Evans,* for appellant.

Dave Partain and *G. L. Grant,* for appellee.

HART, J., (after stating the facts). Inasmuch as the main reliance for reversal of the judgment is that the evidence is not legally sufficient to support the verdict, it may be well, at the outset, to restate the settled principles of law which control cases of this sort. A mine owner owes to its employees in the mine the duty to use ordinary care to furnish a safe place to work and to keep the place in a safe condition. *Central Coal & Coke Co.* v. *Charles;* 122 Ark. 401, 183 S. W. 969.

In *Bauschka* v. *Western Coal & Mining Co.,* 95 Ark. 477, 129 S. W. 1065, it was held that the owner of a mine

is bound to exercise ordinary care, even if props have not been demanded, to discover the condition of the roof of the mine and to keep same in reasonably safe condition for its servants to work in.

There is an exception to the general rule where the injuries result from changed conditions brought about by the servant in the course of his work. *Moline Timber Co.* v. *McClure,* 166 Ark. 364, 266 S. W. 301.

It is first contended that the safe place doctrine is not applicable in the case at bar, because the plaintiff himself was creating the danger during the progress of the work. It is the contention of the defendant that it was the plaintiff's duty, before beginning work, in order to satisfy himself that the room was a reasonably safe place in which to do his work, to inspect the roof, and that it was also his duty to inspect it, if it became dangerous in the progress of the work. On the other hand, the plaintiff contends that his only duty was to make a casual observation to see if any thing was wrong with the roof, and that he was under no duty to make any test for the purpose of discovering any defects in the propping.

According to the evidence adduced by the plaintiff, the machine operators first enter the room with their machine and cut the ground under the vein of coal for about thirty inches. The vein of coal in question was about twenty-eight inches in height. The machine, as it cuts, cleans out three or four inches of dirt and coal and enters into the face of the coal about thirty or thirty-six inches. When the cutting is made, it is the duty of the operators of the machine to put sprags in the openings thus made for the purpose of keeping the vein of coal from caving in. When this is done, it is also their duty to place props from the bottom of the mine to the roof about three or four inches from the face of the vein of coal in order to keep the roof from falling in while the loader is at work. It is the duty of the machine operators to put in as many props as are necessary to make the roof safe. Then the machine is removed from the room, and the place is ready for the loader.

It is the duty of the loader to remove the muck, dirt, coal and rock taken out by the machine in making the excavation under the vein of coal. All this waste material is piled up by the loader on the wall opposite the vein of coal. It is also the duty of the loader to remove or pile up any props which have been left by the machine operators. It is not his duty, in any wise, to inspect the roof of the mine to see if it is safe for him to begin work. After a loader has loaded the coal into the car, it is his duty to inspect the roof and put in new props if necessary, in order to make the place safe for the machine operators to come into the room and make a new cutting or excavation under the face of the vein of coal.

Thus it will be seen that, according to the evidence for the plaintiff, it is the duty of each set of employees to put in props and leave the place safe for the servants who succeed them in the work. In short, it is the duty of the machine operators to prop the roof for the loaders and it is the duty of the loaders to see that the roof is made safe for the machine operators when they come in again.

When the plaintiff attempted to remove the sprags under the vein of coal, the roof fell in, and the plaintiff was seriously injured by a large rock falling on him. According to the evidence adduced by the plaintiff, there was an old break in this rock which might have caused it to fall, and it was also inferable that two of the props had not been properly put in and that this caused the roof to cave in when the plaintiff pulled out the sprags; or the falling of the rock might have resulted from both these causes.

When it is kept in mind that the plaintiff was under no duty to examine or inspect or prop the room until after he had finished loading the coal, it is difficult to see upon what ground the defendant did not owe him the duty of keeping the room in a reasonably safe condition. Mining, under the most favorable conditions, is a hazardous business; and, under the evidence for the plaintiff, after the excavation had been made, it was the duty of the machine operators to prop the roof in order to make it safe for

the work of loading which was to be done by the plaintiff. All that was required to make the room safe for the loaders was to properly prop it. With this the plaintiff had nothing to do. It was the master's duty to exercise ordinary care to do this, or to see that it was done by the machine operators who were engaged for that purpose. If the machine operators failed to do their duty in propping the roof, it was the negligence of the defendant.

A brother of the plaintiff testified that he went to the place where his brother had been injured, and that two of the props had fallen down. From the appearance of the ground it looked like the props had been set on top of the cuttings and that the props had slid out in that dirt. It will be remembered that the undisputed proof shows that it was the duty of the machine operators to clear away the machine cuttings and to set the props on solid rock, or on a cap placed on solid ground. It is necessary to wedge in the props tightly in order for them to hold up the roof of the mine when the sprags are pulled out and allow the vein of coal to drop down. Again, Burt Crumpton testified that he made an examination of the place where the plaintiff had been injured, and could tell where the props had been set, from the appearance of the ground. He could tell that the props were placed upon dirt, and had slid out. He could see where the props had been set in the dirt; that is, the caps had first been placed on the dirt and the props had been set on the caps. He could see in the loose dirt where the props had been set and where they had slid away.

Other witnesses for the plaintiff testified that the rock which fell upon him extended from the face of the vein of coal over towards the opposite wall, which was called the "gob" wall. The rock was about seven inches thick in one place and extended out to a feather edge on the other side. It was about five feet long, and had an old crack on the side of it which extended to the gob wall. This testimony, if believed by the jury, tended to show that, on account of the old break or on account of the defective way in which the props were set upon loose

dirt, or from both conditions, the roof caved in when the plaintiff pulled out the sprags in the course of his work.

The defective condition caused by the results above stated was the direct and proximate cause of the injury to the plaintiff. He was injured by the rock falling upon him, due to the old crack in it, or to the defective manner in which the props were put up, or from the condition resulting from both of these causes. Under these circumstances the jury was warranted in returning a verdict for the plaintiff.

Finally, on this point, it is earnestly insisted that there can be no recovery in this case because the facts bring it within the rule that, where the servant adopts methods for his own convenience or safety, then the master owes the servant no duty to make the working place safe, and that his failure to do so is not actionable negligence. This contention is based on the fact that the mine workers were working under a contract which provided the method for the machine crew to do its work and for the loaders to do their work. In one of these rules it is provided that it shall be the duty of the machine crew to set such props and sprag such coal as may be necessary to make the roof reasonably safe immediately after the coal has been cut. It is true that this rule was adopted by contract between the operator and its employees, but that does not make any difference. It was still a rule prescribed for a proper method of doing the work, and it did not make any difference whether the operator adopted the rule or method of doing the work under contract with its employees or by its own volition. As we have already seen, the business of coal mining is a dangerous one, and it was the duty of the defendant to its employees to make rules necessary to insure the safety of its employees, and to inform the employees of the rules. We cannot perceive how the duty of the master in this respect can be abrogated because the master contracted with its employees to make reasonable rules. The fact that it contracted to do its duty could not make any difference. If there was any doubt about whether the rule adopted

was a reasonable one or not, in testing its reasonableness it would be proper to show that the master had adopted it at the request of its employees, or under contract with them to do so.

This suggests the question of whether or not the machine operators stood in the relation of an independent contractor to the defendant, within the rule announced in *J. H. Wheeler & Co.* v. *Fitzpatrick,* 135 Ark 117, 205 S. W. 302; *W. H. Moore Lumber Co.* v. *Starrett,* 170 Ark. 92, 279 S. W. 4; and other decisions of this court relating to this subject. The machine operators were in no sense independent contractors, and the defendant cannot be relieved of liability on that ground. They were employed by the defendant, just as the loaders were employed. They did not contract to do their work according to their own methods, but were wholly subject to the control of the defendant. It was as much their duty to obey the orders of the defendant and do their work under the rules prescribed for that purpose as it was the duty of the loaders to obey the defendant and work under its rules and directions. They had no capital invested in the mine, and were entirely dependent upon the conditions of their employment, just as the loaders were. Hence we are of the opinion that the machine operators were in no sense independent contractors.

Finally, it is insisted that the court erred in refusing to give certain instructions asked by the defendant. We do not deem it necessary to set out these instructions or to discuss them in detail. They were either peremptory in their nature or were not in accordance with the principles of law decided in the cases above cited. In the instructions given to the jury, the court fully and fairly submitted the respective theories of the parties according to the principles of law decided in the cases above referred to.

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

STOOKSBERRY v. PIGG.

Opinion delivered January 31, 1927.

1. FRAUDS, STATUTE OF—DEFENSE OF—INSTRUCTION.—In an action for damages for breach of a verbal contract for sale of land, an instruction that, if the alleged purchaser, under verbal agreement took possession of the land, the agreement became binding on him and that, on failure to comply with the terms thereof, he was liable for breach of contract, *held* erroneous.
2. FRAUDS, STATUTE OF—WHEN PLEADED.—In an action for breach of a contract for the sale of land, no part of the purchase price being paid, defendant's denial of execution of the contract was sufficient to let in the defense of the statute of frauds.
3. CONTRACTS—BURDEN OF PROOF.—Where pleadings present the issue of agreement or no agreement, the party relying upon the agreement must prove a valid one.
4. FRAUDS, STATUTE OF—BURDEN OF PROOF.—Where, in an action on a verbal agreement to sell land, defendant denied the existence such agreement, the burden of proving a valid agreement within the statute of frauds devolved on the plaintiff.
5. FRAUDS, STATUTE OF—SUFFICIENCY OF PART PERFORMANCE.—Where a contract for the sale of land was in parol, the mere fact that the defendant took possession of the land thereunder, without paying anything or making any valuable improvements, was insufficient to enable the vendor to maintain an action for damages for breach of the contract.

Appeal from Sebastian Circuit Court, Greenwood District; *John E. Tatum,* Judge; reversed.

STATEMENT OF FACTS.

This is an action at law by J. E. Pigg against A. S. Stooksberry to recover damages for the breach of an oral contract for the sale of land. According to the allegations of the complaint, in December, 1924, the plaintiff made a verbal contract with the defendant to sell him a certain tract of land for the sum of $1,500. The complaint further alleges that, in part performance of said contract, the plaintiff delivered possession of said land to the defendant and that the defendant, after remaining in possession of the land for a short time under the contract of purchase, moved away from the land, and refused to carry out the contract.

The defendant filed a demurrer and answer to the complaint. The answer denies that the oral contract for the sale of the land by the plaintiff to the defendant was made, and denies that the defendant took possession of the land under said contract.

J. E. Pigg was a witness for himself. According to his testimony, he is the owner of the land described in the complaint, and, in December, 1924, made an oral contract with the defendant, A. S. Stooksberry, to sell him said land for $1,500. Pigg lived on the land, and moved away after the contract was made, in order that Stooksberry might take possession of the land. Stooksberry moved on the land and stayed a short time, and then moved away. Pigg tendered him a deed, and Stooksberry refused to accept it or to pay the purchase price of the land.

A. S. Stooksberry was a witness for himself. According to his testimony, he did not make any kind of an agreement, verbal or otherwise, to purchase the land in question from Pigg. He only made a verbal agreement with Pigg to purchase the land in case he sold some land owned by himself to the Standard Oil Company. He moved on the land on the 6th day of January, 1925, and stayed there fourteen days. It was distinctly understood between the parties that, unless Stooksberry sold his land to the Standard Oil Company, he could not purchase the land of Pigg. The Standard Oil Company did not purchase Stooksberry's land, and he refused to consider any further his contemplated purchase from Pigg.

Under the instructions of the court the jury returned a verdict for the plaintiff in the sum of $200, and, from the judgment rendered, the defendant has duly prosecuted an appeal to this court.

Robert A. Rowe, for appellant.

George W. Johnson, for appellee.

HART, J., (after stating the facts). Under the instructions of the court, to the effect that, if the jury should find that the plaintiff and the defendant entered into an oral agreement for the sale of the land described in the complaint, and the defendant took possession

of the land under said oral agreement, the agreement became binding upon the defendant; and, if he failed to comply with the terms of the oral agreement, he was liable to plaintiff for damages for breach of the contract. This instruction was erroneous.

This was an action to recover damages for the breach of an oral contract for the sale of land. No part of the purchase price was paid, but, under the allegations of the complaint, the defendant was in possession of the land under the oral contract. The defendant denied making the contract. Under our system of pleading, this was sufficient to let in the defense of the statute of frauds. Where the pleadings present the issue of an agreement or no agreement, the party relying upon the agreement must prove a valid one. If the defendant had admitted that a verbal agreement for the sale of the land had been made as alleged by the plaintiff, then he must have specifically pleaded the statute of frauds in order to rely upon it. Having denied the oral agreement for the purchase and sale of the land as alleged in the complaint, the statute of frauds became a question of fact at the trial, and it devolved upon the plaintiff to prove a valid agreement in order to recover. *Cook* v. *Cave,* 163 Ark. 407, 260 S. W. 49; and *O'Bryan* v. *Zuber,* 168 Ark. 613, 271 S. W. 347.

Among other things, § 4862 of Crawford & Moses' Digest provides that no action shall be brought to charge any person upon any contract for the sale of lands or to charge any person upon any lease of lands for a longer term than one year.

In *Phillips* v. *Grubbs,* 112 Ark. 562, 167 S. W. 101, the court held that a contract of lease for a period of five years is taken out of the statute of frauds when the lessee complies with its terms by paying rent for two years and making valuable improvements on the land. The court said that this holding is true of an oral agreement to sell lands, and that the same principle controls a contract for the lease of lands.

In *Storthz* v. *Watts,* 117 Ark. 500, 175 S. W. 486, which was an action at law, the court said that, in order

to take an oral contract for the lease of lands out of the statute of frauds, there must be substantial expenditures in the way of performance of the contract over and above the mere occupancy of the land and payment of rent for the period actually occupied. In discussing the question, the court said: "The only item of repairs specified is a trifling amount expended on the fence, which is too insignificant to be treated as a substantial performance of the contract. There is nothing more in the testimony, in the way of part performance, than occupancy for the first year and payment of the rent for that year, which is not sufficient to take the case out of the operation of the statute. There must be substantial expenditures in the way of performance of the contract over and above the mere occupancy and payment for the period actually occupied. There is a difference between substantial part performance of a contract, which takes it out of the operation of the statute, and partial execution, which does not have that effect. *Henry & Bro.* v. *Wells,* 48 Ark. 485." To the same effect is *Newton* v. *Watkins,* 140 Ark. 252, 215 S. W. 615.

In *Beattie* v. *Smith,* 146 Ark. 532, 226 S. W. 128, the court held that, where the vendor of standing timber received payment and the purchaser entered into possession, this took the contract out of the statute of frauds, though it was oral. This was an action for the breach of an oral contract for the sale of timber.

In *Carnahan* v. *Terrall Bros.,* 137 Ark. 407, 209 S. W. 64, the court held that a contract for the sale of standing timber is within the statute of frauds, and that the doctrine of part performance applicable to oral contracts for the sale of land applies to such contracts.

In *Dunn* v. *Turner Hardware Co.,* 166 Ark. 520, 266 S. W. 954, it was held that mere occupancy of land and payment of the rent for the period occupied were not sufficient to take the case out of the operation of the statute of frauds. There the court had under consideration an oral lease for five years.

Under these authorities, an action for damages for the breach of the contract sued on cannot be maintained. As we have already seen, the contract for the sale of the land was an oral one, and no part of the purchase money was paid, and no valuable improvements were made under the contract. The only reliance of the plaintiff as a basis for his action is that the defendant took possession of the land under the oral contract; and, as we have just seen, this was not sufficient to entitle him to maintain an action at law for damages for breach of the contract.

It follows that the judgment must be reversed; and, inasmuch as the cause of action seems to have been fully developed, the complaint of the plaintiff will be dismissed here.

AMERICAN INSURANCE COMPANY *v.* RECTOR.

Opinion delivered January 31, 1927.

1. INSURANCE—FIRE POLICY—POSSESSION OF OWNER.—In an action on a fire insurance policy containing a clause voiding the policy for a change in possession of the property, an instruction that if insured's brother occupied the property as insured's tenant the policy was void, but if he occupied it as insured's agent the policy was not avoided, *held* correct.
2. INSURANCE—FIRE POLICY—CHANGE OF POSSESSION.—Evidence, in a suit on a fire insurance policy, *held* to show that insured's temporary arrangement for his brother to live in his house did not constitute such a change of possession as to avoid the policy, under a clause forbidding a change in title, possession or interest, where the right of possession remained in insured, and he left part of his household goods in his brother's charge.
3. INSURANCE—FIRE LOSS—FAILURE TO MAKE PROOF.—Insured's failure to make proof of a total loss of his residence within the time specified for making proof thereof under the policy *held* not to defeat a recovery under the fire policy, where the evidence established that insured reported his loss promptly to the insurer's agent who made report to insurer, since, under Crawford & Moses' Dig., § 6147, a total loss is considered liquidated damages.
4. INSURANCE—WAIVER OF PROOF OF LOSS.—If an authorized agent, within the time specified for making proof of loss under the policy, enters into negotiations for the adjustment of the loss,

or otherwise treats this requirement of the policy as having been complied with or as waived, the insurer cannot thereafter defend upon the ground that a proof of loss was not furnished.

5. INSURANCE—SUFFICIENCY OF PROOF OF LOSS.—If, within the time when proof of loss can be made, the insured furnishes such information in regard to the loss as is apparently sufficient to meet the insurer's requirements in this respect, the insurer cannot, after the time for making proof of loss, be heard to say that the proof furnished was insufficient.

Appeal from Yell Circuit Court, Dardanelle District; *J. T. Bullock,* Judge; affirmed.

W. B. Rutherford, for appellant.

J. W. Wilson, for appellee.

SMITH, J. On November 6, 1922, the appellant insurance company issued to appellee a fire insurance policy for a three-year period on his farm residence for $700, with additional insurance of $300 on the household furniture, etc. On March 7, 1925, the house was destroyed by fire, but the contents were saved by the caretaker. The house was totally destroyed, and this suit was brought to collect the insurance thereon. The insurance company defended upon the grounds that there had been a change of possession which avoided the policy, and that the insured had not made proof of loss as required by the policy. Liability was denied upon both grounds. The trial resulted in a verdict for the insured for $700, with a penalty of 12 per cent. and an attorney's fee of $100, and from the judgment therefor is this appeal.

Appellee, the insured, was a married man at the time the policy was issued, and his wife lived with him in the insured property, but she abandoned him. Their separation had been impending for some time, and a brother of appellee had unsuccessfully attempted to effect a reconciliation. As appellee expressed it, he and his wife "divided," and it appears to have been agreed that he should haul her effects from their residence to the place to which she had decided to remove. Pursuant to this arrangement, appellee's brother, who was a tenant on the farm where the insured residence was located, moved into the insured property, and appellee's wife moved out

the following day. Appellee testified that his brother moved in in order that he might take care of the property. His brother had been living in another house on the farm, which he vacated, and was placed in the insured house as a caretaker, and no increased rent was charged against his brother.

Appellee testified that, immediately after his wife left him, he secured employment to drive a team, and, to enable him to make two trips each day, he stayed in Dardanelle, instead of his own home, but that he left his personal effects at home and retained a furnished room there, and returned home every Saturday night. Appellee secured a divorce, on some ground not stated, and married again, and, after his second marriage, resided in Dardanelle, but he testified that he did this because it made him more accessible to his work, and that he intended at all times to return to his home—the insured property—when his employment terminated, but the house burned before that time, and that, even after his second marriage, he only removed from the house a feather-bed and some pillows.

The policy sued on contained the following provision: "If any change takes place in the title, possession or interest of the assured in the above mentioned property, * * * then * * * this policy shall be null and void."

It is insisted that there was a violation of this provision, and that the policy was invalidated on that account.

Upon this feature of the case the court charged the jury as follows: "Now, if Rector's brother went into that property as Rector's tenant and occupied it as his tenant, the court tells you that the policy is void, because it is in violation of that clause that requires him to maintain his residence and ownership, and the possession would be changed from that of the original owner to that of a tenant. The court tells you further that, if his brother went in there as his agent and maintained his residence in that building as Rector's agent and not as his tenant, then the policy is not void on that account;

* * * if he maintained his possession by either remaining there himself or keeping some one there for him, taking care of his property for him, the court tells you that he did not change his possession. * * *"

It is insisted that this instruction is not only abstract as applied to the facts of this case, but is an incorrect interpretation of the stipulation of the policy quoted above in any case.

We do not think either objection to the instruction is well taken. In addition to the facts stated above, appellee testified that he told Mr. George, the agent who wrote the policy, that he was staying temporarily in Dardanelle, and that his brother was in charge of the insured property for him, and that George told him that this would not invalidate the policy. George denied having this conversation. Appellee testified that he had not put his brother in charge for any definite time, and that he retained the right to reenter and take possession at any time, and that it was his intention always to reoccupy the property when his employment terminated. That the house which his brother vacated when he removed into the insured property remained vacant, so that his brother could move back into it when told to do so, and his brother did return to that house when the insured house burned. He did not charge his brother any rent, and he kept a portion of his effects in the insured property at all times, and had the right to retake possession on demand. Appellee further testified, as stated, that he had advised the agent, George, of his temporary removal from the property, and that George said that this fact would not affect the insurance. If this be true—and the jury evidently credited the testimony—the jury was warranted in finding that the agent did not regard the circumstance as being a change of possession. The agent made no attempt to cancel the policy, and, if there was a change of possession, the question might have been raised whether this provision of the policy had been waived; but that issue was not submitted to the jury. The question of fact submitted was whether there had been a change of possession.

We are of the opinion that the testimony warranted the finding that the temporary arrangement recited did not constitute a change of possession. Not only did the right of possession remain in appellee, but he left a portion of his household goods in the house in charge of a caretaker.

In the case of *Planters' Mutual Ins. Assn.* v. *Dewberry,* 69 Ark. 295, 62 S. W. 1047, 86 Am. St. 195, the policy sued on contained the stipulation that if "* * * any change takes place in the title, occupation or possession * * *" of the insured property, the policy should be void. The owner of the property leased it to one Haile for a year, and gave Haile possession thereof, and moved away from the premises, which remained in the exclusive possession of Haile until the house was destroyed by fire. The court held that there had been a change of possession and occupancy and that the policy had been thereby invalidated.

It may be said that the policy there sued on contained a stipulation against a change either of *occupancy* or *possession,* and that there was a change both of occupancy and possession, as the owner relinquished the right of occupancy and possession to another for a definite time, and, as the opinion recites, Haile was occupying the house exclusively at the time of the fire.

Here the stipulation is only against a change of possession. One might be in possession of property which he did not occupy, and one might give another the right to occupy which would deprive the owner of his right of possession, at least for the period of time that the right of occupancy exists. But this is the question which the instruction quoted submitted to the jury. Under the instruction the jury was told to find for the defendant insurance company if it were found that the occupant was not in possession for the owner. The court directed the jury to find for the insurance company if it were found that appellee's brother was in possession as tenant, although the tenancy was at will, but to find for the plaintiff if it were found that appellee's brother was in pos-

session as a mere caretaker. It thus appears that the court did not submit to the jury the question whether the insurance company had waived the stipulation against change of possession through the notice given its agent by appellee.

In the case of *Queen of Arkansas Ins. Co.* v. *Pendola,* 94 Ark. 594, 128 S. W. 559, the policy sued on contained a provision invalidating it if there were a change of occupancy or possession, and Justice BATTLE, speaking for the court, said: "An insurance company has the right to determine what property it will insure, and to make its liability for such insurance dependent on the occupant. This is a matter of contract. The insured has the right to determine what insurance he will accept; and, when he enters into a contract with the insurance company in which the property insured is specified, and the insurance is made to depend upon the change of occupancy, he is bound by the contract, and he cannot change the occupancy of the property contrary to the terms of the policy and hold the insurer liable. He cannot change the contract. This is necessary for the protection of the insurer."

It is not our intention to impair the doctrine of that case, but we do hold that there was no such change of possession as to render the policy here sued on void under the provision set out above, where the jury has found, under evidence sufficient to support the finding, that the owner did not surrender his possession and right to occupy, but had only turned the property over to a caretaker during his temporary absence.

In volume 2 Cooley's Briefs on the Law of Insurance, page 1723, it is said: "However, it is often difficult to determine what constitutes a change of possession within the meaning of a policy. In *Rumsey* v. *Phoenix Ins. Co.* (C. C.), 1 Fed. 396, 2 Fed. 429, it is said that the change of possession contemplated by a provision of this kind is something more than a change of occupation. It is a change effected 'by legal process, judicial decree, voluntary transfer, or conveyance'; one which refers to

insured's possessory right, and not to his occupancy of the premises. The temporary absence of the insured, leaving the premises in the charge of an agent who occupies them, is not such a change of possession as will terminate the policy (*Shearman* v. *Niagara Fire Ins. Co.,* 46 N. Y. 526, 7 Am. Rep. 380; s. c. 2 Sweeny, 470, 40 How. Prac. 393). Nor is it a change of possession to admit another into actual possession under a parol license for the single purpose of making repairs (*Alkan* v. *New Hampshire Ins. Co.,* 53 Wis. 136, 10 N. W. 91). On the theory that the change of possession contemplated by a policy is something more than a mere change of occupancy, it was held in *Rumsey* v. *Phoenix Ins. Co.* (C. C.) 1 Fed. 396, 2 Fed. 429, that a lease of the premises and occupancy by the tenant was not a violation of the policy. A contrary rule is, however, asserted in *Wenzel* v. *Commercial Ins. Co.,* 67 Cal. 438, 7 Pac. 817, and in *Planters' Mutual Ins. Assn.* v. *Dewberry,* 69 Ark. 295, 62 S. W. 1047, 86 Am. St. Rep. 195, it was said that a lease of the premises vitiated the policy. But it is to be noted that the holding in the Wenzel case was overruled by implication in *Smith* v. *Phoenix Ins. Co.,* 91 Cal. 323, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191, and that the condition involved in the Dewberry case was against change of 'occupancy or possession'."

We conclude therefore that there was no error in the instruction set out, and that the testimony is legally sufficient to support the finding that there was no change of possession.

Upon the question of the failure to make proof of loss, but little need be said. The undisputed testimony shows that on the day after the fire appellee wrote the company, advising that the house had burned, and that he personally notified Mr. George, and asked him about the proof of loss, and appellee testified that George stated he would attend to this.

George admitted that he made a report of the loss to the company on one of the blanks furnished by the company for that purpose, and this report was based upon

what appellee had told him. There was no contention that any information was desired which appellee failed to furnish. Appellee testified that George offered him $350, or one-half the policy, in settlement of the claim, and advised him not to sue if he was not willing to accept that amount. George admitted that he was authorized by the company to adjust the claim, and that he did not prosecute the settlement because appellee refused to sign a non-waiver agreement.

By § 6147, C. & M. Digest, it is provided that "a fire insurance policy, in case of a total loss by fire of the property insured, shall be held and considered a liquidated demand against the company taking such risk for the full amount stated in such policy, or the full amount upon which the company charges, collects or receives a premium; provided, the provisions of this article shall not apply to personal property."

The insured building was totally destroyed by fire. Appellee reported the loss promptly, and had several conversations with Mr. George about the proof of loss, and George told him, within the time when proof of loss could be made, that he (George) would make a report, and that he did so, and George admitted that he did make a report on a blank provided by the company for that purpose, and that included in this report was a statement about appellee removing from the property, and that, in response to his letter to the company inclosing this report, the company wrote him to take up the matter of adjustment of the loss, provided appellee would sign a non-waiver agreement, but, as the agreement was not signed, he did not attempt to make a settlement.

In the case of *National Union Fire Ins. Co.* v. *Wright,* 163 Ark. 42, it was said that, "if an authorized agent, within the time specified for making proof of loss under the policy, enters into negotiations for the adjustment of the loss, or otherwise treats this requirement of the policy as having been complied with, or as waived, then the company cannot thereafter defend upon the ground that a proof of loss was not furnished" (citing cases).

It is also settled that if, within the time when proof of loss might be made, the insured furnishes such information in regard to the loss as is apparently sufficient to meet the company's requirements in this respect, the company cannot, after the time within which proof of loss might be made has expired, be heard to say that the proof of loss furnished was not sufficient. *Glens Falls Ins. Co.* v. *Jenkins,* 169 Ark. 1015, 277 S. W. 541.

No error appears, and the judgment is therefore affirmed.

WAYNE TANK & PUMP COMPANY *v.* BANK OF EUREKA SPRINGS.

Opinion delivered January 31, 1927.

1. BANKS AND BANKING—UNACCEPTED CHECK—RIGHT OF ACTION.—As a general rule, the holder of an uncertified and unaccepted check has no right of action against the bank on which it is drawn, even though the bank has funds of the drawer out of which it could pay the check, for the reason that there is no privity of contract between the holder of the check and the drawee bank.
2. BANKS AND BANKING—UNAUTHORIZED INDORSEMENT OF CHECK.—The payee of a check, whose agent, without authority, indorsed and collected the check, is entitled to hold drawee bank liable for the amount of the check, since the payee may ratify the action of the bank in receiving and collecting the check without ratifying the unauthorized act of the agent in indorsing the check.

Appeal from Carroll Circuit Court, Western District; *W. A. Dickson,* Judge; reversed.

P. F. Johnson and *Charles D. James,* for appellant.

C. A. Fuller, for appellee.

SMITH, J. Cook & Border, merchants at Eureka Springs, bought from Ed Kincaid, a salesman representing the Wayne Tank & Pump Company, an oil storage tank, the regular price of which was $559, a discount of five per cent. being allowed for full payment in cash.

These tanks were sold under written orders, which had printed in large type that "agents for the company

are not authorized to collect money hereunder, except for initial payment."

Cook & Border paid cash for the tank ordered by them, and, in payment therefor, delivered to Kincaid their check on the Bank of Eureka Springs for $538.85. Kincaid presented the check for payment to the bank on which it was drawn, and payment was first refused. Later in the same day Kincaid again presented the check, and exhibited the contracts under which he was taking orders for tanks, and under which he had sold a tank to the drawer of the check which he presented to the bank for payment, and it was paid.

After waiting about a month for the tank to be shipped, Cook & Border wrote the vendor, Wayne Tank & Pump Company, inquiring the cause of the delay in shipping the tank, and received a response from the company advising that no order had been received. Thereupon Cook & Border made profert of their contract with Kincaid and the check which Kincaid had cashed, whereupon the company shipped the tank contracted for by their agent, and brought this suit to recover the amount of the check from the bank. There was a trial before the court sitting as a jury, and a finding and judgment for the bank, from which is this appeal.

From the facts recited it will appear that the case of *Schaap* v. *First National Bank of Fort Smith,* 137 Ark. 251, 208 S. W. 309, is controlling here. The facts in that case were that Slates, the agent of Schaap, had authority to sell drugs and to collect past-due accounts, and to receive payment either in money or in checks drawn in favor of his principal. Slates collected certain accounts, which were paid in checks payable to the order of Schaap, and, after indorsing the checks in the name of the payee, collected the money on them and misappropriated it. Schaaps sued the banks which had paid the checks. It was insisted that the authority to collect past-due accounts either in money or checks carried with it the authority to indorse the checks received by Slates in payment of the accounts, and the trial court sustained that contention. In reversing

that judgment we said: "When Slates received them (the checks) in payment of a debt due his principal, his duty as collector ceased, except to transmit the checks to his principal. The indorsement of the checks was not a necessary incident to the collection of the accounts, and his authority to receive checks, instead of cash, did not confer power to indorse the checks. It has been uniformly held that the fact that an agent authorized to make collections in checks as well as in money does not enlarge his authority to indorse checks so taken in the name of his principal."

It was insisted in that case, as it is here, that the payee in the check had no right to sue the bank upon which it was drawn, for the reason that the indorsement upon which it was paid was forged, and that the bank had not therefore accepted the checks for payment. The cases of *Sims* v. *American Nat. Bk. of Ft. Smith,* 98 Ark. 1, 135 S. W. 356; *Rogers Com. Co.* v. *Farmers' Bank of Leslie,* 100 Ark. 537, 140 S. W. 992; and *State, use, etc.,* v. *Bank of Commerce,* 133 Ark. 498, 202 S. W. 834, L. R. A. 1918F, 538—were cited in support of that contention.

These cases, which are here cited, were reviewed in the Schaap case, and, after saying that these cases are in accord with the general rule that the holder of an uncertified and unaccepted check can, in the absence of a statute, maintain no action thereon against the bank on which it is drawn, even though the bank has funds of the drawer out of which it could pay the check, for the reason that there is no privity of contract between the holder of the check and the drawee bank, this court proceeded to say: "As we have already seen, Slates, the agent of the plaintiff, had no right to indorse the checks in the plaintiff's name, and the plaintiff's right to the checks remained precisely as it was before Slates undertook to indorse them for him. The checks therefore, when received by the defendants, were the property of the plaintiff, and in that case he may, as we have seen, ratify the action of the banks in receiving the checks and collecting their pro-

ceeds without ratifying the unauthorized act of his agent in indorsing the checks in the name of the principal."

The law as stated in the Schaap case appears to be decisive of the present appeal.

The judgment of the court below must therefore be reversed, and it is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY v. HENRY.

Opinion delivered January 31, 1927.

1. RAILROADS—KILLING OF DOG—NEGLIGENCE.—Testimony that a train could not have been stopped within time to avoid killing a dog after he was discovered would not as a matter of law overcome the presumption of negligence where there was proof that his presence was discovered 75 yards in front of the train and that the trainmen failed to blow the whistle or ring the bell.
2. NEW TRIAL—RULING ON FORMER TRIAL.—Though the trial court, in the first trial in an action against a railroad company for killing a dog, held the evidence insufficient to support a judgment for plaintiff, this ruling did not preclude a judgment for plaintiff on a second trial on the same evidence.

Appeal from Phillips Circuit Court; *E. D. Robertson,* Judge; affirmed.

Thomas B. Pryor and *Daggett & Daggett,* for appellant.

A. D. Whitehead, for appellee.

HUMPHREYS, J. Appellee brought this suit in the circuit court of Phillips County against appellant to recover damages in the sum of $110 for killing his pointer dog, in the operation of a passenger train, through the alleged negligence of appellant's employees in failing to give proper warning of the approach of the train and to stop the train when the peril of the dog was discovered.

Appellant filed an answer, admitting the killing of the dog, but denying the allegations of negligence by its employees, and interposing the defense that the dog came on the track in front of the moving train at such time and place that it was impossible to avoid striking him.

The cause was submitted to the court, sitting as a jury, on April 13, 1924, upon the testimony adduced by the respective parties, resulting in a judgment for $60 against appellant.

On May 1, 1924, appellant filed a motion for a new trial upon the grounds that the verdict and finding of the court were contrary to the law and the evidence, and that the court erred in finding and holding that it was the duty of the engineer to give an alarm that would warn the dog of the approach of the train. The abstract does not reflect that this motion was acted upon. On May 2, 1924, the court made the following order: "Now on this day the judgment in this cause heretofore rendered by the court is set aside on the court's own motion and a new trial ordered."

Four witnesses were introduced on the first trial, two by appellee and two by appellant.

Appellee testified, in substance, that he saw the train when it ran over the dog; that the train was fifty or seventy-five yards from the dog when he first saw it, and the dog was in the middle of the track; that the whistle was not blown or the bell rung; that the train was traveling fifteen or twenty miles an hour. Witness admitted that he stated to the claim agent that it was doubtful whether the train could have been stopped so as to prevent the killing of the dog.

C. E. McCabe testified, in substance, that he saw the train at the time it killed the dog; that the dog was in the middle of the track, about sixty yards from the train, when he first noticed it; that the bell was not rung nor the whistle blown; that the train was running probably twenty miles an hour. Witness admitted that he made a statement to the claim agent of the company to the effect that, if the dog had just got on the track when he first saw it, the train could not have stopped in time to prevent striking the dog.

J. M. Smith testified, in substance, that he was the engineer in charge of the locomotive that killed the dog; that the first time he saw the dog it came out of a ditch

which had been leveed on the left side of the track; that the Johnson grass was so high that it prevented him from seeing the dog until it got in the middle of the track, fifty to seventy-five feet in front of the locomotive; that he was in his proper place, and immediately shut off the steam and applied the brakes; that the train was running thirty miles an hour, down grade, and that it would have taken a minute to shut off the steam and apply the brakes so as to become effective; that he did all that could have been done to stop the train and prevent striking the dog; that the bell was ringing, but that he did not have time to blow the whistle before the dog was struck; that it was impossible to stop the train under 600 or 800 feet.

Charlie Begley testified, in substance, that he was the fireman on the train that killed the dog; that he first saw the dog when the train was in the act of running over him; that he had been putting in a fire, and when he got on the box-seat the dog was twenty or twenty-five feet in front of the engine.

At the conclusion of the testimony the court and the attorney for appellant had the following conversation:

"Court: I will concede the engineer could not have stopped the train before he got to the dog. Now, if there is any other feature you might wish to discuss—

"Mr. Daggett: That is the way I see it: if he couldn't have avoided striking the dog—he had only a second to do it—if the dog was anywhere within 44 feet of that train he had only a second—

"Court: How far did it run in a second?

"Mr. Daggett: Forty-four feet. It would run 2,640 feet in a minute, at 30 miles per hour; that is 44 feet per second—a second is just a space of time that nobody can do anything in.

"Court: The court finds that there should have been some warning given by the engineer of the approach of the train that could have been heard by the dog; after he discovered the peril of the dog, it was his duty to give some warning that could be heard by the animal, and, for

his failure to give this warning, judgment is rendered on that ground.

"Mr. Daggett: We except, of course."

On November 12, 1925, the cause was again submitted for trial to the court, sitting as a jury, on the same testimony introduced upon the former trial, which resulted in a judgment in favor of appellee for $60, from which is this appeal.

At the conclusion of the testimony on the second trial there was no repetition of the conversation which occurred between the court and counsel on the first trial.

Appellant contends for a reversal of the judgment upon two alleged grounds:

First, that the evidence is insufficient to support the verdict;

Second, that the court was without authority to render the verdict and judgment in the second trial upon testimony which he, in effect, declared insufficient on the first trial to support a verdict and judgment.

(1). The evidence is conflicting as to the distance between the train and dog when the dog ran upon the track. The testimony introduced by appellee was to the effect that the intervening distance was from sixty to seventy-five yards, whereas the testimony of the witnesses introduced by appellant was to the effect that the intervening distance was from twenty to sixty feet. If the jury believed the engineer discovered the dog in the middle of the track when seventy-five yards from him, they may reasonably have drawn the inference that he should have rung the bell and blown the whistle in an effort to scare the dog off the track. The killing of the dog raised a presumption that it was negligently done, and it cannot be said that the presumption of negligence was removed by undisputed proof to the effect that the dog was unavoidably killed. There is sufficient evidence in the record to support the verdict and judgment.

(2). The argument of learned counsel that the act of setting aside the verdict and judgment on the first trial and granting a rehearing was tantamount to ruling

that the evidence was insufficient to support the verdict, and that the court was bound on the second trial by the first finding, is not sound, for two reasons; the first being that the court set aside the first verdict and judgment on his own motion, without disclosing his reason for doing so, and the second being that the order setting aside the first verdict and judgment and granting a new trial was an interlocutory order which the court had a right to set aside at any time if he concluded he had made a mistake. Of course it would not do to say that a court must adhere to every ruling or interlocutory order made by him during the first trial of a cause, much less to say that he must adhere to rulings and interlocutory orders on the second trial of a cause which he made on the first trial. Such a rule would prevent a court from correcting errors which he had made, or from changing his mind relative to his acts or declarations occurring in the course of a trial. It will be observed in the instant case that appellee did not treat the order setting aside the first judgment as final and appeal from it. The order remained in the case as an interlocutory order. The facts announced in this case do not bring it within the rule announced in *Twist* v. *Mullinix,* 126 Ark. 427, to the effect that, "if the trial court finds and announces that the verdict of the jury is against the preponderance of the evidence on a material issue of fact, he must set aside such verdict." The rule is applicable only to final rulings and orders relative to verdicts and judgments. The trial court's expressions and acts must be consistent in passing upon the sufficiency of the evidence to sustain a verdict and judgment in making final and appealable orders.

No error appearing, the judgment is affirmed.

WILLM v. DEDMAN.

Opinion delivered January 31, 1927.

1. VENDOR AND PURCHASER—EXECUTORY CONTRACT.—Under an executory contract for the sale of lands to B with privilege to resell tracts of not less than 40 acres upon payment of the price to the vendor, no legal title passed to B, and one purchasing from B acquired only such rights as B had.
2. ADVERSE POSSESSION—PAYMENT OF TAXES—COLOR OF TITLE.—Under Crawford & Moses' Dig., § 6943, investing with title one who, with color of title, pays taxes on unimproved and uninclosed land for seven years in succession, *held* that a contract for the purchase of land does not constitute color of title.
3. VENDOR AND PURCHASER—LIMITATION OF ACTION.—Where the acquisition of title to land depended on payment of the purchase money, a purchaser in possession who has failed to pay the purchase money cannot acquire title upon the ground that the debt was barred by the statute of limitations.
4. VENDOR AND PURCHASER—LIABILITY OF SUBVENDEE.—Where land was purchased subject to the payment of a certain amount per acre, the vendor's assignee is not entitled to a personal judgment against a subvendee, but only to a lien on the land for the purchase money.
5. VENDOR AND PURCHASER—LIEN FOR PURCHASE MONEY.—Land sold subject to the payment of a certain amount per acre is subject to a lien for that amount in favor of one purchasing the contract rights of the vendor, regardless of the price paid to the vendor therefor.

Appeal from Cleveland Chancery Court; *H. R. Lucas*, Chancellor; judgment modified.

George Brown, for appellant.

Woodson Mosley, for appellee.

HUMPHREYS, J. Appellee instituted suit against appellant in the chancery court of Cleveland County to cancel a deed from the Western Land Company to said appellant, of date June 13, 1918, for the north half of the northwest quarter section 9, township 9 south, range 10 west, in said county, upon the alleged ground that same constituted a cloud upon appellee's title to said land. Appellee alleged ownership of said tract of land through mesne conveyances from the United States, his immediate grantor being the J. I. Porter Lumber Com-

pany, from whom he purchased it, with other lands, on June 27, 1923; that said land was and had always been wild and unoccupied, and that his grantors had paid the taxes thereon for more than twenty-five years under color of title.

Appellant filed an answer to the complaint, admitting that the J. I. Porter Lumber Company acquired title to said tract of land through mesne conveyances from the United States, but denying that appellee acquired any title thereto by the deed which said company executed to him June 27, 1923, alleging that, prior to the execution of said deed, the J. I. Porter Lumber Company had conveyed the tract of land to Tom Blodgett; that Tom Blodgett conveyed same to the Western Land Company, from whom he (appellant) acquired it by purchase on June 13, 1918; also admitting that said land was and had always been wild and unoccupied, but denying that the grantors of appellee had paid the taxes thereon under color of title for more than twenty-five years, and pleaded the further defenses of estoppel, laches and the payment of taxes for more than seven years under color of title.

The cause was submitted to the court upon the pleadings, exhibits thereto, and the testimony introduced by the parties, which resulted in a denial of the cancellation of appellant's deed, but, instead, the rendition of a personal judgment in favor of appellee against appellant for $694 and a decree for a lien and the enforcement thereof against said land by sale, if said amount was not paid by appellant.

An appeal has been duly prosecuted to this court by appellant from the decree in so far as same is adverse to him.

The evidence in the case is undisputed. Each party traces his title back to the J. I. Porter Lumber Company. On September 15, 1913, the J. I. Porter Lumber Company entered into a written contract for the sale and purchase of a large body of land in said county, including this tract, to Tom Blodgett, for a total consideration of $91,800 to be paid in installments at stated periods.

The contract contained a provision allowing Blodgett to sell the lands in tracts of not less than forty acres, in which event it agreed to make a contract or deed direct to the purchaser upon payment to it of $6.75 per acre in cash, or to accept one-half of said amount in cash and to retain a vendor's lien, or to take a first mortgage on the tracts sold for the other half of said amount.

On the 20th day of October, 1913, Blodgett conveyed said lands by warranty deed to the Western Land Company, a corporation, of which he was president. The deed contained the following recital: "My entire interest in all the lands purchased by me from the J. I. Porter Lumber Company on the 15th day of September, 1913, as described in the contract of that date signed by the J. I. Porter Lumber Company, by J. I. Porter, its president, and J. F. Swanson, treasurer, and by the undersigned, Tom Blodgett, being thirteen thousand and six hundred acres, more or less."

In the year 1914 the Western Land Company contracted to sell the eighty-acre tract of land in question to appellant for $2,000. Appellant paid it $400 of the consideration at the time the contract was executed.

On the 13th day of June, 1918, the Western Land Company executed a warranty deed for said eighty-acre tract of land to appellant upon the payment to it of $1,600, the balance of the consideration. Appellant paid the taxes on said eighty-acre tract of land from the date of his contract in 1914, to and including the year 1923.

The contract from the J. I. Porter Lumber Company to Blodgett was filed for record September 6, 1917. The deed from Blodgett to the Western Land Company was filed for record October 20, 1913. The deed from the Western Land Company to appellant was filed for record on June 13, 1918, the day it was executed.

On June 27, 1923, the J. I. Porter Lumber Company made a deed for a large body of land, including the eighty-acre tract in question, to appellee for $40,300, $30,000 of which amount was paid in cash. Said deed was recorded on the 16th day of July, 1923. At the time of

this conveyance neither the grantor nor the grantee knew of the existence of the deed from the Western Land Company to appellant. Both appellant and appellee had constructive notice, however, of the contracts and deeds of record relating to the eighty-acre tract in question.

After the Western Land Company executed the deed for said eighty-acre tract to appellant, and before the J. I. Porter Lumber Company executed the deed for said eighty-acre tract to appellee, the J. I. Porter Lumber Company filed a suit and obtained a judgment canceling its contract with Blodgett because he failed to make the payments provided for therein.

Appellant contends for a reversal of the decree on the alleged ground that the instrument executed by the J. I. Porter Lumber Company to Blodgett on September 15, 1913, is either a conveyance or else a contract of agency to sell said eighty-acre tract of land. His learned counsel argues that if it is a conveyance then appellee is estopped by a deed of record prior in time and paramount to the deed under which he claims; and, if it is a contract of agency to sell land, then appellee is estopped because he had constructive knowledge of said contract, which had been duly recorded before he purchased the land. The answer to both arguments is that the instrument is neither a conveyance nor a contract of agency to sell land coupled with interest. On the contrary, the instrument is an executory contract for the sale and purchase of land to Blodgett or his assigns, with the privilege to resell in tracts of not less than forty acres upon payment of $6.75 per acre to the J. I. Porter Lumber Company. No legal title passed whatever by the instrument to Blodgett. It is specifically provided in the contract that, in case of resale in small tracts and the payment of $6.75 per acre to the J. I. Porter Lumber Company, said company will execute a deed for the tract sold to the purchaser thereof. All the rights acquired by appellant under his deed from the Western Land Company, of date June 13, 1918, were such rights as it acquired from Blodgett. These rights were accorded to him by the decree rendered in this case.

Appellant also contends for a reversal of the decree because he paid taxes on the eighty-acre tract of land more than seven years under color of title. His 1913 contract for the purchase of the land did not constitute color of title. His deed of date June 13, 1918, constituted his first color of title, and at the time this suit was instituted he had not paid the taxes for seven years under his deed.

Appellant also contends for a reversal of the decree because the debt of $6.75 per acre was barred by the statute of limitations, not having been paid within five years after maturity. The acquisition of appellant's title depended upon the payment of the purchase money, and until he pays the purchase money he cannot acquire the title. The statute of limitations has no application to this character of contracts, so far as the payment of the purchase money is concerned.

Appellant also contends for a reversal of the decree because the court rendered a money judgment against him. This was error. Appellant did not contract to pay the J. I. Porter Lumber Company, or its grantee, $6.75 per acre for the eighty-acre tract. He simply purchased it subject to the payment of that amount per acre. A lien for the amount on the eighty-acre tract of land is all appellee is entitled to.

Lastly, appellant contends that the lien on the land should be reduced to $462.40 because appellee only paid $5.78 per acre for it to the J. I. Porter Lumber Company. This was a matter between the J. I. Porter Lumber Company and appellee, and was of no concern to appellant. Appellee had the right to buy the contractual rights of the J. I. Porter Lumber Company, under the contract as made with Blodgett, as cheaply as he could get them, and it was the privilege of the J. I. Porter Lumber Company to sell such rights at its own price.

The decree is therefore modified by reversing the money judgment rendered against appellant, and, as modified, is affirmed.

STARNES v. BENDER.

Opinion delivered January 31, 1927.

ATTACHMENT—DAMAGES ON FORTHCOMING BOND.—Where a forthcoming bond, given on attachment of casing cemented in an oil well, was issued under Crawford & Moses' Dig., § 514, plaintiff's damages recoverable from the sureties on such bond for their failure to deliver the casing at the county seat, when the attachment was sustained, was the value of the number of feet of casing which could be removed from the well, and not the amount stated in the bond as the value of the casing.

Appeal from Nevada Circuit Court; *James H. McCollum*, Judge; modified.

McRae & Tompkins and *H. E. Rouse*, for appellant.

Gaughan & Sifford and *Haynie, Parks & Westfall*, for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered by the circuit court of Nevada County upon a forthcoming bond in an attachment proceeding in said court, wherein appellee was plaintiff and Ingram Grayson *et al.* were defendants. The writ of attachment was levied upon 860 feet 8½-inch 29-pound casing cemented in an oil well located in Union Township, in said county. Appellants then executed a forthcoming bond under § 514 of Crawford & Moses' Digest. When the attachment was sustained, appellants, sureties upon the forthcoming bond, tendered to the sheriff, in performance of the judgment of the court, all the casing in exactly the same condition and in the same place that it was at the time it was levied upon by said officer. The officer declined to accept the casing in satisfaction of the judgment unless delivered to him at the county seat, whereupon the court rendered a summary judgment against the sureties, appellants here, for $860, to be recovered if the casing was not forthcoming, from which is this appeal.

The sheriff did not have an appraisement made of the casing before taking the forthcoming bond, but based the amount of the bond upon the cost of the casing per lineal foot. The undisputed testimony in the case

revealed that only one hundred feet of the casing could have been recovered by the sheriff, had he attempted to pull same out of the well at the time he made the levy, and that no more than one hundred feet could have been recovered by the appellants, or any one else, in attempting to pull same. The casing was cemented in the well, and could not have been moved without the use of nitroglycerine, a very powerful explosive, the use of which would have destroyed most of the casing. The highest price placed upon the casing, if lying out of the well on the ground, was $1.25 per foot.

The court was correct in ruling that the condition of the bond had been broken on account of a failure to deliver 100 feet of casing to the officer at the county seat; it erred in assessing $860 for the breach thereof. The damage sustained by appellee was the value of the number of feet recoverable, which, according to the highest estimate, was worth $125.

The judgment will therefore be modified by reducing same to $125, and, as modified, is affirmed.

ADKINS v. REMMEL.

Opinion delivered January 31, 1927.

1. LANDLORD AND TENANT—NONPERFORMANCE OF CONTRACT—WAIVER.—If a lessor's failure to complete repairs in the leased building within the time agreed, and his installing an elevator shaft without the lessee's consent, warranted the lessee in refusing to pay rent, such right was waived by the lessee agreeing to a settlement and executing notes in accordance therewith.
2. LANDLORD AND TENANT—LIEN FOR RENT.—Where, by the terms of a lease, a lien was created upon certain personal property, a decree holding that such property was bound for payment of the rent found to be due to the time the building was rented to another tenant, *held* proper.

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

STATEMENT BY THE COURT.

Suit was begun by Remmel, the lessor, against Adkins to recover a balance of $260 claimed to be due upon notes executed by Adkins for the rent of the store-room at 816 Main Street, Little Rock, under a lease for a term of eight years, from November 1, 1921, at a rental of $150 per month, and for the sum of $1,679.10 on notes executed by Adkins to Remmel for the cost of the tile floor put in said building at his instance, upon its being reconditioned and repaired by the lessor after damage by fire.

On February 8, 1923, the store-room was damaged by fire, which caused the lessee to move out of the building until the repairs could be made, which was agreed to be done by supplemental contract of March 17, 1923, wherein the lessor agreed "to restore the premises within a reasonable time, and which it is now expected will be restored within ninety days from March 8, 1923." This also provides for the construction of the tile floor in the building, for which the lessee agreed to pay the amount of the cost to the lessor, in equal monthly installments during the remaining period of the lease, running six years from November 1, 1923. The parties also agreed that the lessor would not charge interest on this investment at the usual rate for the lessee's agreeing that he might construct a stairway to the second floor, the first floor and to the alley, and another to the basement to permit its use for storage, etc.

Appellant's answer admits the execution of the lease and the supplemental contract, and the notes for the rent and payment of the cost of the tile floor, and alleged that the consideration to all the notes had failed, and denied that the cost of the floor was $1,679.10, and that the notes therefor were secured by a lien. He set up, as a defense, breach of the covenant for repair of the building under the supplemental agreement, and, by cross-complaint, alleged he had been damaged in a large sum by such breach for failure to complete the building in the time agreed. The decree was entered against appellant for

the amount of $1,696.73 with interest, the item for rent recovery therein being $257.86 and the cost of the tile floor $1,437.87. The judgment for rent only was declared to be a lien on the personal property and fixtures, and appellant prosecutes his appeal from this decree.

Sam T. & Tom Poe, for appellant.

Frauenthal & Johnson, for appellee.

KIRBY, J., (after stating the facts). Appellant urges that the finding of the court below is not supported by the evidence, and that there was a failure of consideration, in any event, of the notes executed by him in payment for the tile floor in appellee's own building, and from which he received no benefit whatever.

The testimony is in conflict as to the date the repairs on the building were completed, that of the lessor tending to show that it was ready for occupancy on June 18, 1923, while some of the other testimony indicated it was not finished until in August. It is not disputed, however, that the parties made an adjustment on July 1, 1923, of the amount of the rent due under the lease contract, allowing the lessee the credits he was entitled to for being deprived of the use of the building on account of the fire during the period of repair, and agreement as to the amount of the cost of the tile floor. The lessee, Adkins, at that time executed the notes aggregating the amount of the floor cost, payable in installments of $22.52 per month, all being due at once upon failure to pay either of them, the first falling due August 1, 1923.

Appellant knew the condition of the building and the status of the repairs at the time, and made no objection to the work nor claim that it had not been completed in time, or was not ready for occupancy, his first claim of the breach of contract being made by letter on August 1, 1923.

The supplemental agreement giving appellant a reasonable time to repair and restore the premises, expressing that it was expected to be done within ninety days from March 8, 1923, did not bind appellee conclusively to complete it by the expiration of that time, being an esti-

mate rather of the time that would be required, and no objection was made, at the time of the agreement of settlement, of the amount of the rent due and the cost of the tile floor on account of it not being sooner completed, and appellant also afterwards put a card in the window advertising the store-room for rent, and directing persons to apply to him therefor.

If the condition of the repairs and the failure to make same within the time it was thought they could be completed, or the putting in of an elevator shaft additional, that appellant contends he did not consent to, had warranted appellant in refusing further to perform his contract on account of a breach thereof by the appellee, the lessor, he waived such right by the agreement of settlement abating or allowing him credit for the amount of the rent accruing during the period of repairs, and the execution of the notes in payment for the tile floor. Neither can we say that the finding of the chancellor in appellee's favor is clearly against the preponderance of the testimony.

By the terms of the lease a lien was created upon certain personal property, and there was no error in the decree holding that it was bound to the payment of the rent found to be due to the time the building was rented to another tenant, after appellant's refusal to occupy it.

The facts of this case do not bring it within the rule announced in *Berman* v. *Shelby,* 93 Ark. 472, 125 S. W. 124. We find no error in the decree, and it is accordingly affirmed.

Missouri & North Arkansas Railway Company v. Little Red River Levee District.

Opinion delivered January 31, 1927.

Levees—complaint asking for reassessment.—A complaint stating that plaintiff railroad company owns land in defendant levee district, and that, since the original assessment of benefits in the district, the value of plaintiff's land has declined to an almost nominal value while other land in the district has increased in

value, does not justify a reassessment of benefits, since no express or implied authority has been given to make such reassessment.

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

STATEMENT BY THE COURT.

Appellant brought this suit against the Little Red River Levee District, organized under the general laws, and its board of commissioners and assessors, naming them, for the purpose of compelling a reassessment of its property and reduction of the assessment of benefits in accordance with the present assessed value of its property.

It alleged that there were now outstanding approximately $75,000 in bonds of the district issued to provide funds to build and maintain a levee in the district, the bonds payable annually on the installment plan, the last maturing in the year 1939; that all the real estate in the district was assessed according to the benefits to be derived from the contemplated improvement, for the purpose of providing money to pay the annual installment of bonds and the interest thereon; that, at the time of the bond issue and the making of the assessment of the benefits against the property of the district, its main line had just been completed and was in a very prosperous condition, its assessed value, as fixed by the State Tax Commission at that time, being $10,400 per mile, and that the benefits assessed were based upon the value of the road at the time the assessment was made in 1913; that the lands in the district were agricultural in character, consisting of about 15,301 acres, only about 1,041 of which were at that time cleared and in cultivation, with 14,260 acres wild and unimproved; that, since the time of the original assessment in 1913, the railroad's property has constantly decreased in value, and has only a nominal value at this time, as shown by the State taxing officers, of $2,750 a mile; that the other lands of the district have greatly enhanced in value, all being practically cleared and improved and are now capable of producing valuable

crops of all kinds. That, at the present, a railroad which has only a nominal value is required to pay about one-third of the taxes to maintain the levee and pay off the bonded indebtedness; that the company applied to the board of commissioners and assessors for a reassessment and equitable adjustment of the taxes and benefits of the lands of the district, but was refused relief, and brought suit to compel the reassessment of the property of the entire district for distribution of the burden of taxation equally and equitably upon all the real estate therein.

The complaint alleged that the first bond issue was for $50,051.43 in 1913; that later, in 1916, an additional issue of $55,000 was made; in 1917 a third bond issue of $16,500 was made; that the first issue, with interest, had been fully paid, leaving the second and third issues, amounting to $71,500, outstanding and unpaid, with taxes to be collected in annual installments for payment up to and including the year 1939; that these bonds bear interest at 6 per cent. per annum. It alleged the change of the character of property, as already stated, the decrease in the value of the railroad property to the nominal value of $2,750, as assessed by the State, and that the other property had steadily increased.

"Plaintiff states that, while said realty as above set forth has thus been enhanced in value by reason of the benefits derived from the improvement, this plaintiff, in truth and in fact, has only, at most, received a nominal benefit as a result of said improvement; that, as the present assessment and the payments of taxes thereon now stand, the same is very inequitable, unjust and highly discriminatory, and that it is entirely out of proportion to the amount paid on other property in said district and not in accordance with the benefits accruing to the respective properties therein. Plaintiff states that, under said original assessment, and while deriving only nominal benefits from said improvement, and notwithstanding the greatly increased benefits to other real property in said district, it is required to pay approximately one-third of the total taxes levied and collected in said district

for said improvement; that, in view of the said altered condition of the respective properties in said district and of the greatly deteriorated condition of plaintiff's property, said tax as levied and collected is confiscatory, and, if same is continued as thus originally fixed, will amount to confiscation of plaintiff's property in said district.

"Plaintiff avers that the benefits to said real property in said district should be reassessed and, without reducing the total assessed benefits accruing to the whole of said property in said district, and the consequent revenue derived therefrom, the same should be more equitably distributed and placed upon said respective properties commensurate with the benefits accruing thereto; that this plaintiff has made repeated requests and demands upon the defendant and its officers for such reassessment of the benefits, but that the said defendant and its officers decline and refuse the same."

It is also alleged that the board of commissioners and assessors, naming the members thereof, refused to make reassessments of benefits or any readjustment, and that, unless they were compelled to do so, the "plaintiff will suffer irreparable injury and its property will be confiscated by this unjust and discriminatory taxation."

Plaintiff alleged that it had no adequate remedy at law, and prayed an order requiring the defendants and their successors in office to make and cause to be made a reassessment of the benefits accruing to the respective properties in the district and causing taxes to be collected thereon in keeping with equity and accordance with law, and asked that defendants be restrained from collecting or attempting to collect any tax levied upon the original assessment or until the property was reassessed according to its value. A general demurrer was interposed to the complaint and sustained, and, plaintiff declining to plead further, it was dismissed, and from this order the appeal is prosecuted.

Shouse & Rowland, for appellant.

KIRBY, J., (after stating the facts). It appears that this levee district was organized under the general law,

and there is no complaint of any irregularity, defect or mistake in the organization or of any injustice or discrimination in the assessment of benefits, relief being sought only because of an alleged changed condition in values of the property, plaintiff's having declined to almost a nominal value while the other property of the district has been improved, cultivated and increased in value.

The granting of the relief prayed would necessitate a reassessment of the benefits of the property of the district, the increase of assessment and tax upon the other lands of the district in proportion to any reduction made on that of appellant, since no decrease can be made that would impair the obligation of the district to pay its bonds nor its ability to do so. The assessment, being made in accordance with the law (§§ 6823-6831, Crawford & Moses' Digest) became a lien on all the lands of the district in the nature of a mortgage, as provided by law, and necessarily upon each tract as shown by the lists filed in the county clerk's office, it being provided only that, at any time before judgment in any foreclosure proceeding brought to enforce the lien, an error made in the description of any of the lands embraced in the assessment or lists can be corrected.

No authority is given for reassessment of benefits on changed or different values, or reduction or increase of the amount thereof, against any of the lands of the district, it not being contemplated, evidently, that there could be any such material change in condition as would require a change in the benefits assessed during the time for the payment of the improvement.

In any event, no authority is given in the general laws, under which this district was organized, as is the case in acts providing for the organization of some other improvement districts, for reassessment of benefits upon the property contained therein, and none such can be implied, as incident to the authority given for carrying out the purposes of the law, authorizing such reassess-

ment. It follows that the complaint did not state a cause of action, and no error was committed in sustaining the demurrer thereto.

The judgment is affirmed.

HALEY-THOMPSON SPECIAL CONSOLIDATED SCHOOL DISTRICT v. SPLAWN.

Opinion delivered January 31, 1927.

COUNTIES—LIABILITY OF COUNTY TREASURER.—The rule that, before a suit can be brought against a county treasurer for amounts growing out of or in connection with a settlement required to be made in the county court, his accounts must have been passed on by the county court, has no application to an action in the circuit court by a school district against a county treasurer for wrongfully paying school moneys on warrants not properly drawn as required by Crawford & Moses' Dig., § 8925.

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

J. R. Parker and *William Kirten*, for appellant.

Harry E. Cook and *B. F. Merritt*, for appellee.

MEHAFFY, J. This suit was begun in the Chicot Circuit Court, the plaintiff alleging in its complaint that it was a special consolidated school district, created under the acts of the General Assembly, and that C. F. Thompson was elected and served as president of said district for and during the years 1921, 1922, and 1923, and that M. C. Hall was elected secretary and served during the years of 1921, 1922 and a part of 1923. That, by virtue of the office as secretary of said district, said Hall acted as secretary of said board, and it was his duty to draw warrants and pay debts on the proper order of said board, to be signed by the president, C. F. Thompson, and M. C. Hall, as secretary. That W. J. Splawn was the regularly elected and duly qualified and acting county treasurer of Chicot County for and during the years 1921, 1922 and 1923, and was custodian of all the school funds of Chicot County and the Haley-Thompson Special Con-

solidated School District, and had and held in his hands funds of the said district which had come to his hands from the various sources of taxes and apportionment and belonging to said district during those years. That, during the years above mentioned, the said M. C. Hall, as secretary of said Haley-Thompson Special Consolidated School District, unlawfully and without warrant or authority illegally drew and signed the name of the president, C. F. Thompson, to a great number of warrants of said district, which warrants were unlawfully cashed and illegally paid by the said W. J. Splawn, county treasurer of said county, without any authority or right on his part to do so. That, by reason of said W. J. Splawn cashing and paying said illegal warrants, the Haley-Thompson Special Consolidated School District has been damaged in the sum of $1,507.17, interest and costs. The warrants are then described in the complaint, giving the number, amount, payee and date of warrants, and plaintiff prays judgment for the amount above mentioned, interest and costs.

Defendant filed motion to require plaintiff to file the warrants sued on, which warrants were filed in compliance with said motion. The defendant answering, admitted that Thompson was president and Hall was secretary of plaintiff school district, and had duties, power and authority to issue warrants, as alleged in said complaint. Defendant alleged that, as county treasurer, he was advised that it was the practice and custom of Thompson, president of said board, to sign warrants in blank, and in some instances authorizing the signing of his name to warrants by Hall, the then trusted secretary of said school district, and authorizing said secretary to fill in thereafter the amount and purpose for which said warrants were issued, and that all such warrants which were presented and paid by this defendant were paid in good faith and without any knowledge of alleged illegality or lack of authority to issue any of such warrants, and that plaintiff should thereby be estopped from any right of action against the defendant. Defendant denied that

plaintiff was damaged in the sum mentioned or any other sum by reason of the issuance and payment of said warrants, but alleged the truth to be that most of said warrants were issued in payment of salaries earned by teachers under contract with said school district and the remainder thereof on payment of allowances by the board of directors of said school district for necessary incidental expenses of operating schools and expenses of improvements of buildings, etc., and prayed that the complaint be dismissed.

Defendant thereafter filed an amendment to his answer, alleging that he presented said warrants for credit and cancellation, as the law requires, to the Chicot County Court, and that said warrants were duly examined, audited, allowed, canceled, and his accounts credited with same. That judgment approving said settlement and allowing him credit for said warrants, as set forth in the complaint, by the Chicot County Court, was duly entered. That said judgment still stands as a record of said court; that the plaintiff had its day in court, and that plaintiff has not filed petition to set aside said settlement, nor to reopen same, and has taken no appeal, and pleads the judgment of said county court.

Plaintiff then filed reply to the amendment to answer, stating that the complaint was filed in May, 1924, answer filed at October term, 1924, continuance granted, and that the amended answer was filed at the time. Plaintiff states that it was not before the county court when defendant presented fraudulent warrants and obtained the order giving defendant credit for them, and was not a party to the suit; that the county court had no jurisdiction nor authority to enter an order crediting said Splawn with the amount of said fraudulent warrants; that the warrants were void; that, upon the discovery of the fraud in issuing said warrants, President Thompson, W. T. Knight, director, and other directors of the district took the matter up with the county superintendent, D. T. Henderson, and the defendant, W. J. Splawn, as county treasurer, and that, at a conference between the plaintiff

and defendants, the county superintendent and M. C. Hall, the defaulting secretary, the amount of the defalcation and fraudulent warrants issued by said Hall as secretary was fixed and arrived at, the said Hall agreeing to pay the amount to the said Splawn, county treasurer, and during this proposed settlement and adjustment the defendant, Splawn, appeared in the county court and presented the warrants for cancellation and credit, without the knowledge or consent of plaintiff or its officers.

The court entered the following order: "On this day this cause is heard by the court upon the amended answer of defendant, which is taken and considered by the court as a motion in abatement of plaintiff's suit, and upon due consideration thereof said motion is sustained. It is therefore considered, ordered and adjudged by the court that plaintiff's complaint and cause of action herein is abated and dismissed, and that plaintiff pay all costs herein. To which ruling of the court in sustaining said motion and dismissing plaintiff's suit, the plaintiff at the time excepted."

The defendant introduced the county clerk, and by him introduced the records, and the clerk also testified that the warrants were presented by the county treasurer to the county court in open court, canceled, and credited to the proper account of the county treasurer. That he gave the warrants to Mr. Kirten, attorney for the school district, some time last year; that all the warrants involved in this suit were canceled at various times by the county court and credited to Splawn's account, and filed certified copies of the judgments. The judgments were dated August 19, 1922; February 1, 1922; October 1, 1921; September 18, 1922. The treasurer's certified copy of the treasurer's settlement was filed October 6, 1925. The clerk further testified that a balance was struck, and he exhibited whatever money he had on hand. Plaintiff renewed his motion to exclude the testimony of witness as incompetent, which motion was overruled; the court then stated he thought the plea in abatement which was in the answer was well taken, and that the defendant should

have judgment. Plaintiff filed its motion for new trial, which was overruled, and plaintiff prayed an appeal to the Supreme Court, which was granted.

The appellee begins his argument by stating: "The only questions involved upon this appeal, as presented by the record, are: 1. Did the plaintiff's complaint present a cause of action? 2. Did the circuit court have jurisdiction to try and adjudicate the matter involved upon the record made and presented?"

His contention is that, before suit could be brought in the circuit court, it would have to be made to appear that the county treasurer had made his settlement and that the settlement showed a balance due; that this was necessary to fix the liability of the treasurer, and cites cases holding that it was necessary for the declaration to contain an averment that the officer had settled with the county court and failed to pay over the amount due, or that he had failed to settle and the county court had proceeded to adjust his account. It is said in one of the cases:

"The county court is the forum where the liability of the collector upon which that of his securities depend, is to be ascertained and evidenced by his records. An adjudication in that forum is conclusive evidence against the securities as well as the collector in an action upon his bond in the circuit court. There can be no liability upon the collector's bond without such adjudication, unless the circuit court can, in an action upon the bond, draw to itself in a collateral way jurisdiction to investigate and settle the accounts of delinquent officers for the collection of revenue which apparently belonged to the county courts." *Jones* v. *State use of Pope County,* 14 Ark. 170.

It should be remembered that the above case was with reference to the settlement of the accounts of the collector, and what the court held there was that, when that was true, the circuit court did not have jurisdiction to investigate and settle the accounts of the delinquent offi-

cers for the collection of revenue which appropriately belonged to the county court.

The next case to which attention is called by appellee is the case of *Greene County* v. *Croft*, 24 Ark. 550, in which case the court held that it was the duty of the county court to cause settlement to be made with the treasurer to ascertain the state of accounts and strike a balance, if any due him, that this was necessary in order to fix the liability of the treasurer and his securities upon the bond, and in a suit upon a bond this was a necessary averment.

In the case of *Graham* v. *State use of Monroe County*, 100 Ark. 571, the court also held that, before suit could be brought in the circuit court, it was necessary, in order to fix the liability of the sureties of the treasurer, that a settlement should be made with him by the county court, as the law requires, and the amount due determined and ordered to be paid by it before suit could be brought against his bondsmen for any default. That such judgment, when made, is conclusive as to the liability of the sureties, and that it is a condition precedent to the bringing of a suit against them.

It was again held that suit could not be brought in the circuit court before a determination and adjudication fixing the liability of the sheriff's account. *State use of Columbia County* v. *Nabors*, 103 Ark. 16, 145 S. W. 550.

It may therefore be conceded that, if this were a suit against the treasurer for any amounts growing out of or in connection with the settlement required to be made with the county court, no suit could be brought until the county court had examined and passed upon the accounts of the treasurer. This, however, is not a suit of that character, but is a suit for damages for paying warrants in violation of law. It is provided by statute: "When the warrant of any board of directors, properly drawn, is presented to the treasurer of the proper county, he shall pay the same out of any funds in his hands for that purpose belonging to the district specified in said warrant." Crawford & Moses' Digest, § 8925.

This wrongful act, if it were wrongful, had nothing to do with his accounts or with his settlement with the county court.

This court held, in the case of *Hendrix* v. *Morris,* 127 Ark. 222, 191 S. W. 949, that the warrants of a school board issued in payment of the cost of transportation for pupils were invalid when issued by districts other than such school districts as became consolidated school districts in the manner and under the terms of the act. This court reversed the case, and held that the court should have enjoined the issuance or payment of any warrant covering the operation of the automobile, as prayed by appellant.

Again, the court said, in the suit against the treasurer and the school directors, that the school directors were not liable, but continued:

"A different rule of law, however, applied to the treasurer. He is only authorized to pay out money on the orders or warrants of the board of directors of a school district *properly drawn.* The law requires that the directors shall draw orders on the treasurer for the payment of wages due teachers, or for any lawful purpose, and they shall state in every such order the services or consideration for which the order is drawn, and that, when the warrants are properly drawn, he shall honor the same out of the funds in his hands for that purpose belonging to the district. When a warrant is therefore presented to the treasurer for payment for an unauthorized purpose, the treasurer pays the same at his peril, and is personally and individually liable to the district for the moneys unlawfully expended. The judgment of the trial court dismissing appellant's complaint against the appellees, directors, is therefore affirmed. The judgment dismissing the complaint against the treasurer is erroneous and is therefore reversed, and the cause as to him is remanded for a new trial." *Hendrix* v. *Morris,* 134 Ark. 358, 203 S. W. 1008.

In cases against those officers who are required by law to make settlement with the county court, as treas-

urer and collector are required to do, a suit cannot be maintained against them in the circuit court as required by law, but, in a case against such officer for a wrongful act, like the misappropriation or conversion of school funds, suit may be brought in the circuit court, whether the officers' accounts have been passed on by the county court or not. It is not a question of his settlements or his accounts, but a question of wrongful conduct resulting in damage to the school district. Certainly there could be no reason to have the county court pass on whether or not a treasurer had wrongfully paid a warrant. As to whether the treasurer did or did not wrongfully pay these warrants or any of them, is a question of fact, and may be determined in a trial in the circuit court without any regard to what the officer may have done in the county court. It might happen that an officer would make a settlement, and that the school directors or other persons whose money had been converted or misappropriated would know nothing about the settlement, and might not learn about it until the two years had expired, but, independent of that, we think there is no reason why the county court should act in a case like this before suit is begun in the circuit court, and that such action by the county court is not necessary to give the circuit court jurisdiction.

The case is therefore reversed, and remanded for new trial.

SHREVEPORT-EL DORADO PIPE LINE COMPANY v. BENNETT.

Opinion delivered January 31, 1927.

1. MINES AND MINERALS—RESERVATION IN OIL LEASE.—A provision in an oil and gas lease requiring the lessee to deliver to the credit of the lessor one-eighth of the oil produced and saved is a reservation of title in the lessor, and not a mere covenant to pay rent in kind, as affecting the lessor's right to recover against the lessee's vendee for conversion.

2. MINES AND MINERALS—NOTICE OF RESERVATION IN OIL LEASE.—Where a pipe line company purchased oil from a lessee, it was

charged with notice of the lessor's reservation of title to one-eighth of the oil, and is liable for conversion thereof.

3. MINES AND MINERALS—NATURE OF OIL.—Oil, before it is severed, is a part of the land, but after severance is personal property.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy*, Chancellor; affirmed.

Patterson & Rector and *Powell, Smead & Knox,* for appellant.

Mahony, Yocum & Saye, for appellee.

MEHAFFY, J. The plaintiffs brought suit in the Ouachita Circuit Court, alleging that Henry C. Cates was the owner of the south half of the northwest quarter of the southwest quarter of section 33, township 18 south, range 15 west, Union County, Arkansas, which was subject to an oil and gas lease in favor of the G. S. & G. Corporation; that Cates was the owner of one-eighth royalty interest in and to the oil produced and severed from said tract of land; that the G. S. & G. Corporation, from November 21 to March 22, sold and delivered to the defendant numbers of barrels of oil for the total price of $135,924.31, of which sum the plaintiff, Henry Cates, was entitled to $16,990.54; that the defendant had paid Cates one-half this sum and owed him $8,495.26, which was past due; that Henry C. Cates had assigned and transferred to the plaintiff, Harlan Bennett, his interest and claim to said money.

The defendant, Shreveport-El Dorado Pipe Line Company, Incorporated, denied that Cates was the owner of the land and entitled to receive royalty of one-eighth of the oil, and denies that it received the oil from the G. S. & G. Corporation, as alleged in the complaint; denied that it had paid Cates any sum whatever on account of oil purchased from the land described. Defendant, by way of cross-complaint, alleged that it purchased oil from the G. S. & G. Corporation, which was delivered to it on the southwest quarter of the southwest quarter of section 33, township 18 south, range 15 west, and paid Henry Cates one-sixteenth royalty interest; that this payment was made in pursuance to a division order executed

by Henry C. Cates, in which division it was alleged that Cates agreed that this was his only interest. Defendant further alleged that, at the same time, it paid to Cordell, Swilley and Cobb the other one-sixteenth; that, by the terms of the division order, the title to the oil purchased by the defendant was guaranteed, and the defendant made payments to the parties other than Cates, in accordance with the division of interest as shown by said division order; defendant asked that Cordell, Swilley and Cobb be made parties to the action, and that defendant have judgment against them in case plaintiff obtained judgment against it. The case was transferred to equity.

Cordell, Swilley and Cobb filed separate answer. Defendant filed an amendment to its answer, denying that the plaintiff, Cates, was the owner of any oil severed from the lands, but alleged that the G. S. & G. Corporation, under the terms of the lease, was the owner of all oil produced and severed from the soil, and that, if any oil which defendant ran was in fact produced and severed from land described in plaintiff's complaint, it was purchased by this defendant from the G. S. & G. Corporation, which failed and refused to run any part of said oil to the credit of the plaintiff, Henry Cates, except one-sixteenth, for which payment had been made to plaintiff. Defendant says it had no knowledge that plaintiff was entitled to receive any royalty on any part of the oil purchased by it from the G. S. & G. Corporation, except an undivided one-sixteenth, and, if plaintiff had failed to receive what was due him, it was caused by breach of the contract existing between plaintiff and G. S. & G. Corporation, and not the fault on the part of defendant, and was caused by the carelessness of plaintiff in failing to notify defendant about the division order. Defendant alleged that all oil purchased by it was purchased under the division order referred to in the original answer, which was signed by the plaintiff, Cates, and that said division order authorized said defendant to pay to Cordell, Swilley and Cobb one-sixteenth; that, if part of the oil purchased by the defendant, of which Cates was entitled to one-eighth,

was delivered to Cordell, Swilley and Cobb, he and his co-plaintiff, Bennett, knew the fact, and knew that said oil was being run under said division order, and they allowed and permitted defendant to make payment in accordance with said division order, and, by their failure to object and call defendant's attention to the fact that the oil was being produced from lands where the plaintiff was entitled to receive and collect one-eighth, they are estopped to insist that defendant be required to pay them. That, if plaintiff has any right of action, it is against the G. S. & G. Corporation. The court found in favor of the plaintiff against the Shreveport-El Dorado Pipe Line Company, Incorporated, and found in favor of the Shreveport-El Dorado Pipe Line Company, Incorporated, against cross-defendants, Cordell, Swilley and Cobb, finding the amount due each.

The lease passed to the G. S. & G. Corporation, in so far as sixty acres of the land is concerned, and, in discussing the issues and the case, the attorneys have referred to the land as the south forty and the north twenty. The lease is the usual oil and gas lease by Cates and his wife of the land described, for the sole and only purpose of mining and operating for oil and gas, laying pipe lines, etc. After a description of the land and the statement as to the term it is to remain in force, it is stated: "In consideration of the premises the said lessee covenants, (1) to deliver to the credit of lessor, free of cost, in the pipe line to which he may connect his wells, the equal one-eighth part of the oil produced and saved from said leased premises." The above is the important section involved in this suit, because the main contention of appellant is that the lessee became the owner of all the oil and gas, and that the one-eighth was merely paid as rental. Another clause of the lease provided:

"If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is expressly allowed, the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of

rentals or royalties shall be binding on the lessee until the lessee has been furnished with a written transfer or assignment or a true copy thereof; and it is hereby agreed that, in the event this lease shall be assigned as a part or as to parts of said above described lands, and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportional part of the lands due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which said lessee or any assignee thereof shall make due payment of said rentals."

The last quoted clause is also important, because of the contentions of the different parties.

On December 17, 1921, the parties interested signed a division order directed to the Shreveport-El Dorado Pipe Line Company, Incorporated, in which they stated that they certified and guaranteed that they were the legal owners of the wells on the south forty and that they are entitled to the entirety of the oil produced from said well, including the royalty and interest, until further written notice. The Shreveport-El Dorado Pipe Line Company, Incorporated, was to give credit for all oils received from said wells as per directions below. Then the directions were to give Henry C. Cates one-sixteenth, the G. S. & G. Corporation seven-eighths. This letter or division order was signed by the G. S. & G. Corporation, Henry Cates, John A. Cobb, J. C. Swilley, treasurer, and R. M. Cordell.

It is unnecessary to set out the testimony in full or at length. The real contention is largely a question as to the law. That portion of the testimony necessary to be discussed will be set out later.

The appellant's first contention is that, under the terms of the lease, the title to all the oil from the land covered by the lease vested in the lessee and his assigns as and when it was produced and severed from the soil, and that the stipulation in the lease for the delivery of one-eighth of all the oil produced to the pipe line to the

credit of the lessor was a covenant by the lessee to pay rent in kind, and was not a reservation of title in the lessor as to such one-eighth. We do not agree with the contention of appellant that this is true.

Appellant's attorneys call attention to a number of cases decided by this court to the effect that, when the oil or gas is taken from the ground and placed in the pipe line, it becomes the personal property of the plaintiff, just like any other personalty owned by it, but, even in those cases referred to, the question now before the court was not under consideration, and we do not think the authorities of this court cited by appellant support its contention.

The evidence shows that the pipe line company had knowledge of the provisions of the lease, and the provisions of the lease advised it that the appellee owned one-eighth of the oil on the south forty and the north twenty. About this there is no dispute. The division order expressly states that the persons signing it are the legal owners and entitled to the entirety of the production from said wells, including the royalty interest. Therefore, when appellant examined the lease, it was bound to know that one-eighth of the oil which went into its pipe line, under the terms of the lease, belonged to the appellee. When it received the division order, it showed on its face that it applied to the south forty alone. It therefore had knowledge that, under the terms of the lease, the appellee owned one-eighth, and from the division order it knew that he had sold a portion of his royalty on the south forty alone. Therefore, whether the lessee became the sole owner or not would seem to be immaterial, because, when the appellant received the oil into its pipe line, it knew that the appellee was entitled originally to one-eighth on both tracts of land, and knew that he had only sold a portion of that on the south forty. It therefore follows that, when the appellant received oil which came from the north twenty, it was its duty to deliver it according to the terms of the lease, unless it had received a division order as to the oil from this north twenty.

It was said by the West Virginia court: "A complaint is made that the decree required the pipe-line company to make discovery of the oil run into this line, when no officer of it was made a party capable of making discovery. This is answered by the fact that the company filed a statement of such oil which formed the basis of a decree. The law does not require that some officer be made a defendant when discovery is required, as a corporation discovers by an officer; it is a means of discovery for the plaintiff's benefit, but, when the corporation does make the discovery and it is accepted, where is the error?" *Smith* v. *Linden Oil Co.,* 69 W. Va. 57, 71 S. E. 167.

It was also said in the above case:

"That the pipe line company was a common carrier; * * * that it contracted only with the Linden Company to receive its oil, and that parties must look to Harter and the Linden Company. This is a claim of nonaccountability by the pipe-line company to the true owner of the oil; a claim that a common carrier knows only the consignor and consignee, and cannot be called on by a third party, having true title to the goods, to recognize this right. But the authorities do not bear out this position. The carrier is bound to respond to the demand of the real owner for possession of his goods, and, in so doing, does not render himself liable to one who, having wrongfully obtained possession, has delivered them to the carrier for transportation. The real owner may maintain an action against the carrier for refusal to deliver goods to which he is entitled. * * * The lessee in this lease stipulated to deliver the royalty oil into the pipe line to the credit of Harter. When that oil got into the pipe line, it was the property of Smith and Underwood. It was by extraction made personal property, and belonged to them. It cannot be that, simply because it was in the pipes, it was beyond the reach of the true owners."

Again, the court said in the same case:

"The fact that the premises were in the possession of the Linden Company is urged as being the sole test to

show that the pipe-line company was not bound to look further, but only to receive from it without liability to the true owner."

The court also said:

"Counsel tell us that an oil lease providing for royalty is like an agricultural lease; that the royalty is like a share of a grain crop to be paid the landlord; and that title remains in the landlord until he divides the grain and separates the landlord's part, and Harter and those under him have no title to sustain suit until the oil is separated. Now, all the oil is run into the pipe line. The lease in terms says that the royalty shall be delivered into the pipe to the credit of the party of the first part. It provides no separate delivery, but for running the oil as a whole into the pipes. This peculiar provision distinguishes it from an agricultural lease. Delivery to the pipe line was a separation going to the credit of the lessor, giving him title."

We think the decision of the West Virginia court is a complete answer to appellant's argument as to the ownership of the one-eighth interest; but, in addition to the fact that the lease itself showed that the appellee was entitled to the one-eighth, the division order expressly states that the persons signing it are the owners of all the oil. There is no controversy about the fact that oil, before it is severed, is a part of the land, and, when it becomes severed, it is personal property, but it is earnestly argued that it is not only personal property but it is the property of the person who severs it, that is, the property of the lessee. The facts in this case, the lease and the division order, show that a portion of it is the property of the lessor. It is just as much his property under the facts in this case as it would be if he had simply employed the lessee as his servant to do the work and bring it to the surface. In fact, one might employ an agent or servant to bring oil to the surface with the agreement and understanding that, when it was brought to the surface, it should be delivered into a pipe line, a certain portion of it to the employer or landowner and a certain portion of

it to the person who severed the oil. It therefore seems clear that one-eighth of the oil on the twenty acres was the property of the appellee, but we also think that, even if it were the payment of rent in kind, when the one-eighth together with the other seven-eighths was delivered into the pipe line, all together, the appellant was bound to know that one-eighth of it was to be paid to the lessor.

In the case of *Nonamaker* v. *Amos,* 73 Ohio St. 163, 76 N. E. 949, from which the appellant quotes at length, it will be observed that one contention in that case was that a parol contract related to an interest in land, and that it was not to be performed in a year. These were the issues, but it was said in that case:

"This is the lessor's compensation for the lease and rights granted therein. The five-sixths go to the lessees by virtue of the same instrument, because the grant to them was the oil contained in the premises."

So, it seems from that case that the lessor was regarded as the owner. To be sure, it says that the oil becomes personal property and belongs to the owner of the well. That simply means that it belongs to the parties whose interests are shown in the lease and the division order. Other cases referred to hold that the one-eighth is given as a consideration for the grant, and that it was not a reservation in any sense of any part of the gas or oil in place in the land. Of course, it did not become personal property until severed from the land, and the lessee himself had no interest in the soil and no interest in the land except the right given him by the lease as to the gas and oil.

Appellant next contends that, because the title is in the lessee when the oil is severed, an action will not lie by the lessor against the lessee's vendee for conversion. We have already held that the title to the one-eighth is not in the lessee, and certainly, when delivered in the pipe line, one-eighth of it was the property of the lessor.

It is next contended by appellant that appellees are estopped to recover from the appellant by the execution

of the division order which sets forth the interest of Cates as one-sixteenth. Defendants argue that they had no notice. We have already shown that they had knowledge of the lease, which showed one-eighth to belong to the lessor, and that the division order was confined to the south forty.

They next argue that the appellees are estopped by the failure to call appellant's attention to the fact that it was paying royalties to other parties, which should have been paid to Cates. What we have already said about the notice and knowledge of appellant disposes of this question.

The evidence is sufficient to justify a decree in favor of appellees against appellant, and also in favor of appellant against Cordell, Swilley and Cobb. The decree of the chancery court is therefore affirmed.

TOULMIN & TOULMIN v. UNDERWOOD.

Opinion delivered January 31, 1927.

1. PAYMENT—ACCOUNT SETTLED BY NOTE.—The mere giving of a promissory note for an antecedent debt does not extinguish the debt unless the note is received in payment of the debt, but a note given and received for and in discharge of an open account is a bar to an action upon the account.
2. PAYMENT—PRESUMPTION.—Where a note is given subsequently to the existence of an account, the presumption is that the account was settled by the note; but this presumption may be rebutted by proof.
3. BILLS AND NOTES—PAYMENT OUT OF COLLECTIONS.—Where attorneys accepted in satisfaction of their account against clients the latter's note reciting that it was to be paid out of collections by the attorneys from parties indebted to the clients, the attorneys must look to such collections alone for payment of the note.
4. BILLS AND NOTES—PAYMENT—BURDEN OF PROOF.—In an action on a promissory note, the makers have the burden of proving that the payees agreed that the note should be paid by their collections of amounts due to the makers from third persons.

5. ACCOUNT—BURDEN OF PROOF.—In an action to recover the amount due on an account, plaintiffs have the burden of proving that the account is due.

6. APPEAL AND ERROR—REMARK OF COURT HARMLESS WHEN.—In an action on a note, a remark of the court that he did not think the cross-examination of a certain witness had anything to do with the case, if error, was not prejudicial, where such cross-examination was with reference to payment of a note, which matter had been fully developed.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

D. H. Powell, for appellant.

Starbird & Starbird, for appellee.

MEHAFFY, J. The appellants brought suit in the Crawford Circuit Court against the appellees for $1,095, for $995 of which appellants had received the note of J. T. Underwood, and $100 was alleged to be for services not included in the note. The defendants denied the indebtedness of $100, and admitted the execution of the note, and pleaded a final settlement, and alleged that the note was given and received in payment, and that it was agreed that the note was to be paid out of money collected on notes due appellees; alleged that the appellants had neglected to collect the note, and that, for that reason, there was nothing due on the note.

The undisputed proof shows that, on July 25, 1922, the appellee, J. T. Underwood, executed and delivered to the appellants the following note:

"$995 July 25, 1922.

"Ninety days after date I promise to pay to the order of Toulmin & Toulmin nine hundred and ninety-five dollars, at their offices in Schmind Bldg., Dayton, Ohio. Value received.

"J. T. Underwood.

"No..... Due.....

"Indorsed: Toulmin & Toulmin."

On the same day and at the same time the appellants executed and delivered to John T. Underwood the following agreement:

"H. A. Toulmin, Dayton, Ohio,
"H. A. Toulmin, Jr. Schwind Building
"F. W. Schæfer, Washington, D. C.
McGill Building.

"Patent Law Offices,
"Toulmin & Toulmin.

Dayton, Ohio, July 25, 1922.

"Mr. John T. Underwood,
City.

"Dear sir: It is agreed that the promissory note you gave us this date for $995 for ninety days is to be paid out of the proceeds to be derived from the note of the Underwood Gas Producer Co., made in favor of yourself and Mrs. Underwood and payable October 24, 1922.

"Yours truly,
"Toulmin & Toulmin."

Also at the same time, July 25, 1922, the appellants rendered a statement to John T. Underwood, in which they state:

"Dayton, Ohio.
July 25, 1922.

"Mr. J. T. Underwood,
To Toulmin & Toulmin, Dr.
Patent Counselors.

By statement rendered July 8, 1921	$495
To time and services rendered since said statement of July 8, 1921	500
	$995

"Rec'd. payment by note of John T. Underwood dated July 25, 1922.

"Toulmin & Toulmin."

It will be observed that the appellants signed the statement that they had received payment. It therefore appears that the written contract entered into between the parties shows not only that the note was executed but also shows that it was received by Toulmin & Toulmin in payment of their account against the Underwoods.

There are only two questions in this case necessary to consider:

First: Was the note received as a payment of said indebtedness?

Second: Was it to be paid out of notes which other parties owed the Underwoods?

If the note was received in payment, then it extinguished the original debt, and appellants could not maintain a suit for the debt. Not only does the testimony of the appellee show that it was received in payment, but the written statement of appellants themselves shows that they did receive the note in payment. It is well settled that the mere giving of a promissory note for an antecedent debt does not extinguish the debt unless the note is received in payment of the debt, but it is also well settled that, if a note is given and received for and in discharge of an open account, it is a bar to an action upon the account. This court said, in *Costar & Harvick* v. *Davies & Gaines,* 8 Ark. 213:

"An action cannot be maintained on an original contract for goods sold and delivered by one who has received a note as a conditional payment and has passed away the note. A promissory note given and received for and in discharge of an open account is a bar to an action upon open account, although the note be not paid. A note without a special contract will not of itself discharge the original cause of action, but, by express agreement, even the note of the third person may be received in payment. In general a higher security taken from the debtor himself extinguishes the original contract. This proceeds upon the presumption of law that it is taken in satisfaction of the original debt; for, if it appears otherwise upon the face of the security, it will not operate as an extinguishment. It is a mere question of intention."

Where a note is given subsequent to the existence of an account, the presumption is that the account was settled by the note. Again, this court has said:

"It is true that a note given and accepted in discharge of an open account bars an action on the account; and, when a note is taken subsequent to the existence of an account, the presumption of the law is that the outstanding account is settled by the note; but it is a presumption merely, and may be rebutted by proof. It is a question of intention." *Carlton* v. *Buckner*, 28 Ark. 66.

In the case at bar, however, the written statement of the appellants themselves shows that the note in this instance was received in payment. This written statement was a part of the contract entered into at the time, just as much as the note was a part of the contract. Both instruments were signed at the same time, the receipt of the appellants showing that the note was received in payment of the account. In fact, the appellants presented the appellees with a statement of their account, at the bottom of which was written: "Received payment by note," and signed this statement. So, we do not think there could be any question of the intention here. The written contract itself shows that it was received in payment of the existing indebtedness, a statement of which was presented to appellees at the time. It has also been said by this court:

"It is well settled in this State that the giving of notes for a debt is no payment of the debt, unless, by agreement of the parties, the notes are taken in payment." *Daniel* v. *Gordy,* 84 Ark. 218, 105 S. W. 256.

Here we have the positive agreement of the parties in writing that the notes were received in payment of the account. All of the authorities are to the effect that the mere giving a note without agreement does not discharge a debt, but that the giving of a promissory note, with the agreement of the parties that the notes are taken in payment, always extinguishes the original debt. *Triplett* v. *Mansur-Tebbets Implement Co.,* 68 Ark. 230, 57 S. W. 261, 82 Am. St. 284.

Since the writing itself in this case shows that the note was received in payment, we think the debt was

extinguished, and that the suit in this case was properly a suit on the note.

The second proposition is whether, under the contract, the notes were to be paid out of the collections made by Toulmin & Toulmin from parties indebted to the Underwoods. The preponderance of the testimony shows that the appellants had in their possession for collection certain notes due the Underwoods, and that their written agreement, made at the time the $995 note was given, was that said note was to be paid out of the proceeds to be derived from the note of the Underwood Gas Producer Company, made in favor of John T. Underwood and Mrs. Underwood, and payable October 24, 1922, and the testimony of appellee shows that the Toulmins simply neglected to collect these notes. We think the parties had a right to make this agreement, whatever their reason or purpose may have been in making it; that they did make it; and that it was a valid, binding agreement of the parties. According to the preponderance of the evidence, they had the notes which they were to collect, in their possession at the time, and kept them, and, if the agreement was valid, they would have to undertake to make the collection, or, at any rate, they would have to look to the proceeds of said notes for payment of the note to them. It is well settled that any mode of payment accepted by the payee would be binding on him. In other words, payment can be made in anything or in any manner which the creditor is willing to accept.

"An allegation of payment admits evidence of payment in cash or in any other mode agreed upon by the parties, *e. g.*, by delivery of chattels received by the creditor in satisfaction of his demand, or by giving and acceptance of anything in lieu of money, and in discharge of the debt. Payment may be made in anything that the creditor will receive in payment." *Bush* v. *Sproat*, 43 Ark. 416; *Williams* v. *Uzzell*, 108 Ark. 242, 156 S. W. 843.

The appellants complain of the action of the court in giving and refusing instructions, and they also complain because the court stated that he did not think the cross-

examination by Mr. Howell had anything to do with the case. The court properly instructed the jury, we think, that the burden was upon the Underwoods to show by a preponderance of the testimony that the $995 note was to be paid by notes from other people and owing to the Underwoods and in the hands of the plaintiffs for collection. The court stated to them that, if they showed these facts by a preponderance of the testimony, the verdict should be in favor of the Underwoods on the question of the note; certainly there was no error in this. If the appellees showed by a preponderance of the testimony that the $995 note was to be paid from the proceeds of these other notes, and showed that they were in the hands of the holder of this note for collection, and that the agreement was that they were to collect these notes, or had them for collection and were to pay themselves the note due them out of the proceeds of these other notes, the Underwoods would be entitled to a verdict.

The parties had the right to make the agreement about the manner of the payment of the note, they had the right to agree that it should be paid out of the proceeds of the other note, and this was shown in writing, and the instruction simply told the jury that they would have to show these facts by a preponderance of the testimony, that is, show that this was the agreement, and the court required them to show further that the other notes were in the hands of appellants for collection. The instruction went further, and told the jury, if they did not so find from a preponderance of the testimony, that their verdict should be for the plaintiffs. We think this was a correct instruction.

The court instructed, as to the $100 account, that it was only a question of fact for them to determine, and instructed properly that the burden of proof was on the appellants to show by a preponderance of the testimony that the defendants owed them $100. The first instruction requested by plaintiff was properly refused because, as we have already shown, if the note was accepted by appellants in payment of the original account, any

cause of action the appellants might have against the appellees would be upon the note, because, if accepted in payment, it would extinguish the original debt.

The remark of the court objected to by appellants was not a charge to the jury in regard to any matters of fact, but it was a declaration of law. The court simply stated that he did not think the cross-examination of Mr. Howell had anything to do with the case. He made this statement because, evidently, he had concluded the only question in the case was whether or not they were to get their money out of these notes; that is, whether or not this contract had been made; and stated to attorney for appellant that he might go fully into that matter.

The cross-examination to which the appellant objected was with reference to the payment of the $995 note, which the appellees admitted had not been paid, and with reference to the notes which Toulmin & Toulmin had for collection, and as to whether they had been sued on, and if that was not the reason why witness had copies instead of the original. There was no effort made to show that appellants had endeavored to collect said notes; and, since the appellants were permitted to develop the case fully as to whether the note was received in payment of the account and whether it was to be paid out of the proceeds of the other notes, and these two questions were fairly submitted to the jury under the instructions of the court, telling them that the burden was upon the Underwoods upon these questions, we think there was no prejudicial error in the remark of the court. The real issues in the case were questions of fact properly submitted to the jury, and there was evidence to sustain their verdict.

The judgment is therefore affirmed.

BLOEDE COMPANY v. MAE VENEER PRODUCTS COMPANY.

Opinion delivered February 7, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict supported by substantial evidence will not be disturbed on appeal even though it appears to be against the preponderance of the evidence.
2. ACTIONS—CONSOLIDATION OF INTERVENTIONS.—Under Crawford & Moses' Dig., § 1081, relating to consolidation of causes of action, *held* in an action for the purchase price of goods and machinery in which goods and machinery were attached, where one intervener claimed the attached machinery and equipment by purchase and another intervener claimed a mortgage lien therein, it was not error to consolidate the interventions.
3. APPEAL AND ERROR—EXCLUSION OF TESTIMONY—HARMLESS ERROR.—In an action to recover the price of goods, where the issue was as to whether one of the defendants or one of the interveners was an innocent purchaser of such goods, the exclusion of oral testimony that part of the property was purchased by another defendant on the ground that the purchase was witnessed by writing, was harmless error.
4. TRIAL—INSTRUCTION IGNORING ISSUE.—An instruction to find for plaintiff as to certain property in an attachment suit if an intervener made no claim thereto, was properly refused as ignoring a claim thereto of one of defendants as an innocent purchaser.
5. ATTACHMENT—PROPERTY DESTROYED BY FIRE.—In an action of attachment for certain property, it was not error to refuse to direct a verdict for its recovery in favor of the plaintiff if the testimony showed that the property had previously been destroyed by fire.

Appeal from Clay Circuit Court, Western District; *W. W. Bandy,* Judge; affirmed.

Oliver & Oliver, for appellant.

Raley & Ashburn and *C. T. Bloodworth,* for appellee.

McCULLOCH, C. J. Appellant, a foreign corporation doing business in Baltimore, Maryland, instituted this action in the circuit court of the Western District of Clay County against Samuel Frelich, doing business under the style of Western Veneer Products Company, to recover the sum of $2,362.87 alleged to be due for the price of a lot of glue sold and delivered by plaintiff to the defendant. At the commencement of this action an

order of attachment was issued and levied on a lot of glue, alleged to be of the value of $1,400, also machinery and equipment of a veneer plant situated at Knobel, Arkansas, in Clay County. Subsequently an amended complaint was filed, making G. M. Walker, E. L. Walker, Mae Frelich and Mae Veneer Products Company parties defendant. It was alleged in the amended complaint that the attached property had been fraudulently delivered to Mrs. Mae Frelich, who was the wife of Samuel Frelich, or to Mae Veneer Products Company, for the purpose of cheating, hindering and delaying the creditors of Samuel Frelich, including appellant. Appellee, Mae Veneer Products Company, filed an answer and cross-complaint, as intervener, claiming title to all of the attached property by purchase from another corporation, known as the American Investment Corporation, which had purchased from still another corporation, doing business in St. Louis, known as the Western Veneer Products Company. This plea of Mae Veneer Products Company contained a full and complete denial of the charge of fraud in the acquisition of the property in controversy, and alleged that the property was purchased for a valuable consideration, which was paid, and without any notice of any fraud. There was also an allegation that the machinery and equipment in the plant were purchased by the intervener from Frank Sellmeyer, and that the latter had a mortgage lien on the property—that the intervener was the owner, subject to the lien of Sellmeyer. Sellmeyer also filed an intervention, claiming that he had a mortgage lien on the property, and prayed that the lien be enforced. It was also alleged, and the evidence tended to show, that the veneer plant at Knobel, including the equipment and machinery involved in the action, was destroyed by fire, and practically nothing of any value left, except a steam boiler to the engine. There was, over objection of appellant, a trial of the two interventions together, which resulted in a verdict and judgment against appellant and in favor of both of the interveners. Appellant filed a motion for

a new trial, which was overruled, and then prosecuted this appeal.

The Western Veneer Products Company was a Missouri corporation, domiciled at St. Louis, and owned and operated a veneer plant there and at another place in the State of Missouri. Samuel Frelich, one of the defendants, was connected with that corporation, and was a stockholder and officer, and manager of the business. Defendants, G. M. Walker and E. L. Walker, were also connected with that corporation. The Western Veneer Products Company was thrown into bankruptcy by the Walkers on account of a disagreement between the parties interested, but there was a settlement outside of the bankruptcy court, which ended the bankruptcy proceedings, and the corporation continued to do business under the management of Samuel Frelich. A bill of glue was purchased by that corporation from appellant, at a price aggregating the amount sued for in this action. The glue was shipped to St. Louis to the Western Veneer Products Company, and received there.

There is testimony to the effect that, after the bankruptcy proceedings, the business of the Western Veneer Products Company was conducted by Samuel Frelich for his own benefit, and that the corporate name was merely used as a trade name; that Frelich was the real party in interest, and was the real purchaser of the glue from appellant, but the great preponderance of the evidence, which comes very nearly, if not entirely, undisputed, is that the business was carried on by the corporation, and that Frelich was merely the manager. That question, however, is unimportant, as will hereafter be seen in the discussion.

A portion of the glue sold by the appellant was shipped by the Western Veneer Products Company to the Mae Veneer Products Company at Knobel, Arkansas, and constitutes the property involved in this action, in addition to the machinery and equipment of the plant. The glue was sold by the Western Veneer Products Company to the American Investment Corporation, and by

the latter to appellee, Mae Veneer Products Company. It appears also from the testimony that the American Investment Corporation was controlled by Samuel Frelich.

The veneer plant at Knobel was originally owned by Sellmeyer Brothers, merchants at Knobel, under the partnership style of Southern Novelty Company. The Sellmeyers held a mortgage on the property from the Western Veneer Products Company, and foreclosed it in the chancery court, and bought it for the amount of the decree. After the confirmation of the sale, the Sellmeyers sold the plant to Mrs. Mae Frelich, and executed a bill of sale expressly declaring a lien for the purchase price, and on the same day Mrs. Frelich executed to Frank Sellmeyer, who was acting for the partnership, a promissory note for the price, referring to the bill of sale and the lien. The bill of sale also contained a recital that any machinery or other equipment which might thereafter become attached to and become a part of the plant should be embraced in the lien for the purchase price.

The Mae Veneer Products Company was organized as a domestic corporation, and Mrs. Frelich became the principal stockholder, putting in the machinery and other property connected with it in payment for her stock in the corporation.

Testimony was adduced by appellant to the effect that, at the time the glue was shipped from St. Louis to Knobel, there was also included in the shipment a lot of machinery of the value of about $2,000, which had been purchased from the Walkers. It was the contention of appellant that all of the attached property was, in fact, owned by Samuel Frelich, and that the claim of ownership by Mrs. Frelich and the Mae Veneer Products Company was fictitious—that the alleged sale was fraudulent. On the other hand, the contention of the interveners was that Mrs. Frelich was the purchaser of the property for a valuable consideration, and without knowledge of any fraud on the part of Samuel Frelich or the

Western Veneer Products Corporation. Appellant also contended, and attempted to show, that the sale of the plant by the Sellmeyer Brothers, though on its face made to Mrs. Frelich, was really a sale to the defendant, Samuel Frelich. All these issues were correctly submitted to the jury on instructions requested by each of the parties, and we are of the opinion that the evidence was legally sufficient to sustain a verdict in favor of the interveners.

There was very strong testimony, in the way of proof of family relationship and certain other suspicious circumstances, which tend to show that the purchase of the plant by Mrs. Frelich was colorable, but we cannot say that the testimony is not legally sufficient to support the finding of the jury that the purchase was in good faith and for a valuable consideration. Mrs. Frelich testified to that effect, and it appears the jury accepted her statement as true. We are not concerned with the question of preponderance of the evidence, for, under settled rulings of this court, it is our duty to leave the verdict of the jury undisturbed if there is substantial evidence to support it, even though it appears to us that the finding is against the preponderance of the evidence.

It is earnestly insisted by counsel for appellant that the verdict is without support, but, as before stated, we are unable to agree with them in this contention.

It is next contended that the court erred in consolidating the two interventions for trial together. In the first place, it may be said, in answer to this contention, that the two interventions were so closely related that they could be treated as a joint intervention, for one of the interveners, the Mae Veneer Products Company, claims as the owner of the machinery and equipment, as well as the glue, and the intervener, Sellmeyer, claims as lienor. They could have filed a joint intervention, but the fact that they intervened separately does not affect their real status. Besides, the question of consolidation comes squarely within the statute providing for the consolidation of "causes of action of like nature or relative

to the same question" pending in the same court. Crawford & Moses' Digest, § 1081. There was therefore no error of the court in this regard.

The next assignment of error relates to the ruling of the court in excluding offered testimony of witness Walker. It was the contention of appellant that part of the machinery in the plant at Knobel was shipped from St. Louis to Knobel, and appellant offered to show by witness Walker that this machinery was sold by the Walkers to Samuel Frelich. It developed in the examination of the witness that there was a written contract with reference to the sale, and the objection was made that the written contract itself was the best evidence of the transaction. It also appeared from the testimony of the witness that he had the contract in his possession, and that it was in St. Louis, and he could not produce it at the trial. The court sustained the objection, and appellant saved an exception. The contention is that the written contract was the best evidence of its terms but that it was competent to prove by oral testimony the identification of the person to whom the sale and delivery were made. The answer to this contention is that we fail to see the materiality of the proof as to who the purchasers really were—whether it was Samuel Frelich or the Western Veneer Products Company, which was under his management. The real question in the case was whether or not the acquisition of the property by Mrs. Frelich or the Mae Veneer Products Company was in good faith and for a valuable consideration, or whether it was colorable for the purpose of defrauding the creditors, and that question was, as we have already said, submitted to the jury on appropriate instructions, and we fail to see any prejudice in the rulings of the court, even if found to be incorrect.

There are two assignments of error with reference to refusal of the court to give instructions requested by appellant. One of the assignments relates to instruction No. 6, which reads as follows:

"Even though you should find for the intervener, F. J. Sellmeyer, yet your verdict will be in favor of plaintiff as against F. J. Sellmeyer as to the glue attached, and as to the machinery shipped from St. Louis in 1923, if you find any machinery was so shipped."

The first part of this instruction relating to glue is wholly abstract, because Sellmeyer made no claim to the glue. There was no such issue in the case, so far as he was concerned. The other portion of the instruction, which related to the machinery alleged to have been shipped from St. Louis, was incorrect, for it is to be remembered that there was joint claim by the two interveners—one claimed ownership and the other a lien on the property, and it would have been misleading to the jury to tell them to exclude the claim of the intervener Sellmeyer on that property. If the jury found, on the other instructions, that the property was purchased by Mae Veneer Products Company and that the purchase was free from fraud, then it was immaterial, so far as appellant was concerned, whether the recovery was in favor of one intervener or the other.

The other instruction covered by assignment is No. 7, which reads as follows:

"You are instructed that, regardless of any other verdict, your verdict will be for the plaintiff and against both the interveners as to the machinery shipped from St. Louis in March and April, 1923, if you find that any machinery was shipped during or about that time, and you will assess the value of said machinery at the time the bond was filed by interpleader, Mae Veneer Products Company."

This instruction was plainly erroneous, for it excluded the machinery alleged to have been shipped from St. Louis in March and April, 1923. This is so for the reason stated above in regard to the court's ruling on instruction No. 6. In addition to what we have said in regard to those instructions, we are unable to discover the materiality of any testimony in regard to any of the machinery alleged to have been shipped from St. Louis,

for witness Sellmeyer testified that, after the fire, there was no property, constituting machinery and equipment, left there of any value, except the boiler. There was nothing to litigate about, except the boiler and the glue. However, even if there was other property there, we think there was no error in the court's ruling.

This covers all the assignments, and our conclusion from the whole case is that there is no error in the proceedings, and the judgment must be affirmed. It is so ordered.

J. I. PORTER LUMBER COMPANY v. BONNER.

Opinion delivered February 7, 1927.

1. LIMITATION OF ACTIONS—VENDOR'S LIEN.—A note for the purchase price of land, which fell due more than five years before the commencement of an action to enforce a vendor's lien, the vendee holding under bond for title, was not barred by the statute of limitations as against the holder of the note by assignment from the vendor.
2. BILLS AND NOTES—INNOCENT PURCHASER.—One who takes a negotiable note by assignment for value before its maturity is an innocent purchaser, though the assignment was to cover an antecedent indebtedness.
3. VENDOR AND PURCHASER—RIGHTS OF ASSIGNEE.—Under assignment of notes given for the purchase of land, the assignee acquired all the rights of the vendor.
4. VENDOR AND PURCHASER—PAYMENT TO ASSIGNOR OF NOTES.—Where notes were assigned before maturity, the assignee was not bound by subsequent payments to the assignor, where the original holder did not have possession of the notes at the time and was not authorized by the assignee to collect them.
5. BILLS AND NOTES—PAYMENT.—In an action by the assignee of notes against the makers, evidence *held* not to support a finding that the makers had paid the original holder.

Appeal from Cleveland Chancery Court; *H. R. Lucas*, Chancellor; reversed.

Woodson Mosley, for appellant.

George Brown, for appellee.

McCULLOCH, C. J. Appellant, a domestic corporation with its principal place of business at Stuttgart, Arkansas, was the owner of a large body of land in Cleveland County, containing 13,600 acres, and on September 15, 1913, executed to one Blodgett a contract to convey same at a stipulated price to be thereafter paid, and undertaking to execute a deed or deeds upon the payment of the price. The contract contained a stipulation permitting Blodgett to obtain a separate conveyance from appellant, conveying parts of the aggregate acreage, on resale to other parties and payment of the price to appellant. The details of this contract were set forth in a recent decision. *Wilms* v. *Dedman,* p. 783.

Blodgett organized a corporation, of which he was president and manager, known as the Western Land Company, and made a quitclaim deed to that corporation, which operated as a sale of his interest in the contract with appellant. Thereafter, on December 27, 1915, the Western Land Company entered into an executory contract with appellee, Victor E. Bonner, for the sale of one hundred and twenty acres of the land embraced in the Blodgett contract for the total purchase price of $1,800, payment of $600 of which was acknowledged in the contract and the balance of $1,200 was evidenced by eight equal promissory notes, payable annually, beginning December 27, 1918. These notes were subsequently delivered by the Western Land Company and Blodgett to appellant in settlement of certain indebtedness under the original contract, the notes bearing indorsement of assignments to J. M. Cox, on September 1, 1917, and J. M. Cox's subsequent assignment to appellant. There were no credits indorsed on the notes, and appellant instituted this action against Bonner on February 16, 1924, in the chancery court of Cleveland County, to recover the amount of the notes and to enforce a lien as vendor of the land embraced in the contract from the Western Land Company to Bonner. Mrs. Bonner, wife of Victor E. Bonner, was made a party defendant at her own request, and both of the defendants joined in an

answer pleading payment, and also pleading bar of the statute of limitation. The court heard the cause on oral testimony and documentary proof evidencing the contract between the parties, and dismissed the complaint of appellant for want of equity. The court made special findings in the decree that the notes had been paid and discharged.

Counsel for appellees also insist here on the defense of the bar of the statute of limitations against the notes, and we will first dispose of that question. Two of the notes, the one falling due on December 27, 1924, and the other December 27, 1925, matured after the commencement of this action, but all of the notes recited that they constituted a series, and each contained an accelerating clause, which made them all due at the option of the holder. The first note, which fell due December 27, 1918, was the only one of them which matured more than five years before the commencement of the action, but even that note was not barred as against the vendor of appellee or the holders of the note by assignment from the vendor. *Tillar* v. *Clayton,* 76 Ark. 405, 88 S. W. 972; *Perry* v. *Arkadelphia Lumber Co.,* 83 Ark. 374, 103 S. W. 724; *Little Rock & Fort Smith Ry. Co.* v. *Rankin,* 107 Ark. 487, 165 S. W. 431; *Wilm* v. *Dedman, supra.*

Now, as to the plea of payment, we are of the opinion that the trial court erred in its finding, and that the decree should be reversed on that ground. The undisputed testimony shows that the notes were assigned to appellant for the purpose of settling an indebtedness of Blodgett to appellant under the original contract. Blodgett testified to that effect, and it is undisputed. The indorsements show that the assignments were made by the Western Land Company September 1, 1917, which was before maturity of the first note. Appellant was therefore an innocent purchaser for value, even though the assignment was to cover an antecedent indebtedness. *Newell Construction Co.* v. *McConnell,* 156 Ark. 558, 246 S. W. 854.

Under the assignment, appellant acquired all the rights of the vendor of appellee. *Rodman* v. *Sanders,* 44 Ark. 504; *Manwaring* v. *Farmers' Bank of Commerce,* 139 Ark. 218, 213 S. W. 407.

Payments, if any were made at all, were to Blodgett long after the assignments of the notes to appellant, and there is no testimony at all that Blodgett had possession of the notes at the time, or that he was authorized by appellant to make collection. Under those circumstances, appellant was not bound by payment made to Blodgett. *Koen* v. *Miller,* 105 Ark. 152, 150 S. W. 411.

The testimony very clearly preponderates, we think, against the finding of the trial court that the payments claimed by appellees were made to Blodgett. Bonner and his wife both testified concerning those payments, and that was the only testimony they offered on the subject. Their testimony is inconsistent and inherently weak. They claim to have paid large sums, in the aggregate more than the amount of the indebtedness. They testified to a great many payments in small amounts, from a few dollars to several hundred; then they testified to a cash payment of $1,000, for which they say Blodgett gave them a receipt and afterwards purloined it, but no such receipt was produced. They claim they met Blodgett in Pine Bluff for the purpose of settling; that they called for the notes, and Blodgett assured them he would treat them right; and that they made a payment of $1,000 in currency, without the production of the notes, merely upon Blodgett's promise that he would produce the notes and make a deed. This was contradicted by Blodgett, who testified that the payment of $1,000 was not made to him; that the transaction did not occur at all; that nothing had been paid on the notes except a credit of something less than $50 for a fee due to Bonner for acting as auctioneer in the sale of three mules. Mr. Culpepper, the secretary, testified about the notes, and stated that nothing had been paid on them, but there was to be a credit of $28 for auctioneer's service. E. L. McClendon, circuit clerk, who appears not to have had

the slightest interest in the controversy, testified that, just after this action was commenced by appellant against Bonner, the latter stated to him that he had not paid anything on the land except the first payment; that that amounted to no more than the rent would be up to the time of the decree, and that he was not going to contest the suit. The testimony of appellee is, as we have already said, entirely without any corroboration. We have the testimony of Blodgett and Culpepper, which is corroborated by Mr. McClendon's testimony concerning appellee's admission that he owed the debt. With this state of the proof there is no escape from the conclusion that the preponderance of the testimony is clearly in favor of appellant, that no payment has been made on the notes. For each of these reasons there must be a reversal of the judgment, and it is so ordered, with directions to enter a decree in favor of appellant for the recovery on the notes, with interest, and for the enforcement of same as a vendor's lien on the land described in the complaint.

AMERICAN INVESTMENT COMPANY v. KEENEHAN.

Opinion delivered February 7, 1927.

1. JUDGMENT—PREMATURE RENDITION.—A default decree will not be set aside at a subsequent term on the ground that it was prematurely rendered.
2. JUDGMENT—MOTION TO VACATE.—A motion to vacate a default decree rendered at a former term was insufficient as not setting up any grounds stated in Crawford & Moses' Dig., § 6290, and because it did not comply with §§ 1316 and 6292, *Id.*

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

Hillhouse & Caldwell and *Evans & Evans,* for appellant.

WOOD, J. On August 28, 1925, the American Investment Company, an Oklahoma corporation, instituted this action in the White Chancery Court against John Keene-

han to recover judgment on a certain note and to foreclose a mortgage executed to secure the same on certain real estate situated in White County, Arkansas. A. A. Prewitt and his wife were also made defendants. The plaintiff prayed judgment for the amount due on the note and for the foreclosure of the mortgage. The parties named as defendants in the complaint were duly served with summons. The cause was heard on October 19, 1925, and, the defendants failing to appear, a decree by default was rendered against them for the amount of the note and the foreclosure of the mortgage. On December 14, 1925, Avery M. Blount, as solicitor for the defendant, John Keenehan, filed the following motion to set aside the decree:

"Comes the defendant, John Keenehan, and for his motion herein states: That this suit was filed on the 28th day of August, 1925, and that said suit was for the purpose of foreclosing a mortgage which the plaintiff alleges to be due, but such allegation is denied by the defendant. Defendant states further that, soon after the suit was filed, he employed Avery M. Blount as his attorney for the purpose of filing an answer and defending said suit. That his attorney communicated with the plaintiff, American Investment Company, and advised them of defendant's defense, and that the next term of the court was an adjourned term, which was held on the 19th day of October, 1925, and defendant's attorney learned that the plaintiff did not expect to be present, or be represented by counsel at this term of court, and, as no depositions or proof of any kind had been taken by the plaintiff, nor any evidence of the mortgages and notes had been filed with the court, the defendant, for that reason, did not expect the cause to be submitted, and therefore did not file an answer, believing that the plaintiff would recognize the validity of his defense and would make a settlement with him without a trial.

"Defendant further states that, when the court convened on October 19, 1925, the court called the docket of all cases pending, and the defendant's counsel was called

out of the court room by another client, and in his absence this cause was called by the court, not for the purpose of trial but for the purpose of sounding the docket and ascertaining the cases that would be ready for trial, and, when this case was called, J. N. Rachels, an attorney of the White County bar, erroneously announced that he was representing the defendant, and requested that a decree be entered against the defendant, which the court did.

"Defendant further states that the said J. N. Rachels acted without authority, and that he had not employed him nor given him authority to represent him, and that the action of the court in granting the decree was premature, as no evidence of any kind or character was offered by the court, and the court could not make a finding of facts and find that the defendant was due the plaintiff any amount.

"Defendant further states that he has a valid defense, that the mortgage or interest on same is not due, but that, on the other hand, the plaintiff has collected from him the sum of $600 from rents upon his farm and for timber that the plaintiff has sold from his farm.

"Wherefore defendant prays that the decree entered herein be set aside and forever held for naught, and that the defendant be given permission to file an answer and present to this court his defense, and for all other relief that the court may deem just and equitable."

On the same day the motion was filed the motion was heard as if on demurrer thereto, and the court entered a decree setting aside the decree that had been entered on October 19, 1925, an adjourned day of the regular June term of the court for 1925, and entered an order giving the defendants permission to file an answer, and continue the cause until the next adjourned day of court, March 8, 1926.

The allegations of the motion to set aside the decree rendered on the adjourned day of the regular June term, 1925, of the White Chancery Court, treating the same as true, only show, at most, that the decree which the motion

seeks to set aside was prematurely rendered. But the court was without authority to set such decree aside at a subsequent term of the court on the ground that the same was prematurely rendered. Section 6290 of Crawford & Moses' Digest prescribes the grounds upon which a decree may be vacated after the expiration of the term at which it was rendered. The allegations of the motion to vacate do not set up any of these grounds, nor was the motion sufficient in form, nor did the appellee comply with the procedure prescribed by § § 1316 and 6292, C. & M. Digest.

It follows that the court erred in granting appellee's motion to vacate the decree rendered in favor of the appellant against the appellee and others at the regular June term, 1925, of the White Chancery Court. The decree from which this appeal comes is therefore reversed, and the cause will be remanded with directions to dismiss appellee's motion to vacate and set aside the decree rendered in favor of the appellant against the appellee and others, at the regular June term, 1925, of the White Chancery Court, and on the 19th of October, 1925, the same being an adjourned day of the regular term. The trial court is hereby directed to enter an order vacating its decree rendered on December 14, 1925, and to reinstate the decree rendered by it in the cause of the appellant against the appellee and others on October 19, 1925, and for such other and further proceedings as may be necessary according to law and not inconsistent with this opinion.

SNOW v. RIGGS.

Opinion delivered February 7, 1927.

1. CONSTITUTIONAL LAW—DELEGATION OF POWER BY LEGISLATURE.—The State Highway Commission may be authorized by the Legislature to promulgate a rule prescribing on which side of the highway pedestrians should walk, without violating the Constitution.
2. CONSTITUTIONAL LAW—DELEGATION OF POWER.—The Legislature may by statute prescribe general rules and intrust their enforce-

ment to the State Highway Commission and give power to the Commission to enact further rules not in conflict with the statute.

3. STATUTES—UNCERTAINTY.—A statute which is too vague and uncertain to be effective is void.

4. HIGHWAYS—REGULATION OF USE.—Acts of Extraordinary Session of 1923, p. 11, § 68, giving the State Highway Commission power to make rules and regulations for traffic on State highways, *held* not to authorize the Commission to adopt a rule as to the side of the highway on which pedestrians should travel.

5. HIGHWAYS—INJURY BY AUTOMOBILE—CONTRIBUTORY NEGLIGENCE.—A pedestrian walking on the right side of a highway, contrary to a rule of the State Highway Commission, is not guilty of contributory negligence as matter of law precluding recovery for injury by an automobile coming from behind.

6. HIGHWAYS—RIGHTS OF PEDESTRIANS.—A pedestrian has equal rights with others to the use of public roads, and must exercise ordinary care for his own safety, and it is generally a question for the jury whether such care has been exercised.

7. HIGHWAYS—INJURY TO PEDESTRIAN—BURDEN OF PROOF.—In an action for personal injuries by a pedestrian, the burden of showing defendant's negligence is on plaintiff, and the burden of showing plaintiff's contributory negligence is on the defendant.

Appeal from Randolph Circuit Court; *John C. Ashley,* Judge; affirmed.

STATEMENT OF FACTS.

Mary Riggs instituted this action in the circuit court against Linn Snow to recover damages for having been negligently struck and injured by an automobile which he was driving while she was walking along a State highway in Randolph County, Arkansas.

According to the evidence adduced in favor of the plaintiff, she came out of a gate on the State highway in Randolph County, Arkansas, and started walking northward along the edge of the road on the east, or right-hand side thereof. She was at the edge of the road, and did not hear any warning of the approach of an automobile. There was a wagon about the center of the road where the plaintiff was walking, and Linn Snow approached in an automobile, also going north. He was traveling at a rapid rate, and turned around to the right of the wagon in order to pass it, and struck the plaintiff

with his automobile and severely injured her. It is fairly inferable from the evidence that the defendant could have seen the plaintiff in time to have stopped his automobile and thus have avoided striking her. According to the evidence of the plaintiff, she did not hear or see the approaching automobile.

There was a verdict and judgment in favor of the plaintiff, and the case is here on appeal.

E. G. Schoonover and *Smith, Jackson & Blackford,* for appellant.

Pope & Bowers, for appellee.

HART, J., (after stating the facts). Under an act of an extraordinary session of the Legislature, approved October 10, 1923, power is given the State Highway Commission to promulgate reasonable rules and regulations to regulate traffic on State highways. Extraordinary Acts of 1923, page 11. According to the rules promulgated pursuant to § 68 of the act, pedestrians on State highways are required to travel on the left side of the highway in order that they may face and thus see approaching automobiles.

It is the contention of counsel for the defendant that, under this regulation adopted by the State Highway Commission, the plaintiff was guilty of contributory negligence as a matter of law because she was walking on the wrong side of the road when she was struck by the automobile. It is sought to uphold the judgment on two grounds.

The first ground is that the State Highway Commission had no authority to promulgate a rule prescribing on which side of a State public highway footmen should walk. We do not agree with counsel in this contention. In 6 Ruling Case Law, page 179, § 179, the general rule is declared to be that there are no constitutional objections arising out of the doctrine of the separation of the powers of government to the creation of administrative boards empowered within certain limits to adopt rules and regulations, and authorizing them to see that the legislative will expressed in statutory form is carried

out by the parties or corporations over whom such boards may be given administrative power. This doctrine has been recognized and applied by this court according to the facts of each particular case. *Davis* v. *State,* 126 Ark. 260, 190 S. W. 436; *State* v. *Martin & Lipe,* 134 Ark. 421, 204 S. W. 622; and *Britt* v. *Laconia Circle Sp. Drainage Dist.,* 165 Ark. 92, 263 S. W. 48.

The rule itself and the reason for it is stated in a clear and comprehensive manner by the Supreme Court of Illinois in *People* v. *Roth,* 249 Ill. 532, 94 N. E. 953, Ann. Cas. 1917A, p. 100. In discussing the subject, Vickers, C. J., said:

"The government of a State is not such an exact science that every possible contingency can be foreseen and provided for by legislative enactment. The agencies of government do not act automatically, but, to accomplish the ends of government, it is necessary to vest in its officers certain general powers, with a discretion in the government agents as to their exercise. It would be as impracticable as it is undesirable to attempt to formulate in advance a set of hard-and-fast rules by which every conceivable public act should be governed. In order to accomplish the ends of local government it has been found expedient to create various boards and commissions, which are charged with the duty of supervising, directing and controlling particular subjects, and to authorize such boards to formulate rules to carry out the object in view, and it has usually been held, in this and other States, that the granting of such power by the Legislature was not a grant either of legislative or judicial power."

There can be no doubt that, in pursuance of its authority to regulate public highways and travel thereon, the Legislature may by statute prescribe general rules and intrust their enforcement to a State Highway Commission, and may give power to the Commission to enact further rules not in conflict with the statute. 12 C. J. 847 *et seq.,* and p. 917. If the Legislature, within reasonable limits, may enact statutes regulating the use of

vehicles on the highways and prescribing the side of the highways upon which pedestrians may travel, in the application of the principles above announced, it is equally certain that the Legislature may delegate to the State Highway Commission the power to adopt reasonable rules and regulations to carry out the provisions of the statute regulating the use of the public highways of the State.

It is also insisted that the rule in question is of no effect because the statute under which the rule is promulgated is not sufficiently definite for that purpose. In this connection we think counsel for the plaintiff are correct. Where an act is too vague and uncertain to be effective, it is void on that account. *Bittle* v. *Stuart,* 34 Ark. 224, and *Ex parte Jackson,* 45 Ark. 158.

The rule prescribing upon which side of State highways footmen may travel was enacted under the authority of § 68 of the act referred to above. It reads as follows:

"Power is hereby conferred on the State Highway Commission to make all necessary and reasonable rules and regulations to carry out the provisions of this act, to regulate the traffic on State highways, including regulation of lights on motor vehicles, to fix the load limits and speed limits, the cancellation of licenses issued to incompetent or reckless chauffeurs, to regulate the placing of appropriate road signs and danger signals, to fix the duties of all persons employed by the Commission, including the State Highway Engineer and secretary, and to issue necessary bulletins and publications. Said rules and regulations may be printed and distributed by the State Highway Commission."

There is nothing in the section, when construed according to the plain and ordinary meaning of the language used, which would give the State Highway Commission the authority to adopt rules prescribing upon what side of the street highway pedestrians should travel. If the Legislature thinks such an act is desirable, it should declare its purpose in a statutory enactment, or should give the Highway Commission the power to do so in

plain and unmistakable terms. The Legislature, having failed to confer the power upon the State Highway Commission, the courts cannot do so by judicial construction.

Then, too, the judgment must be affirmed for another reason. Even if the rule in question was rightfully in force, it could not be said as a matter of law that the plaintiff was guilty of contributory negligence which would preclude her recovery. A pedestrian, having equal rights with others to the use of the public roads, must exercise ordinary care for his own safety, and it is generally a question for the jury to say whether such care has been exercised. In the present case the burden of proving negligence was upon the plaintiff and of proving contributory negligence upon the defendant. *Millsaps* v. *Grogdon,* 97 Ark. 469, 134 S. W. 632, 32 L. R. A., N. S., 1177, and *Minor* v. *Mapes,* 102 Ark. 351, 144 S. W. 219, 39 L. R. A. N. S. 214. In the latter case the court held that, while drivers of automobiles and other vehicles have the right to share the street with pedestrians, they must anticipate the presence of the latter and exercise reasonable care to avoid injuring them, commensurate with the danger reasonably to be anticipated. In the case first cited, the court held that a pedestrian and the driver of an automobile each have the same right to the use of the streets of a city, and each is bound to the exercise of ordinary care for his own safety and the prevention of injury to others in the use thereof. In the application of this principle of law, even if there was a valid statute or a regulation of the State Highway Commission prescribing upon which side of a public road a pedestrian should travel, it could not be said that the pedestrian was guilty of contributory negligence as a matter of law for the reason he was struck by an automobile approaching from his rear; for the pedestrian might have some good cause or excuse for traveling on the wrong side of the road.

No other assignments of error are urged for reversal of the judgment, therefore it will be affirmed.

AMERICAN INSURANCE UNION *v.* WILSON.

Opinion delivered February 7, 1927.

1. ACCORD AND SATISFACTION—CHECK MARKED "PAYMENT IN FULL."—Where a debtor sends a check to his creditor to apply upon a disputed claim, bearing upon its face a statement that it is a payment in full, the reception and collection of the check by the creditor renders it an accord and satisfaction of the debt.
2. ACCORD AND SATISFACTION—ACCEPTANCE OF CONDITIONAL CHECK.—Where an insurer tendered the beneficiary in a policy a check stating that it is in full payment of the amount due under the benefit certificate, which amount was in dispute, and the beneficiary accepted and cashed the check with full knowledge of the condition attached, an accord and satisfaction was completed, though the beneficiary wrote to the insurer that the check was not accepted in full payment, but only in part payment.
3. ACCORD AND SATISFACTION—LIQUIDATED CLAIM.—The term "liquidated," when used in connection with the subject of accord and satisfaction, has reference to claims which the debtor does not dispute.

Appeal from Calhoun Circuit Court; *W. A. Spear*, Judge; reversed.

STATEMENT OF FACTS.

C. C. Wilson sued the American Insurance Union to recover the sum of $636.65, alleged to be due him upon a life insurance policy. The suit was defended upon the ground that the defendant only owed the plaintiff the sum of $363.35 under the terms of the policy; that the defendant had paid the plaintiff this sum of money, and that the latter had accepted it as payment in full of his claim against the former.

The record shows that W. A. Wilson obtained a benefit certificate of life insurance from the Mutual Relief Union of Fort Smith, Arkansas, on October 10, 1916. On April 1, 1918, said company merged with the Home Protective Association of Springdale, Arkansas, while W. A. Wilson was still a member. By the terms of the merger the Home Protective Association assumed liability under the certificates of the Mutual Relief Union. On November 1, 1918, the Home Protective Association was merged into the American Insurance Union. A con-

tract was entered into by these two companies which provided, among other things, that the American Insurance Union should not be liable to the holders of benefit certificates in the Home Protective Association in excess of the net amount realized from one assessment on the members of the roll of which he was a member in the Home Protective Association, after deducting his proportionate share of the expense of operation.

According to the evidence of the defendant, a copy of this agreement fixing the liability of the American Insurance Union to the owners of benefit certificates of the Home Protective Association was mailed to the owners of certificates in the Home Protective Association. The American Insurance Union sent a copy of said contract to W. A. Wilson for the purpose of attaching the same to his benefit certificate and becoming a part thereof.

According to the testimony of C. C. Wilson, W. A. Wilson was his father, and lived with him at the time the defendant claims to have sent said contract to be attached to his benefit certificate. The plaintiff opened all his father's mail, and knows that he did not receive said contract.

After W. A. Wilson died, proof of his death was made to the American Insurance Union by C. C. Wilson, the beneficiary named in the policy. On February 21, 1923, the American Insurance Union mailed a check from its home office at Columbus, Ohio, to C. C. Wilson of Tinsman, Arkansas, the body of which is as follows: "Pay to the order of C. C. Wilson, son, $363.35, the sum of 363 and 35 cents. For amount due C. C. Wilson, beneficiary of W. A. Wilson, certificate No. 10 H. P. 185, chapter No. 2200, Springdale, Arkansas, said amount being in full and satisfactory settlement of all claims accrued or to accrue."

This check was inclosed with a letter of the same date which is as follows: "*In re*: Payment of benefits due under certificate held by W. A. Wilson.

"Inclosed herewith you will find our voucher No. 6605 for $363.35, payment in full for benefits due under certificate No. 10 H. P. 185 held by W. A. Wilson.

"The Home Protective Association of Springdale, Arkansas, was taken over by the American Insurance Union in January, 1919. The rider-contract attached to the certificate of W. A. Wilson, in which you are named as beneficiary, provides in paragraph 3 of said rider that the American Insurance Union is not to be liable under the attached certificate in excess of the amount realized from one assessment on the members of the roll in which he was a member in the Home Protective Association, after deducting his proportionate share of the expense of operation.

"A copy of the rider-contract is herewith inclosed, and your special attention is called to the marked portion thereof. Said member died on the 16th day of December, 1922. The total amount of the assessment received from the members of roll No. 10 for the said month of December, 1922, the month in which the member died, amounts to $436.02, less the reduction of one-sixth allowed under said merger contract for expenses, leaves the balance of $363.35, the amount due you as beneficiary under said certificate.

"Please sign the inclosed receipt and return same to us in the inclosed self-addressed envelope."

C. C. Wilson received the check and the letter accompanying it, and wrote to the American Insurance Union that he could not accept the check in full payment of the amount due him under the benefit certificate, but that he would accept it as part payment due on his policy of $1,000, and on the same day cashed the check and converted the proceeds to his own use. This letter was written about five days after he had received the check from the defendant. When the plaintiff first received the check, he wrote the defendant that he had received it, but that he could not accept the amount of it as the

total payment under the policy, and that he was not going to cash it until he heard from them.

The jury returned a verdict for the plaintiff in the sum of $636.65, the amount sued for. From the judgment rendered the defendant has duly prosecuted an appeal to this court.

T. E. Helm, for appellant.

J. S. McKnight, for appellee.

HART, J., (after stating the facts). Regardless of whether the American Insurance Union owed C. C. Wilson $1,000, the face of his benefit certificate in the Home Protective Association, or whether it only owed him $363.35, as claimed by the defendant under the rule announced in *Knight* v. *American Insurance Union, ante,* p. 303, the judgment in the case at bar was wrong, because the defendant tendered the plaintiff the sum of $363.35 in full payment of the amount due under the benefit certificate and the plaintiff accepted the check and cashed it with full knowledge of the condition attached to it. The law is well settled in this State that, where a debtor sends a check to his creditor to apply upon a disputed claim, bearing on its face a statement that it is a payment in full, the reception and collection of the check by the creditor renders it an accord and satisfaction of the debt. *Barham* v. *Bank of Delight,* 94 Ark. 158, 126 S. W. 394, 27 L. R. A. N. S. 439, and *Cunningham Co.* v. *Rauch-Darragh Grain Co.,* 98 Ark. 269, 135 S. W. 831.

In these cases, as in the case at bar, it was urged by counsel for the plaintiffs that, inasmuch as the plaintiffs immediately wrote to the defendant that the check was accepted only in part payment of the debt, this was conclusive evidence that the plaintiffs did not agree to the accord and satisfaction of the demand.

In the first case cited, in answer to this contention, the court said: "But, if the offer of payment was made upon condition and the plaintiffs so understood it, there was but one of two course open to them, either to decline the offer and return the check, or to accept it with the condition attached. The moment the plaintiffs indorsed the

check and collected it, knowing that it was offered only upon a condition, they thereby agreed to the condition, and were estopped from denying such agreement. It was then that the minds of the parties met, and the contract of accord and satisfaction was complete in law."

Again, in the second case cited, it was held that, where a debtor sends a check to his creditor, bearing upon its face a statement that it is a payment in full, the reception and collection of the check by the creditor renders it an accord and satisfaction of the debt; and it is immaterial that the creditor wrote the debtor stating that the check was not accepted as a settlement, where no offer was made to return the check if desired by the debtor.

The reason is that the plaintiff could only accept the money upon the terms offered, which was in full settlement of his demand. He could not accept the benefit and refuse the condition. If the plaintiff was not satisfied with the sum paid him, good faith required him to refuse to accept the money, to return it to the defendant, and to bring suit for the amount he claimed to be due him. By accepting the smaller sum, which was tendered upon condition that he receive it in full payment of his demand, the plaintiff is estopped from denying the agreement.

The plaintiff in the case at bar was fully informed in the letter which accompanied the check of the condition imposed upon him and the grounds upon which the defendant imposed it. This is not a case of a liquidated claim which cannot be discharged by payment of less than it face value. The term "liquidated," when used in connection with the subject of accord and satisfaction, has reference to a claim which a debtor does not dispute. *Schnell* v. *Perlman,* 238 N. Y. 362, 144 N. E. 641, 34 A. L. R. 1023; and *Chicago, Milwaukee, etc. Rd. Co.* v. *Clark,* 178 U. S. 353, 20 S. Ct. 924.

Later cases from this court recognizing the rule are *Pekin Cooperage Co.* v. *Gibbs,* 114 Ark. 558, 170 S.

W. 574, and *Collier Commission Co.* v. *Wright,* 165 Ark. 338, 264 S. W. 942, and cases cited.

The plaintiff, having accepted the check and cashed it, must be deemed also to have accepted the condition attached to it, which was that it was in full settlement of the amount due by the defendant to the plaintiff under the benefit certificate. The undisputed evidence shows that there was a *bona fide* dispute as to the amount due under the benefit certificate, and the payment of a smaller sum in satisfaction of the entire claim was a sufficient consideration for the release of the balance of the amount claimed.

The result of our views is that the judgment must be reversed, and, inasmuch as the plaintiff has cashed the check and used the proceeds, his cause of action will be dismissed here. It is so ordered.

POTTS v. STATE.

Opinion delivered February 7, 1927.

1. LARCENY—SUFFICIENCY OF EVIDENCE.—Evidence in a prosecution for grand larceny *held* sufficient to sustain a conviction.
2. CRIMINAL LAW—EXCLUSION OF EVIDENCE—PREJUDICE.—Where it was a question whether defendant had a certain conversation with the prosecuting witness in defendant's office, it was error to exclude the testimony of a witness which tended to identify the prosecuting witness as the person who had the alleged conversation with defendant.

Appeal from Union Circuit Court, First Division; *L. S. Britt,* Judge; reversed.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

SMITH, J. Appellant was convicted under an indictment charging him with the crime of grand larceny, alleged to have been committed by stealing a sewing machine, the property of Rose Tucker. For the reversal of the judgment appellant insists that the verdict of the

jury was contrary to the law and the evidence, and that the court erred in excluding certain testimony offered in his behalf.

We think the testimony is sufficient to sustain the verdict, and no error was assigned in giving and in refusing to give instructions.

A brief summary of the testimony follows: Nate Tucker, a colored man, was confined in jail on a charge of possessing and transporting intoxicating liquor. He testified that appellant, who is a practicing attorney, came to the jail to see a client, and, while there, solicited witness' case, and procured from witness a note for $100 as an attorney's fee. Appellant ascertained where Tucker lived, and went out to Tucker's home, where he met Rose Tucker, the wife of the prisoner. Appellant discussed with Rose Tucker the question of his fee, and brought her to his office, where the discussion was continued. A few days later appellant went to the home of Rose Tucker, and, finding her absent, took from her house a talking machine and a sewing machine. This was done without the knowledge or consent of either Rose Tucker or her husband. The property was shown to be of a greater value than $10, and appellant was found guilty of grand larceny and sentenced to a term in the penitentiary.

Appellant admitted taking the sewing machine and talking machine in the absence of Rose Tucker, but he testified that he did so pursuant to an agreement with her that he should take them and allow a credit therefor of $50 on the fee.

J. E. Bradley was called as a witness for appellant, and was interrogated concerning a conversation between appellant and Rose Tucker in appellant's office. Rose Tucker was called in for identification by the witness, and, when she appeared, he was examined as follows:

"Q. Is that she? A. I think so. She is not dressed the same. Q. Do you state that she is the same woman? A. To the best of my knowledge, yes sir. Q. You may state whether or not she came in the room and made this statement, or this in substance, to Mr. Potts: 'We can't

get the money; you go out and get those machines and I will pay the balance of the money today, this evening or tomorrow evening,' and if Mr. Potts, in reply to what she said, stated, 'Well, I have not got time to go out there now, but I will look after it just as soon as I can'?" (The State objects, as the time is not sufficiently placed, and the party whom he alleges to have made the statement is not identified). By the court: "Q. Do you say this was the woman who made the statement in the office? A. To the best of my knowledge. Q. Will you say this is the woman who made the statement? A. I would not say for sure. (Objection sustained. Exception saved). Q. At the time you were in Mr. Potts' office was there a negro woman in there? A. Not when I went in there. Q. During the time you was there did a negro woman come in? A. Yes sir. Q. State whether or not you heard a conversation between her and Mr. Potts? A. I heard part of the conversation. Q. Do you know what they were talking about? (State objects. Objection sustained. Exception saved). By the court: I will rule that the time is sufficiently placed, but the identification is insufficient."

It is then recited that the above testimony of Bradley was withdrawn by agreement of both parties.

Appellant was then called as a witness, and testified that, in a conference which he had with Rose Tucker in his office, she agreed that he might go to her house and get the machines and credit them as a $50 payment on the fee, and that Bradley was present in his office at the time.

Taylor Potts, a brother of appellant, testified that he was present in his brother's office and heard this conversation between appellant and Rose Tucker, and that Bradley was also present.

Thereafter Bradley was recalled as a witness and was examined as follows: "Q. You have been on the stand before in this case? A. Yes sir. Q. Do you know about what day of the month it was that you were in the office of Hugh D. Potts—had you ever been there before that day? A. No sir. Q. What time of day were you there?

A. Somewhere about 12 o'clock. Q. You have not been talked to since you left the witness stand? A. No sir. Q. When this negro woman came into the office and talked to Mr. Potts, I will ask you if she stated, in substance, this: 'Mr. Potts, I can't get the money; you go on out and get the machines, and I will get you the rest of the money today or tomorrow or the next day;' and if Mr. Potts did not reply, 'I am busy now, and I don't know whether I can go out there today or not, but I will go as soon as I can'? (State objects). By the court: Q. If you can testify that Rosie Tucker made such a statement as that, you may answer the question? A. I don't know her name. Q. Can you say she was the woman who made the statement? A. To the best of my knowledge. Q. Answer my question? A. No sir. Objection sustained. Defendant excepts." Counsel for the defendant then stated: "We put Mr. Potts (appellant) on the stand and he said this was the woman who was in his office when Mr. Bradley was there, and if we identified her as being the woman, this man can testify. By the court: Mr. Potts cannot testify for this witness. (Objection overruled. Exceptions saved)."

We think this ruling was erroneous and necessarily prejudicial. The defense was that Rose Tucker, the owner of the property, had consented that appellant might have it as a credit on the fee he had agreed to charge her husband. It was the theory of the State that no such conversation had occurred. Appellant and his brother testified that there was such a conversation and that Bradley was present when it occurred. Bradley stated that he did not know Rose Tucker, and he was not positive in his identification of her, although he did state, as appears from the testimony of Bradley, set out above, that he thought the woman presented to him for identification at the trial in the courtroom was the woman he had seen in appellant's office. Moreover, appellant and his brother, who knew Rose Tucker, had testified that it was she who was in appellant's office at the time Bradley was in there, and, if this were true, it would have been compe-

tent for Bradley to have testified what that woman said, although he had been uncertain in his own identification of her or had been unable to identify her at all. But we think that his own identification of her was sufficient to make the proffered testimony admissible. Its value would have depended upon the jury's opinion of the witness' credibility. They might have regarded his testimony as untrue, just as they did the testimony of appellant and his brother. The jury might also have thought that Bradley's identification of the witness was not sufficiently certain to make the testimony very important. But these were all questions for the jury. But, in view of Bradley's testimony that he thought the woman who appeared in court was the woman he had seen in appellant's office, and the additional testimony of appellant and his brother that the woman present in appellant's office when Bradley was there was Rose Tucker, we think it was clearly erroneous for the court to refuse to permit Bradley to testify concerning the conversation between appellant and the woman who was in appellant's office.

The judgment of the court below must therefore be reversed, for the error indicated, and the case will be remanded for a new trial.

JOHNSON v. BELMONT.

Opinion delivered February 7, 1927.

1. MINES AND MINERALS—CONTRACT TO PURCHASE OIL LEASE.—A written contract for the purchase of an oil lease was not void as having been executed under a mutual mistake of fact because the sale of the property by a receiver to one of the parties, without their knowledge, had been set aside by order of court, where the other parties proceeded under the written contract by purchasing at a subsequent receiver's sale.
2. TRUSTS—WHEN ARISES.—Where, as a result of plaintiff's information relative to an oil lease, defendants were put in touch with such property, and a written agreement was entered into whereby plaintiff was to have a one-fifth interest, a lease acquired by defendants in their own name will be *held* subject to a trust in favor of plaintiff for such interest.
3. FRAUDS, STATUTE OF—ORAL AMENDMENT OF WRITTEN CONTRACT.—An oral agreement amending a written contract for an interest in an oil lease is not within the statute of frauds where it went to the manner of acquiring the lease and did not change the relative interests of the parties.
4. MINES AND MINERALS—FAILURE TO CONTRIBUTE TO DEVELOPMENT OF LEASE—LACHES.—Where plaintiff furnished information to the purchasers of an oil lease under a contract for an interest therein, his failure to contribute money to the development was not laches where the lease was at all times worth more than it cost, and money borrowed for development was obtained on the security of the lease, and suit was brought for plaintiff's interest as soon as he was informed that his interest had been forfeited.

Appeal from Ouachita Chancery Court, First Division; *J. Y. Stevens*, Chancellor; affirmed.

Gaughan & Sifford, E. E. Godwin and *T. D. Crawford*, for appellant.

Coulter & Coulter, Joiner & Stevens and *W. R. McHaney*, for appellee.

J. N. Saye, amicus curiae for appellee.

SMITH, J. Appellee, H. B. Bellmont, who is a geologist and petroleum engineer, made a survey and investigation of the southwest quarter of the southeast quarter section 34, township 15 south, range 15 west, Ouachita County, Arkansas, which convinced him that the land was promising territory for oil exploration. He made

inquiry about the land, and ascertained that it was involved in litigation and was in charge of a receiver, who had possession of the property under the directions of the court. The land was owned by J. M. Farris, who had give an oil lease to E. L. Miller as trustee, who had become involved in litigation, and there were debts and liens against the property amounting to about $20,000. Appellee entered into an agreement with Haines, the receiver, to pay the creditors and the court costs and thereby terminate the receivership, and, at the same time, entered into a contract with Miller whereby Miller was to convey or release to appellee his residuary interest in the property.

To carry out this arrangement it was necessary for appellee to interest some one able to command the necessary money, and, with this purpose in view, appellee went to Rock Island, Illinois, where he got in touch with appellants, with whom he had several conferences in regard to going into the adventure. Appellants had never been to this oil field, and knew nothing about the proposition except what they were told by appellee, and they asked time to investigate the proposition.

When this was done, it was decided not to attempt to acquire the lease by private sale, but to permit a sale by the receiver, which had been ordered by the court to be made, and the property was sold by the receiver on October 18, 1924. J. D. Anderson, as attorney for appellee, became the purchaser at this sale for $22,000, it being agreed between Anderson and the receiver that appellee should have a reasonable time to execute the bond required by the order of sale.

On October 27 appellee, accompanied by appellants, Johnson and Flannigan, arrived in El Dorado, and they immediately went out to inspect the property. The prospects were sufficiently alluring to enlist the interest of Johnson and Flannigan, and they discussed with appellee what the respective interests of the parties should be if they went into the adventure. Johnson and Flannigan represented not only themselves but Quinlan and Hawley,

all of whom were to share equally in the adventure if they went into it at all.

On the day following the inspection of the property, Johnson and Flannigan went with appellee to the office of appellee's attorney. This attorney was among the numerous witnesses in the case, and he testified that he drew up a contract which outlined the agreement appellee had made with Johnson and Flannigan. This agreement reads as follows:

"MEMORANDUM AGREEMENT

"It is hereby mutually agreed by and between H. B. Bellmont, party of the first part, and D. N. Johnson, W. H. Flannigan, Wm. J. Quinlan and J. H. Hawley, parties of the second part hereto, that the party of the first part did, on the 18th day of October, 1924, purchase all the property making up the estate in the case of E. L. Miller *et al.* against Geo. Barbare *et al.*, pending in the Ouachita Chancery Court, Second Division, and that the parties of the second part have advanced the sum of five thousand and no/100 ($5,000) dollars on the purchase money, and have undertaken to pay the balance, making a total of twenty-two thousand and no/100 ($22,000) dollars.

"That if, and when, the parties hereto shall have paid the entire purchase money of said property and the receiver thereof executed deed, the property will be conveyed by the party of the first part hereto to the parties of the second part, to the extent of the four-fifths, one-fifth to be conveyed to each of the parties of the second part hereto.

"It is further contemplated that the parties hereto are now organizing themselves, together with others, into a corporation to be known as Smackover Petroleum Corporation, and, in the event the said company shall have been fully incorporated at or before the date of the execution of the deed or assignment from the receiver to the parties hereto, the said property shall be conveyed to the corporation. And that the party of the first part shall receive in payment of his one-fifth interest in said property, the capital stock of said corporation to the

amount of twelve thousand and no/100 ($12,000) dollars, and that he, the said Bellmont, will make, execute and deliver unto the said parties of the second part, or to the corporation aforesaid, good and sufficient conveyance in and to said property.

"Witness our hands and seals on this the 28th day of October, 1924.

"H. B. Bellmont,
"Party of the first part.
"D. N. Johnson,
"W. H. Flannigan,
"Wm. J. Quinlan,
"J. H. Hawley,
"Parties of the second part."

At the time this contract was signed, none of the parties knew that the court had, on the 20th of October, set aside the receiver's sale. When that fact was discovered, an attorney was employed to sustain the sale and to secure the confirmation thereof, if this could be done. The court's order was not set aside, and there is some conflict in the testimony as to why this was not done. Appellants testified that the term of court had lapsed before the attorney was prepared to present their case to the court. Appellee testified that it was agreed to proceed under the written contract set out above and to buy the property at the second sale which had been ordered by the court.

After the conference between appellee and appellants at the attorney's office, the receiver executed to appellee a certificate of purchase, and an escrow agreement was entered into between appellee and the receiver, setting forth the terms and conditions of the sale. By this escrow agreement, appellee deposited to the receiver's credit with the Bank of Commerce of El Dorado the sum of $5,000, and a note for the balance was executed to the receiver's order, which was also placed in escrow. This note was signed at the time by appellee and Johnson and Flannigan, and it was agreed that Johnson and Flannigan should take a duplicate of the note to Illinois and have it executed by Quinlan and Hawley, and that the

note so signed should be signed by all parties and substituted for the one placed in escrow.

When it was discovered that the first sale by the receiver had been set aside, the parties agreed that they would proceed under their original agreement to acquire the lease, and that, when acquired, it should be owned by all five of the contracting parties, each owning a one-fifth interest. This is the big question of fact in the case, but the court found the fact to be as stated, and we think the testimony supports that finding. The proposition of appealing from the order of the court setting aside the sale was discussed, but it was agreed that the matter could be closed more expeditiously by permitting a second sale to be made and by buying at that sale. Appellee had filed a motion to vacate the order setting aside the first sale, but, by agreement, the hearing of this motion was continued to November 29, 1924, the day upon which the second sale was to be made.

A second sale was ordered and was later made by the receiver on November 29, 1924. Desiring to purchase the lease as cheaply as possible, it was agreed that the property should be bid in by Farris, and this was done, the purchase price being $23,000.

It was also agreed that appellee Bellmont should not attend the sale. He went to El Dorado to release the escrow agreement, in order that the $5,000 on deposit in escrow might be available to perfect the bid made by Farris. Johnson advanced $6,000 additional to indemnify the surety on the bond which the purchasers were required to execute pursuant to the order of sale, and, when this was done, Farris transferred his certificate of purchase to Johnson.

Up to this time the testimony is overwhelming that all parties interested regarded the second sale as having been made for the benefit of all of them; but it is the insistence of appellants that appellee passed out of the transaction by reason of his failure to "kick-in," as they expressed it, with his part of the money to pay for the lease and its development.

After the second sale, Johnson and his associates attempted to buy the interest of appellee, and offered him $3,000, which appellee declined. This discussion and offer took place in Rock Island, Illinois, on February 4, 1925. When this offer was declined, Johnson stated to appellee that he (appellee) had no interest in the lease, whereupon appellee returned to El Dorado, and, on February 9, 1925, instituted this suit to recover and to have declared his interest in the property.

Money to pay for the lease and to develop it was obtained from George W. James, and, to secure him in his advances, the certificate of sale was assigned to him, and later a deed was made directly to him by the commissioner. At the time of the first sale to appellee a small well had been brought in. Appellants drilled two other wells, which were also small producers. A fourth well was drilled to a greater depth, and the well thus brought in was of the capacity of 15,000 barrels of oil per day.

James was repaid his advances, and, on May 28, 1925, he reconveyed to appellants, who conveyed to the Smackover Petroleum Corporation. A conveyance was then executed by appellants and the Smackover Petroleum Corporation to the Phillips Petroleum Company for the consideration of $375,000, the vendors reserving all the oil which had been produced prior to the date of the conveyance.

Appellee's right to recover is resisted upon several grounds: (a) That the contract of October 28, 1924, set out above, was executed under a mutual mistake of fact, in that appellee was not the owner of the property with reference to which the contract was made; (b) that there was no trust in favor of appellee; (c) that the parol agreement in regard to the second sale was within the statute of frauds, and was void because it was not in writing; and (d) that appellee was barred by laches.

The court found in favor of appellee upon all these issues, and declared that all the persons through whose hands the lease passed, as stated, took title thereto subject to an existing trust in appellee's favor, except the

last purchaser and present owner, the Phillips Petroleum Company. Upon this finding, the court appointed a master to state an account of the profits and proceeds of the lease, and from the final decree confirming the master's report is this appeal.

We think the written contract of October 28 was not void as having been executed under a mutual mistake of fact. It is true that, when its terms were agreed upon, the parties were under the misapprehension that Bellmont had the title to the lease, which could and would be perfected when the terms of the sale had been complied with; but it appears that, after it was known the sale had been set aside, the parties proceeded under the written contract as amended, the essence of which, so far as appellee was concerned, was that he should have a fifth interest in the lease.

In support of the contention that there was no trust in appellee's favor, it is insisted that appellee had nothing to convey, and that the lease was not acquired under the agreement of October 28, and that the alleged subsequent agreement under which appellee says a trust in his favor arose was void because it was not in writing.

In reply to this contention, and to the contention that the parol agreement was within the statute of frauds, it is answered—and we think correctly so—that appellee made a very valuable contribution to the enterprise. It was through his investigation and survey and the information obtained as a result thereof that appellants were put in touch with this very valuable property, which has proved so enormously profitable to them, and the agreement of October 28 evidences that fact. It is true, as pointed out by counsel for appellants, that this agreement was amended, but this amendment went to the manner of acquiring the lease and did not change the relative interests of the parties. It may be that this amended agreement cannot be enforced as an express trust because it was not evidenced by a writing, but this change in the written agreement was not intended to eliminate appellee as a party in interest or to diminish his interest, and

his right to recover is not to be defeated because of the absence of a writing evidencing the supplemental agreement and which prevents the finding that there was an express trust.

The contention that appellee is barred by laches is based upon the fact that he made no contribution of money, while appellants used their credit to the extent of $56,000 in developing the lease, including the sum paid for it, and that, in addition, they gave the enterprise much of their time and attention, whereas appellee devoted neither time nor attention to the development of the lease. It is also insisted that, by his non-participation, appellee speculated, at the expense of appellants, on the outcome of the adventure.

In reply to this contention it is answered that the lease was at all times worth more than it cost, and before its development appellants were offered $60,000 for it. The development of the adjacent lands and the discovery of oil thereon proved the value of the lease and added to its value. Appellee testified that he had devoted several months of his time to the discovery of this property, and had spent about $2,500, including the expenses of his various trips to Illinois, in his effort to enlist appellants in the adventure. Appellants did develop the lease by drilling wells, but all the wells drilled were producers, and the money borrowed for this purpose was obtained on the security of the lease itself. The services rendered by appellants consisted in clearing the ground for the location of the wells and in arranging for the money to drill them. It does not appear that appellee was called upon to participate in this service or that he declined to render any aid for which he was asked.

The master, in stating the account between the parties, made a finding on the credits to which appellants are entitled, and it is not insisted that the account was not correctly stated if appellee is entitled to recover the interest claimed by him. Nothing was allowed appellee for his own time or for the expenses which he said he had incurred. Appellee brought this suit immediately

after being advised by appellants that he had forfeited his interest in the original agreement. We conclude therefore that the defense of laches is not sustained.

Respective counsel have filed briefs reviewing the decisions of this and other courts on trusts of various kinds. We do not review these decisions—not even those of our own court—as they are quite recent, and no useful purpose would be served by going into a subject which has been so thoroughly considered.

There is a contrariety of opinion among the members of the court, under the facts stated, as to the kind of trust created, but a majority are of the opinion that a constructive trust arose and that the decree of the lower court should be affirmed on that theory.

In the case of *Haskell* v. *Patterson,* 165 Ark. 65, 262 S. W. 1002, we quoted from 3 Pomeroy's Equity Jurisprudence, § 1044, the following statement of the law: "Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and, in most cases, contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal declaration of the trust. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed trusts *in invitum,* and this phrase furnished a criterion, generally accurate and sufficient, for determining what trusts are truly 'constructive.' An exhaustive analysis would show, I think, that all instances of constructive trusts, properly so-called, may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source. Even in that single

class where equity proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser intended to act in pursuance of his fiduciary duty, the notion of fraud is not invoked, simply because it is not absolutely necessary under the circumstances; the existence of the trust in all cases of this class might be referred to constructive fraud. This notion of fraud enters into the conception in all its possible degrees. Certain species of the constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud. Courts of equity, by thus extending the fundamental principle of trust—that is, the principle of a division between the legal estate in one and the equitable estate in another—to all cases of actual or constructive fraud and breaches of good faith, are enabled to wield a remedial power of tremendous efficacy in protecting the rights of property; they can follow the real owner's specific property, and preserve his real ownership, although he has lost, or even never had, the legal title, and can thus give remedies far more complete than the compensatory damages obtainable in courts of law. The principle is one of universal application; it extends alike to real and to personal property, to things in action, and funds of money." See also *Bray* v. *Timms,* 162 Ark. 247.

In the case of *Strasner* v. *Carroll,* 125 Ark. 34, 187 S. W. 1057, it was said: "It is true the general rule is that a mere verbal agreement by which one of the parties thereto promises to buy in, at a judicial sale, lands of the other and hold same for his benefit, does not create a resulting or implied trust, the agreement itself being within the statute of frauds. There are, however, several well recognized exceptions to the rule, and one of them is that, where the purchaser of lands in which the other is interested becomes such under such a state of facts as

would make it a fraud to permit him to hold on to his bargain. *Trapnall* v. *Brown,* 19 Ark. 39; *McNeil* v. *Gates,* 41 Ark. 264; *LaCotts* v. *LaCotts,* 109 Ark. 335. In the first two mentioned cases the principle is announced that it would be a fraud in a purchaser, who obtained property at a price greatly below its value by means of a verbal agreement, to keep the property in violation of the agreement."

Appellee had an equity in the property when he made the agreement of October 28. He might have prosecuted his contract with the receiver and the residuary owner and have thus acquired the property. He might, by prosecuting an appeal from the order of October 20, have had that order set aside and the sale confirmed. But, whether this could have been done or not, he abandoned the pursuit of either course, pursuant to the amended agreement with appellants to let the property go to sale and buy it a second time. He refrained from bidding at the sale or from attempting to enlist any other person to do so.

Upon this point he testified that he had arranged with one Landau of Chicago to furnish the money to acquire this lease. But he did not close the contract with Landau because Carl Sundeen, who had put him in touch with appellants, advised that appellants were ready to proceed, and he closed with appellants rather than Landau, because he thought Sundeen had earned and was entitled to the commission promised him. Sundeen corroborates appellee in this statement. Appellants were permitted to bid at the second sale in reliance upon appellee's investigation and discovery, and they did bid, and bought the property under an agreement which contemplated that the purchase should inure to the joint and equal benefit of all the parties.

We conclude therefore that a trust existed in appellee's favor, and that the court below was correct in so holding.

Appellee has prosecuted a cross-appeal wherein he insists that his interest in the lease itself should be

declared and accorded him. He testified that the lease was sold for a grossly inadequate price, although the sale price was $375,000, and the proceeds of the sale of the oil before the sale of the lease brought the gross income of the property to $393,978.46, and there is testimony corroborating him in his estimate of the value of the lease.

The court found, however, that the lease sold for a fair price, and that the sale thereof should be confirmed, and we think this finding should be affirmed.

Appellee expressly states that he raises no question about his being charged with his part of the expenses of developing the lease, and the finding of the court below that he should be so charged is affirmed.

The report of the master found that the net value of appellee's one-fifth interest was $67,386.94, and judgment was rendered in his favor for that amount.

The correctness of that finding is not questioned, if it be conceded that appellee is entitled to receive a fifth of the net profits. The court below found that he was so entitled, and, as we concur in that finding, the decree of the court below is affirmed.

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

BLACK v. GOLDWEBER.

Opinion delivered February 7, 1927.

1. AUTOMOBILES—DUTY TO SELF-INVITED GUEST.—In an action by a self-invited guest in an automobile against the owner and driver of the car, it was error to direct a verdict on the theory that the only duty owed to a self-invited guest by the owner of the car was to refrain from willful or wanton injury.
2. AUTOMOBILES—CARE AS TO SELF-INVITED GUEST.—The owner and driver of an automobile owes to a self-invited guest the duty of using reasonable care not to cause him injury.

Appeal from Jefferson Circuit Court; *T. G. Parham*, Judge; reversed.

Sam M. Levine, for appellant.

Wooldridge & Wooldridge, for appellee.

HUMPHREYS, J. Appellant instituted this suit in the circuit court of Jefferson County against appellee to recover damages in the sum of $5,000 for injuries received while riding in appellee's automobile from Pine Bluff to Little Rock, through the alleged negligence of appellee in driving same in a reckless and dangerous manner, and at a reckless and dangerous rate of speed, and in disregard of the traffic laws and the regulations of the highway. Appellee filed an answer, denying the material allegations of the complaint.

The cause was submitted to the court upon the pleadings and testimony adduced by the respective parties, which resulted in a peremptory instruction to the jury to return a verdict in favor of appellee and a consequent judgment dismissing her complaint, from which is this appeal.

Appellant was and had been employed by appellee for a number of years in his store at Pine Bluff. She is a widow, and her children live in Little Rock. Appellee and his little girl were going to Little Rock in an automobile, on or about April 12, 1925. Appellant expressed a desire to the little girl to accompany them to Little Rock, so that she might see her children. The little girl spoke to her father on behalf of appellant, and obtained his permission for her to accompany them. The testimony introduced by appellant tended to show that the automobile in which they made the trip was turned over on account of fast driving by appellee, which resulted in injury to appellant.

The trial court instructed a verdict for appellee upon the theory that the only duty he owed appellant, while riding in his automobile as a self-invited guest, was to refrain from injuring her willfully or wantonly. The testimony failed to reveal any evidences of a willful or wanton attempt on the part of appellee to injure appellant.

The only question presented for determination on this appeal is whether the trial court was correct in assuming, as a matter of law, that the only duty the owner and driver of an automobile owes a self-invited guest riding in his car is not to injure him willfully or wantonly. The doctrine announced by the trial court finds support in the case of *Lutvin* v. *Dopkus,* decided by the Supreme Court of New Jersey in 1920, reported in 108 Atl. 862, and two or three other courts which have adopted the rule announced by the New Jersey court. The general rule or duty to bare licensees is applied by these courts to owners and drivers of automobiles and other vehicles. The distinction between the duty to invitees and bare licensees has been preserved by these courts and applied in vehicle cases.

The trend of modern authority is to disregard this distinction and apply the rule of duty imposed on owners and drivers of vehicles to invitees, to self-invitees or licensees also. The prevailing rule, approved by recent cases, requires drivers of automobiles to exercise ordinary care in the operation thereof to transport their passengers safely, whether guests by sufferance, self-invited guests, or invited guests. In the recent case of *Munson* v. *Rupker* (Ind.) 148 N. E. 169, the court disapproved the doctrine announced in *Lutvin* v. *Dopkus, supra,* and adopted the prevailing rule, for the following reasons:

"It seems to us that the only sensible and humane rule is that an owner and driver of an automobile owes a guest at sufferance the duty of using reasonable care so as not to injure him. The rule as to trespassers and licensees upon real estate, with all its niceties and distinctions, is not to be applied to one riding in an automobile at the invitation of, or with the knowledge and tacit consent of, the owner and operator of the automobile. A trespasser and licensee going upon a tract of land—an inert, immovable body—takes it as he finds it, with knowledge that the owner cannot and will not by any act of his start it in motion, and hurl it through

space in a manner that may mean death to him who enters therein. He who enters an automobile to take a ride with the owner also takes the automobile and driver as he finds them. But, when the owner of the automobile starts it in motion, he, as it were, takes the life of his guest into his keeping, and, in the operation of such car, he must use reasonable care not to injure any one riding therein with his knowledge and consent. It will not do to say that the operator of an automobile owes no more duty to a person riding with him as a guest at sufferance, or as a self-invited guest, than a gratuitous bailee owes to a block of wood. The law exacts of one who puts a force in motion that he shall control it with skill and care in proportion to the danger created. This rule applies to a guest at sufferance as well as a guest by invitation."

The Indiana court cited the following cases in support of the prevailing doctrine: *Pigeon* v. *Lane,* 80 Conn. 237, 67 A. 886; *Dickinson* v. *Connecticut Co.,* 98 Conn. 87, 118 A. 518; *Grabau* v. *Pudwill,* 45 N. D. 423, 178 N. W. 124; *Christie* v. *Mitchell,* 93 W. Va. 200, 116 S. E. 715; *Rappaport* v. *Stockdale* 160 Minn. 78, 199 N. W. 513; *Mazey* v. *Loveland,* 133 Minn. 210, 158 N. W. 44.

The reasoning of the Indiana court seems to us to be sound, and, since it is supported by the weight of authority, we adopt it as the rule applicable to vehicle cases.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

Mr. Justices HART and KIRBY concurring.

Chief Justice MCCULLOCH dissenting.

CONCURRING OPINION.

HART, J. Judge KIRBY and I hold to the view that, in a gratuitous carriage for the sole benefit of the guest, the law requires only slight diligence and makes the owner of the automobile liable for only gross neglect. *Cody* v. *Venzir,* 263 Penn. 541, 107 A. 383; *West* v. *Poor,* 196 Mass. 183, 11 L. R. A. (N. S.) 936, 124 Am. St. Rep. 541, 81 N. E. 960; and *Massaletti* v. *Fitzroy,* 228 Mass. 487, 118 N. E. 168, L. R. A. 1918C, 264, Ann. Cas. 1918B, p. 1088.

STATE v. JOHNSON.

Opinion delivered February 7, 1927.

1. FISH—GAME—CONSTITUTIONALITY OF LICENSE FEE.—Crawford & Moses' Dig., § 4773, in so far as it fixes a hunting and fishing license fee for residents of the State and one for nonresidents, *held* a proper classification.
2. FISH—GAME—REGULATION.—Fish and game belong to the State in trust for the public, and the Legislature may regulate the taking of same, so long as it does not discriminate against any class of its citizens.
3. FISH—GAME—DISCRIMINATORY REGULATION.—Crawford & Moses' Dig., § 4773, in so far as it limits the right to resident game licenses to residents possessing the qualifications of legal voters, is an unauthorized discrimination against residents who do not possess such qualifications.

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

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant; *H. U. Williamson* and *Guy Amsler,* of counsel, for appellant.

Fred M. Pickens and *J. Vernon Ridley,* for appellee.

HUMPHREYS, J. The only question involved on this appeal is the constitutionality of the latter part of § 4773 of Crawford & Moses' Digest, which is as follows: "Any person wishing to avail himself of the privilege of hunting in this State, upon an application to the commission and furnishing the commission with his personal description, as provided in the form of license hereinafter provided, and payment to the State Treasurer or to the circuit clerk of the county in which application is made (of) a license fee, as follows: For a resident to hunt deer, bear or turkey, $1.10; to fish with artificial bait, $1.10; for nonresident of the State to hunt, $15; to fish, $5; shall receive a license to hunt or fish in any county in this State; all licenses to expire December 31 of the year issued. Provided, the commission may, on application, issue to a nonresident a trip license to fish not to exceed fifteen days for $1.10; but such holder of said license shall not take nor ship any fish so caught out of

the State; and provided, further, that only one trip license may be issued to one person during any one year; provided, further, that only those persons shall be classed as residents who possess the qualifications of a legal voter under the laws of Arkansas."

The case was tried below on an agreed statement of facts, which resulted in a finding by the court that the latter part of said section was contrary to § 18, article 2, of the Constitution of Arkansas which provides:

"The General Assembly shall not grant any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."

Based upon this finding and declaration of law, the trial court acquitted appellee of the charge against him for fishing without obtaining a nonresident license in accordance with said section. The agreed statement of facts is as follows:

"Comes H. U. Williamson, prosecuting attorney for the State of Arkansas, and Fred M. Pickens, attorney for the defendant herein, and respectfully submit by agreement the following statement of facts upon which this case is to be tried: This cause is here on appeal from the justice court of Union Township, Jackson County, Arkansas, defendant being charged with a violation of the fish and game laws of the State of Arkansas by fishing in the waters of this State without first procuring a nonresident license to do so, and, the defendant waiving a jury, this cause is submitted to the court sitting as a jury for the trial hereof, and the facts are as follows: W. E. Johnson, the defendant in this case, has lived in this State for the past three years, two of which he lived in Blytheville, Arkansas, which is in Mississippi County. He owned a house and lot in Blytheville, and he and his family, composed of wife and children, lived in same for two years; he then sold said property and moved to Newport, in Jackson County, Arkansas, July 25, 1926, and took charge of the office of Anderson-Clayton Cotton Company, cotton buyers, and moved to Newport with the intention of making it his permanent home,

bringing his family with him and renting a home in Newport. He has bought three resident licenses to fish for the three years which he has been in this State, the last resident license being for the year 1926, the fees for said license being $1.10, and he had same with him at the time of his arrest and while fishing. He has never paid a poll tax in this State since he has been in same, but has paid property tax on his property at Blytheville. He does not claim citizenship in any other State, and has not paid a poll tax in any other State, but claims Arkansas as his home and expects to permanently reside therein. He admits fishing in the waters of this State without the payment of poll tax during the year 1926 for which he was arrested. Admits that he had no nonresident license, but has, and has had for three years, annual resident license."

Section 4773 of Crawford & Moses' Digest, down to the last proviso or last clause, extends to every resident of Arkansas the right to fish with artificial bait upon the payment of a license fee of $1.10. This is a proper classification, because it embraces every *bona fide* resident in the State, excluding from the right to pay a resident license and fish all who are temporarily residing in the State. This classification is in keeping with the well-recognized doctrine that the fish and game of the State belong to the State in trust for the public, and that the Legislature may regulate the taking of same so long as it does not discriminate against any one class of its citizens. *Lewis* v. *State,* 110 Ark. 204, 161 S. W. 154.

The last clause of said section attempts to make a classification within the first classification by limiting the right to fish in the waters of the State to those residents only who possess the qualifications of a legal voter under the laws of Arkansas. The proviso clearly means that, before a *bona fide* resident of the State can pay a resident license to take fish out of the waters of the State with artificial bait, he or she must have attained to his or her majority, paid a poll tax, and have resided in the State a year, in the county six months, and his

voting precinct thirty days. The attempted classification in the last proviso is in conflict with the first classification, wholly foreign to the subject in hand, that of a right to fish, and is an unjust, unreasonable classification. There is no rhyme, reason or justice in saying that a *bona fide* resident boy or girl of the State cannot pay a resident license and take fish from the waters of the State until they attain their majority, pay a toll tax, reside in the State a year, the county six months, and their voting precinct thirty days. It would be just as reasonable to say that one could not pay a resident license to fish after he attained to the age of 25 or 30 years, as to deprive him of the privilege until he has reached his majority. Classifications of the citizenship to whom privileges and immunities are granted must be reasonable and just, else there is necessarily an arbitrary discrimination between the citizens embraced in the class, or between the class and all other citizens of the State. Section 18, article 2, of the Constitution of Arkansas prohibits the General Assembly from granting to any citizens or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. The proviso or last clause of § 4773 of Crawford & Moses' Digest is therefore void because repugnant to the valid part of said section as well as to § 18, article 2, of the Constitution of Arkansas.

The judgment of the trial court is affirmed.

Chief Justice McCULLOCH dissents.

BELL v. KOONTZ.

Opinion delivered February 7, 1927.

1. MECHANICS' LIENS—RIGHT TO LIEN.—The fact that a materialman held the title to lots as security for the purchase money did not defeat his right to a lien for materials furnished to build a a house thereon, since the purchaser had an equitable estate in the lots.
2. MECHANICS' LIENS—CONVEYANCES IN GENERAL.—Persons acquiring an interest in lots subject to a materialman's lien, after the materials were furnished and within the time allowed by Crawford & Moses' Dig., § 6911, to bring suit to enforce such lien, were not innocent purchasers, but purchased subject thereto.
3. MECHANICS' LIEN—ESTOPPEL TO ASSERT LIEN.—A materialman is not estopped to assert his lien for materials by erasing his own name and inserting that of the purchaser as grantee in the deed of the lots to him executed as security for the purchase money, where his successors in title were not thereby induced to purchase or lend money on the property and did not know of the change when they became interested in the property.
4. ESTOPPEL—ACTS DONE AND CHANGE OF POSITION.—Estoppel *in pais* is worked by conduct intended and calculated to induce and in fact inducing one to alter his condition, so that it would be a fraud on him to allow the other to take an inconsistent attitude to his detriment.
5. MECHANICS' LIEN—RIGHT TO LIEN.—A materialman is not entitled to a lien on lots for money paid by him to a laborer whose claim was not assigned to him, but is entitled to a personal judgment against the owner for the amount so paid at his request.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland*, Chancellor; reversed.

John D. Arbuckle and *George W. Dodd*, for appellant.

J. H. Clendening, Jr., and *A. A. McDonald, Geo. F. Youmans* and *Roy Gean*, for appellee.

HUMPHREYS, J. This suit was instituted in the chancery court of Sebastian County, Fort Smith District, by appellant against appellees, on the 2d day of April, 1925, to enforce a lien for material and labor in the total sum of $1,216.13 against lots 21 and 22, in block 9, in General Benjamin Bonneville Addition No. 2 to the city of Fort Smith, Arkansas. It was alleged, in substance, that the

materials and labor were furnished by appellant to H. A. Koontz, the owner of the lots, between the dates of October 16, 1924, and January 8, 1925, the last item being furnished on the 7th day of January, 1925.

Appellees filed an answer, denying the material allegations in the complaint and pleading an estoppel *in pais* against appellant; and Ben Fant, a subsequent purchaser, and Samuel Baron, a subsequent mortgagee, pleaded, by way of further defense, that they were innocent purchasers of the property for value.

The cause was submitted to the court upon the pleadings and testimony, resulting in a dismissal of appellant's complaint for the want of equity, from which is this appeal.

After a careful reading of the testimony, we are convinced that the weight thereof reflects that the items for material contained in appellant's account were delivered upon the premises and used in the construction of the house thereon, and that the items of labor on the house embraced in the account were paid for by appellant; also that the last item for material was furnished within ninety days before the institution of this suit. We deem it unnecessary to set out, in substance or detail, the testimony responsive to these issues.

The only three questions of consequence presented for determination on this appeal are:

First. Whether appellant can claim a lien for material furnished while holding the legal title to the lots as security for the payment as a part of the purchase price thereof.

Second. Whether appellant was estopped from asserting a lien upon the property because he had changed the deed from W. E. Lowery and wife by erasing his own name and inserting the name of H. A. Koontz therein as grantee; and,

Third. Whether he can claim a lien for the amount paid by him for labor in the construction of the house. The facts necessary to a determination of these questions are undisputed, and are as follows:

H. A. Koontz desired to purchase the lots described above from W. E. Lowery and build a house upon them. Lowery asked $115 for the lots, and Koontz had only $50. He applied to appellant for a loan of $65 to pay the balance of the purchase money, and requested him to furnish material and pay for labor to construct the house. The application and request were granted. Pursuant to agreement, H. A. Koontz paid W. E. Lowery $50 and M. T. Bell paid him $65 for the lots. Koontz executed a note to Bell for $65, and W. E. Lowery and wife executed a deed for the lots to M. T. Bell, to be held as security by him until Koontz paid the note, at which time the deed was to be turned over to Koontz. Koontz took possession of the property and proceeded to build the house, and worked on it one day himself. J. C. Harry did most of the work, and was paid partly by Koontz and partly by Bell. Bell paid him $100 on his labor account. Bell furnished all of the material for the house, the last item being furnished on January 7, 1925. On January 14, 1925, Koontz paid Bell the $65 note, evidencing the balance of the purchase money for the lots, and Bell scratched out his name in the deed as grantee and inserted the name of H. A. Koontz, and delivered the deed to him. The deed was dated September 30, 1924, and recorded February 25, 1925. On February 16, 1925, H. A. Koontz and wife conveyed the lots by warranty deed to J. C. Harry, which was recorded March 14, 1925. J. C. Harry had received the materials and used them in building the house, with full knowledge that they had not been paid for by Koontz. On March 16, 1925, J. C. Harry and wife conveyed the lots by warranty deed, for $1 and a loan to J. B. Fant, which was recorded on the day of its execution and delivery. On the same date, March 16, 1925, J. B. Fant executed a note and mortgage on the property to secure same, for $600. The note recited that it was executed for purchase money, whereas the mortgage recited that it was given to secure the loan.

(1). The fact that Bell held the title as security merely for the balance of the purchase money due on

the lots did not defeat his statutory lien for materials furnished to build the house. Koontz was the equitable owner and in possession of the lots. The instrument of conveyance was in fact a mortgage, although a deed in form. Bell's lien for material attached to the estate owned by Koontz in the lots. *White* v. *Chaffin,* 32 Ark. 59. Bell's lien for material could not merge in the legal title held by him to the lots as security merely, when the equitable title to the lots belonged to another.

The appellees, who traced their title back to Koontz, who was not himself an innocent purchaser as against Bell's lien, could not be innocent purchasers as against the lien, because they acquired their deeds and mortgage after the materials were furnished and within the period Bell was given by the materialman's lien statute to bring suit to enforce his lien. They bought subject to Bell's lien for material, because the statute required them to take notice of the existence thereof during the ninety-day period given him after furnishing the last item to file his lien or to bring suit to enforce it. Section 6911 Crawford & Moses' Digest; *Eddy* v. *Loyd,* 90 Ark. 340, 119 S. W. 264.

(2). None of the appellees tracing their title back to H. A. Koontz were induced to purchase or lend money upon the property on account of Bell scratching out his name as grantee in the deed from W. E. Lowery and inserting H. A. Koontz's name. None of them had any knowledge that the change had been made when they respectively acquired, sold and incumbered the property. Having no knowledge of the change, they could not have been misled by it to their damage. The rule of an estoppel *in pais* is as follows: "Estoppel *in pais* is worked by conduct intended and calculated to induce, and in fact inducing, another person to alter his condition so that it would be a fraud on him to allow the other person to take an inconsistent attitude to his detriment." *Thompson* v. *Willard,* 66 Ark. 347, 50 S. W. 870; *Johnson* v. *Taylor,* 140 Ark. 100, 215 S. W. 862; *Ferguson* v. *Guydon,* 148 Ark. 295, 230 S. W. 260.

(3). Appellees are correct in their contention that Bell is not entitled to a lien for money paid to J. C. Harry on account of labor. J. C. Harry's lien was not assigned to him. The labor for which Bell paid cannot be treated as the cost of material in place, as was done in the case of constructural iron used in a building in the case of *Terry* v. *Klein,* 133 Ark. 366, 201 S. W. 801. Appellant, however, is entitled to a personal judgment against H. A. Koontz for the amount he paid for labor to J. C. Harry at his request.

On account of the errors indicated the decree is reversed, and the cause is remanded with instructions to give appellant a judgment against H. A. Koontz for the entire amount of his claim, with interest, and to enforce the lien against the said property in appellant's favor for the amount of the claim, after deducting the items of labor therefrom.

BLYTHEVILLE *v.* WEBB.

Opinion delivered February 7, 1927.

LICENSES—DEALER IN OILS AND GASOLINE.—Under a city ordinance imposing a license tax on dealers engaged in selling oils and gasoline within the city, a wholesale dealer in oils and gasoline who maintains his office and storage tanks without the city but drives his trucks into the city and then sells and delivers oils and gasoline, is liable for the tax.

Appeal from Mississippi Circuit Court, Chickasawba District; *W. W. Bandy,* Judge; reversed.

Ivy W. Crawford, for appellant.

KIRBY, J. This appeal is prosecuted by the city of Blytheville on judgment of the circuit court reversing the judgment of the police court of that city, convicting appellee for a violation of an ordinance prohibiting the engaging in the oil and gas business without a city license. The case was submitted to the circuit court on agreed statement of facts, the jury being waived, and the court found the appellee not guilty.

The appellee is an oil and gas dealer, a wholesale distributor thereof, with office and storage tanks just outside the corporate limits of the city of Blytheville. Pursuant to an ordinance of the city prohibiting stationary surface containers or tanks for gasoline and other petroleum products in greater quantities than fifty gallons to be erected or maintained within the fire limits or 150 feet of any dwelling, the appellee moved his tanks and office outside the corporate limits. Before the passing of this ordinance his office and storage tanks were within the city limits, and he paid the city license fee of $100 assessed by ordinance No. 243 for engaging in the oil and gas business.

"The facts are that appellee Webb sells and delivers oil and gas, in wholesale, to retail filling stations in the city of Blytheville, in the same manner as prior to the removal of his office and storage tanks from within the city; that he had been regularly engaged in the sale and delivery of oil and gas to retail filling stations in the city of Blytheville during the first half of the year 1926; that the method of making the sale and delivery of oil and gas is for the appellee to fill his tank trucks at his storage tanks, located less than a mile outside the city limits, and drive into the city of Blytheville, and from one retail filling station to another, asking the owners thereof the quantity of oil and gas desired, and then and there delivering the quantity of oil and gas desired; the retail dealers usually paying cash therefor."

The retail filling stations or customers pay a privilege tax, and are not connected with the business of appellee. He collects the State tax fixed on the oil and gas, remits to the proper authorities, and pays no occupation or privilege tax to any State, county or municipality, and paid no license tax for selling oil and gas for the year 1926 or any part thereof. Ordinance No. 243 provides:

"Section 1. It shall be unlawful for any person, firm or corporation in the city of Blytheville to engage in, exercise or pursue any of the following lines of

business without first having obtained and paid for a city license therefor from the city collector, the amount of which licenses are hereby fixed in this ordinance.

"Section 3. The licenses as provided in this ordinance are hereby fixed, defined and established under the several items as follows, to-wit:

"Item 80. Oils, lubricating, gasoline, fuel, illuminating, naphtha and grease, $100 per annum.

"Section 6. All licenses provided for under this ordinance shall be issued by the city collector for a six-months period, such licenses shall be paid in full in advance, and shall be due and payable on January 1 and July 1 of each year, respectively.

"Section 7. Any person, firm or corporation violating any provision of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction in the police court, shall be fined in any sum not less than five dollars nor more than fifty dollars, and each day said violation shall continue shall be a separate offense."

Appellant contends that appellee was doing business in the city of Blytheville without having paid the license for that privilege, in violation of said ordinance. There can be no question but that the method of selling, by his filling tank trucks at his storage tanks a mile outside the city limits, and driving them into the city of Blytheville, and from one retail filling station to another, and there making the sale and delivery of the quantity of oil or gas desired by the purchaser, and usually collecting the price thereof, constituted engaging in or doing business within the city of Blytheville. *Clark* v. *Watkins Medical Co.,* 115 Ark. 166; *Miellmier* v. *Toledo Scales Co.,* 128 Ark. 211; *Wagner* v. *City of Covington,* 251 U. S. 95, 64 L. ed. 157.

Although it is true that appellee did not keep his office and storage tanks in the city of Blytheville, he did engage in, exercise or pursue one of the lines of business prohibited being pursued by said ordinance, without payment of the city license. The purpose of the ordinance, and a fair construction of its terms, shows it was the

intention to prohibit the engaging in, pursuing or exercising the line of business within the city limits without payment of license, rather than that only firms or corporations who live or reside within the city should be required to procure license. He was "in the city of Blytheville," too, within the meaning of that clause of said ordinance, if it could be held to have a meaning other or different from the construction already expressed, when he brought his products and merchandise in supply tanks to the door of the retail stations, made his contracts of sale, and delivered his products there, as much so as though his supply tanks had been loaded from storage tanks within the city and driven to the place of sale.

It follows that the judgment of the circuit court was erroneous, and the same is reversed, and the cause is remanded for a new trial.

TENNYSON v. KEEF.

Opinion delivered February 7, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The verdict of a jury will not be disturbed by the Supreme Court if there is any substantial evidence to support it.
2. TRIAL—AMBIGUOUS INSTRUCTION—SPECIFIC OBJECTION.—Where an instruction is ambiguous, a specific objection should be made or the error will be waived.
3. TRIAL—GENERAL OBJECTION TO INSTRUCTION.—When a portion only of an instruction is correct, and a general objection only is made to it, the giving of such instruction is not error.
4. TRIAL—AMBIGUOUS INSTRUCTION—WHEN CURED BY OTHER INSTRUCTIONS.—An instruction on the joint liability of a person constructing an electric light system and of the person supervising the construction of the wires, although ambiguous, *held* not reversible error, in view of other instructions properly submitting the issue that defendant was liable only if he placed or caused to be placed the wire in such manner as to injure plaintiff.

Appeal from Boone Circuit Court; *J. M. Shinn*, Judge; affirmed.

Woods & Greenhaw, for appellant.

V. D. Willis and *Shouse & Rowland,* for appellee.

MEHAFFY, J. The plaintiff commenced this suit in the Boone Circuit Court, for personal injuries alleged to have been caused by the appellant and others. It is alleged that the defendant stretched, or caused to be carried and stretched, directly across the public highway, the principal street through the town, a strand of insulated wire, well knowing that said highway was a public thoroughfare, and not regarding their duty in that behalf, and without due and proper care towards the public and the plaintiff; that they stretched or caused to be stretched the wire at a low and dangerous and unlawful place. That plaintiff came along said highway, across which said wire was stretched, and, without knowledge or warning from the defendant or any one, came violently in contact with the wire, through no fault of his own, but by reason of defendant's negligence and carelessness; that plaintiff was in an automobile, and that the wire was hanging at a low and dangerous height from the ground, and, extending directly across the highway, caught plaintiff in the mouth, whereby he was violently thrown from said car to the ground, and received severe injuries. The defendants filed separate answers, denying the material allegations in the complaint. It is unnecessary to set out the testimony at length. It is sufficient to say that there was testimony to the effect that appellant was superintending the work of putting up the wires, was supervising the work. The testimony is conflicting, but we think there was sufficient evidence to submit the question of the appellant's negligence to the jury. There is no testimony that the appellant put up the wire where the appellee was injured, and the only theory on which the appellant could be held liable is that he caused it to be done, or that he was supervising the construction of the wire. This was a question of fact for the jury, and the verdict of the jury will not be disturbed by this court if there is any substantial evidence to support it. The appellant contends

that instruction No. 2, given at the request of the appellee, was erroneous, and, for that reason, the case should be reversed. Instruction No. 2 is ambiguous, and should not have been given. It reads as follows:

"Even though you believe from the evidence that the defendant, Tobe Tennyson, and the parties purchasing the electric light system, were constructing the lines in question jointly, that is, if you believe that the defendant, Tennyson, and the purchasers of the electric system, were each and all together constructing the system, and the plaintiff was injured through the negligence of any one of the said parties or any one working under the supervision and direction of the defendant, Tobe Tennyson, then in that event every one interested in supervising and constructing said work would be responsible for such damages as were sustained by their negligence. And the plaintiff has the right to sue either or all of said parties, or either or any one of them. Therefore, even though you may believe from evidence that the defendant, Tobe Tennyson, was only acting jointly with the purchasers of the system in the supervising and directing and constructing of said wire, if you further believe that the plaintiff was injured through the negligent construction thereof, then, and in that event, the defendant, Tobe Tennyson, would be responsible for such damages as were sustained, and you must find accordingly."

It is difficult to tell just what the first paragraph of the instruction means. It tells the jury that if Tennyson and other parties were constructing the lines jointly, were each and all together constructing the system, and the plaintiff was injured through negligence of any one of said parties, or any one working under the supervision and direction of Tobe Tennyson, then, in that event, each and every one interested in supervising and constructing said work would be responsible for such damages as were sustained by their negligence.

It will be observed that, while the first part of the instruction mentions constructing the system together, and of plaintiff being injured through the negligence of

any one of, etc., the latter part of the instruction confines it to any one working under the supervision and direction of the defendant. It only tells them that the defendant would be responsible for such damages as were sustained by their negligence. The latter part of the instruction then correctly tells the jury that, if the appellant was supervising and directing and constructing the wires, and plaintiff was injured through the negligent construction thereof, the defendant would be responsible. The appellant did not make specific objection to this instruction, but his objection was general. It has been often held by this court that, where an instruction was ambiguous, specific objection should be made or the error would be waived. It is also true that, when a portion of an instruction is correct and a general objection only is made to it, the giving of said instruction is not reversible error.

Moreover, we do not think the instruction, as given, would make Tennyson liable for the acts of any of the owners of the system if done without his knowledge or against his consent or instruction, as argued by the appellant. If the appellant was superintending the putting up of the wires, if he was having wires stretched, then if they were negligently stretched, and, because of this negligence, the appellee was injured while he was in the exercise of ordinary care, the appellant would be liable to him for his injury. The appellant himself requested and the court gave the following instruction:

"Before you can find for plaintiff in any sum against the defendant, you must find, by a preponderance of evidence, that the defendant negligently placed, or caused to be placed, the wire in question in such manner as to injure the plaintiff, or cause the same to be done under his supervision and direction, and if you fail to find such facts, you will find for the defendant."

This instruction submitted the issue squarely to the jury. It was made plain to them that, unless the appellant negligently placed or caused to be placed the wire in such manner as to injure the plaintiff, or unless he caused the

same to be done under his supervision and direction, there was no liability. Other instructions were given confining liability to acts done by appellant himself or caused to be done by him. There was therefore no reversible error in giving instruction No. 2, and the evidence is sufficient to support the verdict, and the judgment will be affirmed.

H. ROUW COMPANY v. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Opinion delivered February 14, 1927.

1. CARRIERS—BURDEN OF PROOF OF NEGLIGENCE.—In a suit against a carrier for damage negligently caused to a shipment of strawberries, the shipper has the burden of proving the carrier's negligence, but a *prima facie* case is established by evidence that the strawberries were delivered to the carrier in good condition and were delivered by the latter to the consignee in bad condition.
2. CARRIERS—NEGLIGENCE IN SHIPMENT—INSTRUCTION.—In an action by a shipper against a railroad for damages to a shipment in transportation, an instruction which placed on the shipper the burden of proving the railroad's failure to exercise ordinary care in keeping a car properly refrigerated, instead of requiring merely proof of delivery to the railroad in good condition and to the consignee in bad condition, *held* prejudicial error.
3. CARRIERS—NOTICE OF DAMAGE TO SHIPMENT—WAIVER.—In an action by a shipper against a carrier for damages to a shipment, where plaintiff's attorney at the trial asked if the railroad raised "any question about us making demand for payment of this claim," and defendant's attorney answered in the negative, the defendant will be held to have waived compliance with a provision of the contract of shipment making notice of damages a condition precedent to recovery.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; reversed.

STATEMENT OF FACTS.

The H. Rouw Company brought this suit against the St. Louis-San Francisco Railway Company to recover damages in the sum of $420 for damage to an interstate shipment of strawberries.

According to the evidence for the plaintiff, on May 21, 1924, it shipped a car of strawberries over the defendant's line of railroad from Lowell, Arkansas, to Minneapolis, Minnesota. On the bill of lading appears the following notation: "From the H. Rouw Company, the property described below in apparent good order, except as noted." The berries were bought by the plaintiff, from growers in the neighborhood, for shipment. They were inspected before they were loaded in the car, and were good, firm berries, graded as No. 1. They were ripe, smooth and clean. The car of berries was received by the consignee at St. Paul, Minnesota, on May 26, 1924. The car contained 420 crates, and there was considerable decay in them. Other evidence for the plaintiff tended to show that the berries, if properly iced and refrigerated, should have arrived in sound condition. It was also shown that the berries were damaged in the amount sued for.

According to the evidence for the defendant, the car in which the berries were shipped was properly iced when the berries were loaded in the car, and the car was kept properly refrigerated until it reached its destination and was delivered to the consignee.

There was a verdict and judgment for the defendant, and the plaintiff has duly prosecuted an appeal to this court.

C. M. Wofford, for appellant.

E. T. Miller and *Warner, Hardin & Warner,* for appellee.

HART, C. J. It is earnestly insisted by the plaintiff that the court erred in giving instruction No. 7, which is as follows:

"The court charges you that, before the plaintiff can recover herein, it must show by a preponderance of the testimony that the said berries were in good condition for shipment at the time they were delivered to the defendant, and that said defendant failed to exercise ordinary care to ice said car, while the same was in transit, at regular icing stations along the line of railroad

over which said car was transported, and to keep the vents and drain-pipes open, and, further, that defendant negligently failed to furnish a car that would properly refrigerate, and negligently failed to transport said car from Lowell, Arkansas, to its destination within a reasonable time after said car was delivered to the defendant for shipment, and that said alleged negligent acts were the proximate cause of the damage, if any, to said berries; and, if plaintiff fails to establish these facts by a preponderance of the testimony, then it will be your duty to find for the defendant."

The burden of establishing the carrier's negligence was upon the plaintiff. When it introduced evidence to show the delivery of the shipment of berries to the carrier at Lowell, Arkansas, in good condition, and its delivery to the consignee at Minneapolis, Minnesota, in bad condition, such evidence made out a *prima facie* case of negligence. *C. R. I. & P. Ry. Co.* v. *Walker,* 147 Ark. 109, 227 S. W. 12; *Mo. Pac. Rd. Co.* v. *Bell,* 163 Ark. 284, 259 S. W. 745; *Mo. Pac. Rd. Co.* v. *Wellborn & Walls,* 170 Ark. 469, 280 S. W. 18; and *C. & O. R. Thompson Mfg. Co.,* 270 U. S. 416, 46 S. C. 318, 70 L. ed. 659. In the application of the principle of law, instruction No. 7 was wrong and necessarily prejudicial to the plaintiff, because it placed upon it the burden of showing that the defendant failed to exercise ordinary care in keeping the car in which the berries were shipped properly refrigerated during transit.

Counsel for the defendant claim that the instruction was not erroneous because of a clause in the contract of shipment which provided that, if loss or damage to the berries was claimed to have occurred in transit by the negligence of the defendant, a notice to this effect should be required as a condition precedent to recovery, and that the plaintiff did not prove compliance with this provision of the contract. As bearing on this point, we quote from the record the following:

"Mr. Wofford: You don't raise any question about us making demand for payment of this claim? Mr. Hardin: No sir. We don't deny that."

Mr. Wofford was attorney for the plaintiff and Mr. Hardin for the defendant. This agreement was made at the close of the testimony, and it is fairly inferable that it was intended to cover the point in question. We think the agreement is broad enough to show that the defendant waived compliance with this provision of the contract. Having done so, no assignment of error can be based upon the failure to comply with the provision of the contract. It necessarily follows that the instruction as given is contrary to the principles of law decided in the cases above cited. Therefore the judgment must be reversed, for the error of the court in giving instruction No. 7, and the cause will be remanded for a new trial

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UNITED ORDER OF GOOD SAMARITANS v. THOMPSON.

Opinion delivered February 14, 1927.

1. INSURANCE—FRATERNAL INSURANCE—CONSTITUTION AND BY-LAWS.—The constitution and by-laws of a fraternal order become part of the contract insuring its members.
2. INSURANCE—DEATH OF SUSPENDED MEMBER.—Under a benefit certificate providing that the insured should be automatically suspended for nonpayment of more than one month's dues, and that a subsequent payment will not entitle the insured or the beneficiary to any benefits if sickness or death occur before the expiration of 30 days from reinstatement, *held* that, where a member suspended for nonpayment of two months' dues died within 30 days after paying his back dues, his beneficiary was not entitled to recover on his benefit certificate.

Appeal from Woodruff Circuit Court, Southern District; *E. D. Robertson,* Judge; reversed.

STATEMENT OF FACTS.

Sena Thompson sued the United Order of Good Samaritans to recover the sum of $300, alleged to be due her on a benefit certificate. The suit was defended on the ground that the policy was not in force at the time that the insured died.

On the first day of January, 1922, the United Order of Good Samaritans, a fraternal insurance company incorporated under the laws of the State of Arkansas, issued to Henry Thompson a benefit certificate. The certificate reads, in part, as follows:

"This is to certify that Henry Thompson, of Cotton Plant, is a member of Shady Grove Colony No. 226, subordinate to the supreme colony, Arkansas jurisdiction. In consideration of the issuance of this certificate and of an agreement to be governed by the constitution and by-laws of the supreme colony and to pay the local colony the requisite amounts to maintain membership in the society, the supreme colony, upon the satisfactory proof of the death of the above member, promises to pay to Sena Thompson, who bears the relationship of wife, the sum of three hundred dollars, or the sum of its value, in accordance with the general law."

The benefit certificate also contains a clause as follows:

"The constitution, by-laws, medical certificate and all laws that may be hereafter adopted by the supreme colony shall be read together as a part of this contract."

The plaintiff also introduced in evidence by-laws of the subordinate lodge of which the insured was a member. Section 3 reads as follows: "Any brother or sister neglecting to pay all arrears to the funds of the colony for two months shall be automatically suspended, and, during such suspension, he (she) shall forfeit all claims on the order, and should he (she) desire to return, he (she) shall pay all indebtedness and contributions that may have been assessed on each member in the interval between his (her) suspension and time of return, and shall stand over one month before he (she) shall be entitled to any benefits."

According to the testimony of Ethel Peaden, she was financial secretary of the local lodge at the time the transaction in question took place. It was the custom of the local lodge to collect dues at the meeting held on the

first Tuesday night in each month. Henry Thompson was not present in September, 1924, and did not pay his dues that night. He was present at the meeting on October 7, 1924, and at that time paid his dues for September and October. The dues were ninety cents per month, and he also paid a tax or penalty of fifty cents. This made a total payment of $2.30. It was the duty of the local lodge to send the dues to the secretary of the supreme colony by the tenth of each month. The secretary of the local lodge sent them to the secretary of the supreme colony in time for them to have been received by the tenth instant. Henry Thompson died on October 16, 1924.

The constitution and by-laws of the supreme colony were introduced in evidence by the defendant. Section 6 is as follows: "When the dues exceed one month's dues, taxes and fines included, the insured shall be automatically suspended, and in case of sickness or death neither supreme, grand nor subordinate colonies shall be liable for any sum under the contract. Should the dues be paid, neither the insured nor the beneficiaries shall be entitled to any benefits if sickness or death occurs before the expiration of thirty (30) days; also, the subsequent payment of such arrears shall not entitle the insured, or beneficiary, to any benefits for sickness or death occurring during the period of such suspension. The insured will not be permitted to pay up while sick."

According to the secretary of the supreme colony, the dues sent in by the local lodge in payment of the arrears of Henry Thompson had not been received by the 10th of October, 1924. After the death of Henry Thompson the amount of $2.30, paid by him to the secretary of the local lodge on October 7, 1924, was tendered to his widow, and she refused to accept the same.

From the verdict and judgment against it the defendant has duly prosecuted an appeal to this court.

Ross Mathis, for appellant.

W. D. Trice and *Ed Trice,* for appellee.

HART, C. J., (after stating the facts). Counsel for the defendant relies for a reversal of the judgment on the ground that, under the by-laws of the supreme colony, the benefit certificate sued on had lapsed at the time of the death of Henry Thompson, and that there was no liability under the terms of the benefit certificate. In this contention we think counsel is correct. On the 9th day of August, 1924, the supreme colony adopted the rules and by-laws of which § 6, copied in our statement of facts, is a part. The benefit certificate sued on was issued by the supreme colony, and had lapsed for the nonpayment of the assessment for the month of September, 1924. It is true that the insured paid the assessment for September on October 7, 1924, and at the same time paid his assessment for the month of October. It will be noted, however, that, under the provisions of § 6, when a member is in arrears for one month's dues he is automatically suspended. Under the provisions of that section the member was entitled to pay up his arrears on the 7th day of October, 1924, and the record shows that he did so. The section further provides that, should the dues be paid, neither the insured nor the beneficiaries shall be entitled to any benefits if sickness or death occurs before the expiration of thirty days thereafter; and also the subsequent payment of such arrears shall not entitle the insured, or beneficiary, to any benefits for sickness or death occurring during the period of such suspension. The record shows that the plaintiff died on October 16, 1924, which was within the thirty-day period.

It is a settled rule of this court that the constitution and by-laws of a fraternal order become a part of the contract insuring its members, and this is especially so where the certificate, as in the case at bar, provides that the constitution and by-laws of the order shall be a part of the contract of insurance. *W. O. W.* v. *Hall,* 104 Ark. 538, 148 S. W. 526; *Supreme Royal Circle* v. *Morrison,* 105 Ark. 140, 150 S. W. 561; and *Mutual Aid Union* v. *Lovitt,* 170 Ark. 745, 281 S. W. 354.

The benefit certificate in the case at bar especially provides that it is to be governed by the constitution and by-laws of the supreme colony. Again, it provides that the constitution and by-laws of the supreme colony shall be read together as a part of the contract. It is plain, when this is done, that the contract of insurance was not in force when the insured died. He had been automatically suspended for nonpayment of dues, and the thirty days during which, under the by-laws, he was not entitled to any benefit for sickness or death, had not expired when he died.

Counsel for the plaintiff, however, seeks to avoid the force of § 6 by invoking the provisions of § 3, which is also copied in our statement of facts. The record shows that § 3 was adopted as a by-law of the local lodge. As such, it could only govern the rules under which persons were entitled to membership in that lodge. The benefit certificate especially provides that the constitution and by-laws of the supreme colony shall be a part of the contract of insurance. As we have already seen, when the contract of insurance of the benefit certifcate and the constitution and by-laws of the supreme colony are read together, the insured was suspended at the time of his death and was not entitled to any benefit for sickness or death at that time. Besides, there is nothing in the benefit certificate which makes the rules and by-laws of a subordinate lodge part of the contract of insurance.

The result of our views is that the circuit court should have directed a verdict for the defendant, and erred in not doing so. Therefore the judgment will be reversed, and, inasmuch as the plaintiff's case has been fully developed, her cause of action will be dismissed here.

COFFMAN v. CITIZENS' LOAN & INVESTMENT COMPANY.

Opinion delivered February 14, 1927.

1. EQUITY—EXHIBITS TO COMPLAINT.—Exhibits to a complaint in equity become, for all purposes of pleading, a part of the complaint, and on demurrer may be used in aid of a defective statement in the complaint itself, and may be looked to for the purpose of testing the sufficiency of the allegations of the complaint.
2. MORTGAGES—FRAUDULENT CONVEYANCE.—Chattels brought for the express purpose of daily, indiscriminate sale to the general public, exposed for such sale at the place of business of a dealer, and over which the dealer is permitted to exercise the dominion of owner, cannot be made the subject of a valid chattel mortgage, though, as in the case of an automobile, they may be of considerable size, value and capable of identification.
3. MORTGAGES—STIPULATION AGAINST SALE—WAIVER.—A stipulation in a mortgage on automobiles against the sale, conversion or removal is waived by the mortgagee knowingly permitting its violation.

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

STATEMENT BY THE COURT.

On June 19, 1925, the Citizens' Loan & Investment Company filed a complaint in the Pulaski Chancery Court against the Yale Automobile Company, H. R. Coffman, receiver of said company, and the General Motors Acceptance Corporation, to foreclose a lien claimed by it on certain Chevrolet cars of the Yale Automobile Company, sold by said company to various customers, and notes retaining title in the cars until paid for, which were transferred to the Citizens' Loan & Investment Company. Judgment is sought against the General Motors Acceptance Corporation for the value of a car upon which the plaintiff claimed a lien, and which, it is alleged, the latter corporation converted to its own use. A decree of foreclosure of the lien of the plaintiff is also asked and judgment against the Yale Automobile Company for the amount of the plaintiff's debt.

The General Motors Acceptance Corporation brought suit in replevin against the Yale Automobile Company

and the England National Bank, in which it sought to recover the possession of certain automobiles turned over to said bank by said automobile company under certain mortgages, which are claimed to be void. The complaint alleged that the General Motors Acceptance Corporation was the owner of said automobiles, and entitled to possession thereof. The ground upon which the plaintiff in that suit claimed title and possession to the cars is that they were sold to customers by the Yale Automobile Company and notes taken for the purchase price thereof. The title was retained until the purchase price was paid, and the notes for the purchase price were assigned to the plaintiff in the replevin suit. By consent, the replevin suit was transferred to the chancery court and consolidated with the suit brought in that court by the Citizens' Loan & Investment Company.

The England National Bank filed an answer and cross-complaint, and, by consent of all parties, the cases were consolidated for trial. Inasmuch as a demurrer was sustained to the cross-complaint by the chancellor, we need only set out the issues raised by the cross-complaint.

The cross-complaint of the England National Bank alleges that the Yale Automobile Company was indebted to said bank on different dates for various sums of money, and to secure said indebtedness executed its several mortgages on certain automobiles, which are specifically described in the cross-complaint. Said mortgages were duly filed for record in Pulaski County, Arkansas. Copies of the mortgages are exhibited with the cross-complaint. In order to save cost, it is agreed that the exhibits A to J inclusive, which are copies of said mortgages, are identical in form, words and figures, except for the difference in car numbers and types as set out in the cross-complaint. It is further agreed that Exhibit K, which is a copy of one of the mortgages, is the form upon which all of them were prepared. We copy from this mortgage the following:

"Whereas, party of the first part is indebted unto party of the second part in the sum of (amount) dollars ($), which is payable ninety days after date, and which is evidenced by the promissory notes of the party of the first part of even date herewith. This chattel mortgage is given as security to above note or any renewal thereof.

"Whereas, party of the first part is to retain possession of automobiles above described as long as the party of the second part shall deem said debt and said security safe and secure, and as long as the conditions of this mortgage shall be faithfully observed and fulfilled, and the party of the second part may take possession of the automobiles above described at any time it may deem the security unsafe, or that the conditions of the mortgage are not being faithfully observed.

"Now it is hereby agreed that the party of the first part will, until payment of the said indebtedness shall have been made in accordance with the terms set forth, hold and keep all of said automobiles in brand-new condition, and will not operate any of them for demonstration or for any other purpose, and it is further agreed that said party of the first part will not sell, loan, rent, deliver, mortgage, pledge, or otherwise dispose of any of said automobiles until it shall first have paid to said party of the second part the amount which the party of the first part may desire to dispose of and shall have obtained from party of the second part an instrument of writing releasing the said automobile or automobiles from the lien of this instrument."

Another exhibit to the cross-complaint contains a copy of the form of notes prepared by the Citizens' Loan & Investment Company and the General Motors Acceptance Corporation for the use of the Yale Automobile Company in selling cars to its customers. Title is retained in each car sold until it has been paid for, and the notes were transferred to the Citizens' Loan & Investment Company and the General Motors Acceptance Corporation for money advanced by these companies to

the Yale Automobile Company for use in carrying on its business.

The exhibits to the cross-complaint are very voluminous, and for that reason we do not set them out. It is sufficient to say that it is fairly inferable from them that the Yale Automobile Company was a dealer in Chevrolet cars in the city of Little Rock, and, from time to time, transferred notes to the Citizens' Loan & Investment Company and the General Motors Acceptance Corporation to secure money with which to carry on its business as such dealer in automobiles. These notes were on printed forms prepared by said companies, and retained title in the car until the purchase price of the car was paid. There is no dispute about the Yale Automobile Company being indebted to the England National Bank, Citizens' Loan & Investment Company and the General Motors Acceptance Corporation. The mortgages executed by the Yale Automobile Company to the England National Bank were filed for record prior to the time the dealers' notes above referred to were transferred by the Yale Automobile Company to the Citizens' Loan & Investment Company and the General Motors Acceptance Corporation.

The chancellor was of the opinion that the mortgages by the Yale Automobile Company to the England National Bank were invalid as against *bona fide* creditors of the Yale Automobile Company, and rendered a decree in favor of the Citizens' Loan & Investment Company and the General Motors Acceptance Corporation. To reverse that decree the England National Bank has duly prosecuted an appeal to this court.

J. A. Sherrill, for appellant.

Frank H. Dodge, John W. Newman and *Rogers, Barber & Henry,* for appellee.

HART, C. J., (after stating the facts). At the outset, it may be stated that, under the practice in equity, exhibits to a complaint become, for all purposes of pleading, a part of the complaint, and consequently on demurrer may be used in aid of a defective statement in

the complaint itself, and may be looked to for the purpose of testing the sufficiency of the allegations of the complaint. *Moore* v. *Exelby,* 170 Ark. 908.

It is fairly inferable from the allegations in the cross-complaint, when read in connection with the exhibits thereto, that the Yale Automobile Company was a dealer in Chevrolet cars during the time all the transactions involved in this suit were had. The exhibits show that the Yale Automobile Company sold cars to individuals and took notes for all or a part of the purchase money, retaining title in itself until the purchase price was paid. These notes were made on printed blanks furnished by the Citizens' Loan & Investment Company and the General Motors Acceptance Corporation. This arrangement was made pursuant to agreements between the Yale Automobile Company and the Citizens' Loan & Investment Company and the General Motors Acceptance Corporation, whereby the former was to borrow money from the two latter companies for use in its business and transfer said conditional sale notes to them in payment of the same.

The England National Bank had taken mortgages on all cars furnished to the Yale Automobile Company by the manufacturer of the cars and had duly filed said mortgages of record. All these chattel mortgages were filed for record before the cars were sold by the Yale Automobile Company to customers and conditional sale notes were taken for the purchase price thereof and transferred to the Citizens' Loan & Investment Company and the General Motors Acceptance Corporation.

It is the contention of counsel for the England National Bank that the chattel mortgages given by the Yale Automobile Company were valid and gave it a lien prior to that which might be subsequently secured by the creditors of the Yale Automobile Company. We do not agree with counsel in this contention. We think the case is settled by the principles of law decided by the Virginia Supreme Court of Appeals in *Boice* v. *Finance & Guaranty Corporation,* 102 S. E. 591, 10 A. L. R. 654,

In that case the court held that property bought for the express purpose of daily indiscriminate sale to the general public, exposed for such sale at the place of business of a licensed dealer, and over which the dealer is permitted to exercise the dominion of owner, cannot be made the subject of a valid chattel mortgage, though, as in the case of an automobile, it is of considerable size and value, and capacity of identification.

Inasmuch as this is the only case bearing directly upon the issues involved in the case at bar, we copy extensively from the opinion and adopt the reasoning thereof. The court said:

"It is a matter of common knowledge, and will therefore be judicially noticed, that, in the large cities, there are department stores in which a customer can buy almost anything from a nut-cracker to a threshing machine, from a doll carriage to an automobile. It would never occur to a customer that he must be on his guard to see whether the article was bulky, of large value, and easily susceptible of identification, and, if so, to examine the registry for liens thereon. Besides, many of the articles carried in such stores would be on the border line, and it would be unreasonable to require a purchaser to determine what could be mortgaged and what could not. To require an examination of the records for liens in such cases would break up the business, and indeed be an embargo on legitimate trade. Capital must seek a more substantial security for its protection. Otherwise, it were better that the few should suffer than the general public, who have been lured into purchasing from a dealer who has been intrusted with the *indicia* of ownership. A purchaser in such case is not bound to see to the application of the purchase money.

"It is true that, as a rule, the seller of personal chattels cannot confer upon a purchaser any better title than he himself has; but, if the owner stands by and permits a seller, who is a licensed dealer in such goods, to hold himself out to the world as owner, to treat the goods as his own, place them with other similar goods of his own

in a public showroom, and offer the same indiscriminately with his own to the public, he will be estopped by his conduct from asserting his ownership against a purchaser for value without notice of his title. The constructive notice furnished by a recorded mortgage or deed of trust in such cases is not sufficient. The act of knowingly permitting the goods to be so handled and used by the seller in the ordinary and usual conduct of his business is just as destructive of the rights of the creditor as if such permission had been expressly granted in the mortgage or deed of trust."

The case was decided upon the principle that, where one of two equally innocent persons must suffer, he should bear the burden whose conduct has induced the loss. In the present case, the England National Bank took mortgages from time to time upon the automobiles of the Yale Automobile Company, which were to be placed on sale and sold by said company. If these mortgages are to be considered valid, no one would be safe in purchasing a car from a dealer until he first went to the records at the county seat and made an examination to see if there was a chattel mortgage on the car which he was about to purchase, and he also would have to see to it that the mortgage was released or that the purchase price of the car was paid to the mortgagee.

The mortgage given by the Yale Automobile Company to the England National Bank contained a provision that the former company was to retain possession of the automobiles as long as the mortgagee deemed its security safe, and provided that the bank might take possession of the automobiles described in the mortgages at any time it might deem the security unsafe. It is also true that the mortgages contained a provision that the mortgagor agreed, until payment of the said indebtedness, to hold and keep all of said automobiles in brand-new condition and not to operate any of them for demonstration or for any other purpose; and agreed, further, not to sell, loan, rent, deliver, mortgage, pledge, or otherwise dispose of any of said automobiles until he should

obtain from the bank an instrument in writing releasing the said automobile from the terms of the mortgage.

This does not help the case of the bank any. Indeed, it shows that it was the obvious intention of the parties that the automobiles should be exhibited for sale; and, from the long course of dealing between the parties and the number of mortgages given, it is plainly inferable that, while the mortgage stipulates against sale, conversion or removal of the automobiles without the written consent of the bank, the stipulation was waived, if its violation was knowingly permitted by the bank. It is plainly inferable from the length of the time the transactions in question were in progress, and from the number of mortgages taken by the bank, that it must have known that the automobiles were being sold and that the proceeds were not being applied to the payment of its indebtedness.

It is said in the case cited that it would be a travesty on justice and a fraud on the rights of third persons to permit a creditor to take such chattel mortgages as were taken in this case and immediately destroy their effect by permitting a use of the property inconsistent with the terms of the mortgages. In that case the court further said that it was immaterial whether the permission to use the property as owner was given contemporaneously with or subsequent to the mortgage. In either event it has the same effect as if it had been set out in the mortgage. The case cited above was followed by the Virginia Supreme Court of Appeals on the same day in *O'Neil* v. *Cheatwood,* 102 S. E. 596.

This view is in accord with our previous decisions bearing on the question. In *Lund* v. *Fletcher,* 39 Ark. 325, it was held that a mortgage of articles of merchandise left in the possession of the mortgagor, with power to sell in the ordinary course of business, is void except between the parties to it. The court had under consideration a mortgage of a stock of drugs, paints, glassware, etc., and the majority of the court approved the views on this question expressed by Chancellor Cooper of Ten-

nessee, considering them based on good reason and sound policy. In adopting the views of Chancellor Cooper for the decision of the case, the court said: "That eminent jurist, whose ability, judicial temperament and profound study entitle his opinions to the highest consideration, whilst conceding that a mortgage may be made to cover after-acquired property, and that there may be left in the mortgagor a limited power of disposition, such as tools, machinery, rolling stock, etc., denies that such power or disposition consists with a valid lien on personal goods, which can only be profitably used as articles of commerce. He says that such a fluctuating lien, opening to release what is sold, and to take in what may be purchased, is invalid in law, and not enforceable in equity."

In *Gauss Sons* v. *Doyle & Co.,* 46 Ark. 122, it was held that, when there is an agreement or understanding between the mortgagor and mortgagee of a stock of goods that the mortgagor may remain in possession of the goods and sell them as his own, the mortgage is as fraudulent and void as to other creditors as if the agreement were expressed in the mortgage; and, to arrive at their true meaning, the concurrent acts, surrounding circumstances and subsequent conduct of the parties are taken together for the consideration of the court or jury trying the issue. It was further held that it was against public policy for the mortgagor to remain in possession and sell the mortgaged goods, except as agent of the mortgagee.

This principle was again recognized in *Felner* v. *Wilson,* 55 Ark. 77, where it was held that a mortgage of a stock of goods was not invalidated by a provision that the mortgagor should retain possession of the property as agent of the mortgagee and sell for him. This view of the law is supported by the Supreme Court of the United States in *Robinson* v. *Elliott,* 22 Wall. 513.

The Citizens' Loan & Investment Company and the General Motors Acceptance Corporation were *bona fide* creditors of the Yale Automobile Company. We think that the England National Bank, in taking the mort-

gages under the circumstances alleged in the cross-complaint, can stand on no higher footing than one who sells to a retailer and gives him the power of sale to his customers.

Therefore we are of the opinion that the mortgages given by the Yale Automobile Company to the England National Bank are void as to the claims of the Citizens' Loan & Investment Company and the General Motors Acceptance Corporation against the Yale Automobile Company. It follows that the decree of the chancery court was correct, and must be affirmed.

MIDLAND VALLEY RAILROAD COMPANY v. BARKLEY.

Opinion delivered February 14, 1927.

1. COURTS—INTERSTATE SHIPMENTS—JURISDICTION OF STATE COURTS.—Under the Interstate Commerce Act, § 22, a State court has jurisdiction of an action against a railroad for failure to furnish cars for use in interstate shipments of coal, in violation of Crawford & Moses' Dig., §§ 895, 951, since the Transportation Act (Acts of Cong. of Sept. 20, 1920) and act of Congress of Sept. 22, 1922, do not vest in the Interstate Commerce Commission exclusive power in the matter of distribution of coal-cars.
2. COMMERCE—JURISDICTION OF INTERSTATE COMMERCE COMMISSION.—A complaint alleging that the rules and orders of the Interstate Commerce Commission are unreasonable or unfair, or that they result in unlawful or unreasonable practice or in unjust discrimination or undue prejudice to shippers, would involve an administrative question over which the Interstate Commerce Commission alone would have jurisdiction.
3. CARRIERS—DUTY TO FURNISH CAR SERVICE.—Under the Interstate Commerce Act (U. S. Comp. Stat. § 8563 *et seq.*) it is the duty of a carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by such carrier, and, when the supply of cars available for service does not equal the requirements of the mines, it is the duty of the carrier to maintain just and reasonable ratings of such mines and count against such mines each car furnished for transportation of coal.
4. CARRIERS—DUTY TO FURNISH CAR SERVICE.—The law requires a carrier to make reasonable effort to provide instrumentalities for

accommodating the business of the localities which it assumes to serve.

5. APPEAL AND ERROR—INVITED ERROR.—Appellant cannot on appeal complain that the court submitted an issue which it requested to be submitted to the jury.

6. TRIAL—CAUTIONARY INSTRUCTIONS.—A cautionary instruction telling the jury "if the majority are for the defendant (appellant) the minority ought to seriously ask themselves whether they may not be reasonable and ought to doubt the correctness of their judgment" *held* not an invasion of the jury's province.

7. NEW TRIAL—MISCONDUCT OF JUROR.—Alleged misconduct of a juror in riding back and forth from his home during the progress of the trial in plaintiff's automobile, and paying for plaintiff's dinner as return for such courtesy, *held* insufficient to justify setting aside of verdict.

Appeal from Sebastian Circuit Court, Greenwood District; *John E. Tatum,* Judge; affirmed.

O. E. Swan and *Pryor, Miles & Pryor,* for appellant.

U. C. May and *Evans & Evans,* for appellee.

WOOD, J. Plaintiffs below, appellees here, instituted this action against the defendant below, appellant here, to recover damages for failure to furnish cars in which to ship coal from appellees' mine, located near Excelsior, in Sebastian County, Arkansas. Appellees alleged in substance that, in June, 1922, they were operating under a lease a coal mine on which they had expended and were expending large sums of money; that the appellant was an Arkansas corporation, having a line of railroad extending to appellee's coal mine, over which appellee shipped coal in carload lots; that, about the date above mentioned, when the appellees were preparing to mine and load one car of coal per day from their mine, the cars containing an average of 45 tons of coal each, the appellant demanded of the appellees that they sell to the appellant their output of coal at a price of $3.75 per ton, when coal was selling on the market at a much greater price; that appellant threatened appellees that, unless they sold their output of coal to appellants at the above price, the appellant would refuse to furnish appellees with coal-cars; that appellees refused to accede to the

demand of appellant, and appellant thereupon wrongfully refused to furnish the appellees coal-cars to ship the output of their mines, from August 1, 1922, until January 1, 1923, during which time the appellant only furnished to appellees twelve coal-cars. The appellees alleged that the refusal of appellant to furnish coal-cars compelled appellees to shut down their mine. Appellees then set forth in detail the damages alleged to have accrued to them by reason of the alleged wrongful failure of the appellant to furnish coal-cars as demanded by the appellees. The concluding portion of the complaint is as follows:

"But for the wrongful failure and refusal of defendant to furnish coal-cars as aforesaid, when and as requested and demanded by the plaintiffs, the plaintiffs would not have been compelled to give up their mine and lease, and plaintiffs could and would have mined, shipped and sold from their said mine from January 1, 1923, to September 1, 1923, a period of eight months, twenty cars of coal during each of said months, or a total of one hundred sixty cars of coal during said period, and plaintiffs could and would have realized thereon a net profit of seventy-five dollars per car, or a total profit of twelve thousand dollars.

"The plaintiffs have sustained damages in the total sum of $33,676, as hereinbefore set forth in detail, as approximate result of the defendant's wrongful failure and refusal to furnish plaintiffs coal-cars when and as requested and demanded by them in which to ship coal from their said mine. Wherefore the plaintiffs pray judgment against the defendant for the sum of $33,676, with interest, for costs of suit, and for all legal relief."

The appellant demurred to the complaint on the ground that it did not state a cause of action within the jurisdiction of the court, that "the act of Congress known as the Interstate Commerce Act, as amended by the Transportation Act and other acts of Congress amendatory thereof, confer exclusive authority upon the Interstate Commerce Commission in the matter of distribution

of coal-cars and jurisdiction in matters of alleged failure to furnish the same."

Appellant's demurrer was overruled, and it answered, denying specifically the allegations of the complaint. It was alleged in substance that, under the orders of the Interstate Commerce Commission, certain rules and regulations adopted by the United States Railroad Administration in December, 1923, were in effect during the period alleged in the complaint. The appellant alleged that the appellees' mine was what is termed a "wagon-load mine," in that the coal produced at the mine was hauled in a wagon to the spur or switch-track upon which it was loaded into the cars, and was therefore not rated as mines loaded from a tipple were rated under the rules of the Interstate Commerce Commission. Appellees then set forth certain bulletins issued under the rules and regulations of the Interstate Commerce Commission fixing the rates for tipple mines, which it attached to its answer, and made exhibits thereto. The appellant alleged that, notwithstanding the appellees' mine was without a rating for furnishing cars under the orders and rules of the Interstate Commerce Commission, the appellant did furnish appellees cars in which to load their coal, but, acting under the orders of the Interstate Commerce Commission, when unable to obtain a sufficient supply of open cars or regular coal-cars, appellant furnished to appellees box-cars in which to ship their coal, until the appellees finally refused to use such cars. The appellant further alleged that, from August 1, 1922, to January 1, 1923, there was an unusual and unprecedented and unforeseen demand for cars in which to ship coal on appellant's railroad, and that appellant was therefore unable to supply the demand for cars to ship coal from wagon-load mines, and was not able to supply the demand for cars to mines that loaded directly into the cars by use of tipple. The appellant also set up that the claim of the appellees for damages accruing one year prior to the filing of the complaint was barred by the statute of limitations.

The testimony is exceedingly voluminous, and we deem it wholly unnecessary to set forth the testimony bearing upon the issue as to whether or not the appellant failed to furnish cars as alleged in the complaint, and, if so, the amount of damages appellees sustained by reason of such failure, because, if the trial court had jurisdiction of the action, we are convinced that the testimony was amply sufficient to sustain the verdict on the issue of whether or not the appellant failed to furnish cars and also as to the amount of damages which accrued to appellees by reason of such failure. The trial resulted in a verdict and judgment in favor of the appellees in the sum of $2,000. Judgment was entered in favor of the appellees for that sum, from which is this appeal.

1. Section 402 of what is designated as the Transportation Act of Congress, February 28, 1920, amends § 1 of the Interstate Commerce Act, approved May 29, 1917, to read as follows:

"(10). The term 'car service' in this act shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this act.

"(11). It shall be the duty of every carrier by railroad subject to this act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Paragraph (12) makes it the duty of carriers by railroads to make just and reasonable distribution of cars for transportation of coal among the coal mines served by them, whether located upon their own lines or lines dependent upon them for car supply. When the car supply is not equal to the requirements of the mines, it is the duty of the carriers to maintain and supply just and rea-

sonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal, against the mine, and a penalty is attached for failure to comply with this provision.

Under paragraph 13 the Interstate Commerce Commission is authorized to order any or all carriers by railroad subject to the act to file with the Commission, from time to time, their rules and regulations with respect to car service, which rules and regulations shall be incorporated in their schedules, showing rates, fares and charges for transportation, and making the carrier subject to all provisions of the act.

Under paragraph No. 14 the Commission may, after hearing on a complaint, or upon its own initiative, establish reasonable rules, regulations and practices with respect to car service by railroads subject to the act, and prescribe a penalty for nonobservance of these rules, etc.

Under paragraph 15, whenever the Commission is of the opinion that shortage of equipment, congestion of traffic, or other emergency exists, with or without complaint, or on its own initiative and with or without notice to the carrier, and without hearing or filing of report, it is empowered (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service, for such time as may be determined by the Commission; (b) to make such just and reasonable direction with respect to car service, without regard to the ownership, as between carriers of locomotives, cars, and other vehicles, during such emergency, as, in its opinion, will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may, after subsequent hearing, find to be just and reasonable, etc. 41 U. S. Statutes at Large, ch. 91, p. 476, § 402.

By an act of Congress, September 22, 1922, 42 U. S. Statutes at Large, p. 1025, an act was again passed entitled "An act to declare a national emergency

to exist in the production, transportation, and distribution of coal and other fuel, granting additional powers to the Interstate Commerce Commission, providing for the appointment of a Federal Fuel Distributor, providing for the declaration of car-service priorities during the present emergency," etc. Section 2 of that act provides, in part, as follows:

"That the powers of the Interstate Commerce Commission, under the act entitled 'An act to regulate commerce', approved February 4, 1887, as amended, including the Transportation Act, 1920, and especially under § 402 of said Transportation Act, 1920, are, during the aforesaid emergency, enlarged to include the authority to issue, in transportation of coal or other fuel, orders for priorities in car service, embargoes, and other suitable measures in favor of or against any carrier, * * * and to take any other necessary and appropriate steps for the priority in transportation and for the equitable distribution of coal or other fuel so as best to meet the emergency and to promote the general welfare, and to prevent, upon the part of any person, partnership, association or corporation, the purchase or sale of coal or other fuel at prices unjustly or unreasonably high. This act shall not be construed as repealing any of the powers heretofore granted by law to the Interstate Commerce Commission, but shall be construed as conferring supplementary and additional powers to said Commission and as an amendment to § 1 of the Interstate Commerce Act, and subject to the limitations and definitions of commerce controlled by said act, and all powers given said Interstate Commerce Commission shall be applicable in the execution of this act."

Learned counsel for the appellant contend that it was the purpose of Congress, in the above enactments, to vest the Interstate Commerce Commission with supreme power in the matter of distribution of coal-cars, regardless of whether the coal was to be shipped in intra or interstate commerce. Counsel for appellant say: "It is the contention of the defendant that all State statutes

and common-law obligations are swept away, as far as the transportation of coal, or the furnishing of cars in which to transport the same, by the provisions of the Transportation Act, and the later emergency act of September 22, 1922." We cannot agree with counsel in this contention.

Section 8 of the Interstate Commerce Act, 24 Statutes at Large, p. 379 (1 Supp. to Revised Statutes of the United States, 529) provides as follows: "That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act," etc.

Section 9 provides that "any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction."

Section 22 provides in part as follows: "And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

These provisions of the Interstate Commerce Act, approved February 4, 1887, were not repealed, expressly or by implication, by the provisions of the Transportation Act of Congress of February 8, 1920, and the Emergency Act of September 22, 1922, upon which counsel for appellant relies. On the contrary, the above provisions of §§ 8, 9 and 22 of the Interstate Commerce Act were in full force and effect when appellee's cause of action is alleged to have accrued. Counsel for the appel-

lees concede that the cars which it is alleged appellant failed to furnish were ordered for and to be used in interstate shipments. Such being the case, the provisions of § 22 of the Interstate Commerce Act *supra,* confer jurisdiction upon the State court. The question, we believe, is thoroughly settled against the contention of counsel for the appellant by decisions of the Supreme Court of the United States.

In *Pennsylvania Railroad Co.* v. *Puritan Coal Mining Co.,* 237 U. S. 121, Mr. Justice Lamar, speaking for the court, said: "But §§ 8 and 9, standing alone, might have been construed to give the Federal courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the commerce act. And, evidently for the purpose of preventing such a result, the proviso to § 22 declared that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' * * * But for this proviso to § 22, it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the State courts, and this clause was added to indicate that the commerce act, in giving rights of action in Federal courts, was not intended to deprive the State courts of their general and concurrent jurisdiction." It was further declared in that case concerning §§ 8, 9 and 22 of the Interstate Commerce Act, construing the same as a whole, that "it did not supersede the jurisdiction of State courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive."

And in the case of *Pennsylvania Railroad Co.* v. *Sonman Shaft Coal Company,* 242 U. S. 120, Mr. Justice Van

Devanter, speaking for the court, among other things, said: "Thus we have held that a manifest purpose of the provision in § 22 is to make it plain that such 'appropriate common-law and statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced." Then, after reviewing and reiterating the doctrine of the above case of *Railroad* v. *Puritan Coal Co., supra,* and other cases, he further says: "Applying these rulings to the case in hand, we are of the opinion that a State court could entertain the action consistently with the Interstate Commerce Act. Not only does the provision in § 22 make strongly for this conclusion, but a survey of the scheme of the act and of what it is intended to accomplish discloses no real support for the opposing view."

In *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, at page 446, Chief Justice White, speaking for the court, concerning § 22 of the Interstate Commerce Act, *supra,* said: "This clause, however, cannot be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

The case of *Midland Valley Railroad Co.* v. *Hoffman Coal Co.,* 91 Ark. 180, was an action by the coal company against the railroad company to recover damages for an alleged failure of the railroad company to furnish cars for shipment of coal for interstate shipments. The jurisdiction of the State court was challenged in that case, as it is in this. We quoted the above clause from *Railway* v. *Abilene Cotton Oil Company,* and, among other things, said: "The case now under consideration involves the

liability of the carrier to the shipper for an alleged breach of its common-law or contractual duty for its failure to furnish cars, and does not involve any infraction of the provisions of the interstate commerce act; and we are of the opinion that the suit was properly brought in the State court. This view, we think, is the logical result to be deduced from the reasoning of the authorities cited above and from the opinion of this court in the case of *Halliday Milling Co.* v. *La. & N. W. Rd. Co.*, 80 Ark. 536. Hence the court properly overruled the demurrer to the jurisdiction of the court."

The appellant sets up in his answer and makes an exhibit thereto various orders and rules of the Interstate Commerce Commission and the rules adopted by the United States Railroad Administration relating to the supply and distribution of coal-cars, which were in effect during the period covered by the appellees' action. We deem it wholly unnecessary to set out and comment upon these rules and the authorities upon which the appellant relies to support its contention that the State court was without jurisdiction. We have examined all these rules and considered the authorities, and especially the decision of the Interstate Commerce Commission in the case of *Interstate Commerce Commission* v. *Victor American Fuel Co. and Salt Lake Rd. Co.*, of July 20, 1926, and we are convinced that these authorities have no application. As we construe the complaint, no attack is made by the appellees upon the rules and orders of the Interstate Commerce Commission relating to the supply and distribution of cars by railroads for the shipment of coal. We cannot discover in the complaint any allegation to the effect that the rules and orders of the Interstate Commerce Commission are unreasonable or unfair, that these rules themselves result in unlawful or unreasonable practice or in unjust discrimination or undue prejudice to shippers. That would involve an administrative question over which the Interstate Commerce Commission alone would have jurisdiction.

As is said in *Penn. Rd. Co.* v. *Puritan Coal Co., supra,* at page 131: "In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. * * * But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the court being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or Federal courts."

The Interstate Commerce law which we have quoted above makes it the duty of carriers by railroads to make just and reasonable distribution of cars for transportation of coal among the coal mines served by such carrier, and, when the supply of cars available for service does not equal the requirements of the mines, it is the duty of the carrier to maintain and apply just and reasonable ratings of such mines and count against such mine each and every car furnished for transportation of coal. It is the duty of the carrier, under the Interstate Commerce Act, to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service.

This is purely an action against the appellant company for its failure to furnish cars, which is its common-law and statutory duty, both Federal and State. But the allegations of this complaint show that this action is bottomed upon appellant's alleged failure to comply with its common-law or contractual, as well as statutory, duty

to furnish cars under §§ 895 and 915, C. & M. Digest. According to the above decisions of the U. S. Supreme Court and our own court, appellees had the right to maintain this action under § 22 of the Interstate Commerce Act. It follows that the court did not err in overruling the appellant's demurrer to the complaint.

2. No useful purpose could be subserved by setting forth and commenting upon the separate instructions given by the court, constituting its charge as a whole to the jury, in submitting the issue of appellant's alleged failure to furnish cars. The appellant, in its prayer for instruction No. 1, asked the court to instruct the jury to return a verdict in its favor, which prayer the court refused, and the ruling was correct. In its prayers for instructions numbered 2 and 3, and in a modification of prayer for instruction by the appellee, the court, in effect, told the jury that the burden was upon the appellee to prove that the appellant, in failing to furnish cars, had violated the act of Congress of February 28, 1920, known as the Transportation Act, and the rules and orders of the Interstate Commerce Commission pursuant thereto, concerning the supply and distribution of coal-cars, and, if the jury so found, their verdict should be for the appellant. It follows, from what we have already said in discussing the question of jurisdiction, that the court erred in granting these prayers for instruction, but they were granted at the request of the appellant. The only issue, as we have seen, that the court should have submitted to the jury was whether or not the appellant wrongfully failed, neglected or refused to furnish the appellees cars for the shipment of coal from their mines, and, if so, the amount of damages appellees were entitled to recover by reason of such neglect, refusal or failure. The court submitted this issue to the jury, in instructions at the request of the appellees, in substantial conformity with the law as announced by this court in numerous decisions; some of the more recent being *Gage* v. *Arkansas Central Rd. Co.*, 160 Ark. 402, 254 S. W. 665; *C. R. I. & P. Ry. Co.* v. *Simms,* 161 Ark. 289, 256 S. W. 33; and *Express Co.* v.

Bald Knob Fruit Exchange, 162 Ark. 588, 258 S. W. 995. In the last case we said: "The law requires a carrier to make reasonable effort to provide instrumentalities for accommodating the business of the localities which it assumes to serve. This is not merely a statutory requirement, but it is an elementary principle originating in the common law."

The instructions which the court gave, both at the instance of the appellant and the appellees, fairly submitted the issues to the jury, and the appellant is in no attitude to complain because the instructions which the court gave at its request introduced the issue of whether or not the appellant had violated the Interstate Commerce Act of February 28, 1920, and the rules and orders of the Interstate Commerce Commission pursuant thereto. We are convinced that the appellant was not prejudiced by these rulings of the court in its favor, because there was testimony in the record to have warranted the verdict of the jury, even if the action had been based on violation of the Interstate Commerce Act and the orders and rules of the Commission passed pursuant thereto, it being assumed that those rules were, on their face, in every respect fair and reasonable.

3. It would unduly extend this opinion to set out all the instructions constituting the court's charge. It suffices to say that we find no error prejudicial to appellant, when the charge is carefully analyzed as a whole. Instruction No. 6 of the instructions given by the court on its own motion is a cautionary instruction, which the appellant contends is the same instruction as that condemned by us in the case of *McGehee & Co.* v. *Fuller*, 169 Ark. 920, 277 S. W. 39. The special language of the instruction in the Fuller case complained of is as follows: "On the other hand, if a majority are for the defendant, the minority ought to doubt the correctness of their judgment, which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows." The language of the instruction which

the appellant asks us to condemn in the present case is as follows: "And, on the other hand, if a majority are for the defendant, the minority ought to seriously ask themselves whether they may not be reasonable and ought to doubt the correctness of their judgment which is not concurred in by most of those with whom they are associated and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

After a careful comparison of the instructions, we are convinced that the language is not the same as that used in the Fuller case, and the instruction in the present case does not invade the province of the jury. It does not direct or advise the minority of the jury that it is their duty to yield their own independent judgment to that of the majority. The language of the instruction quoted in effect but tells the jury that it is the duty of the minority to seriously compare their own views with the views of the majority and determine, in the light of the evidence, whether it is more reasonable that the majority should be mistaken in its conclusion than the minority. This part of the instruction, taken in connection with the other part thereof, is but cautionary to the jury, and tells them to endeavor to arrive at a verdict by reconciling, if possible, their conflicting views, but without any of them surrendering their own convictions for the sake of arriving at a verdict by mere acquiescence in the judgment of his fellows, without being really convinced of the correctness of such judgment. The instruction is not out of harmony with what we have said concerning cautionary instructions in the case of *McGehee & Co.* v. *Fuller, supra,* and in *St. L. I. M. & S. R. Co.* v. *Carter,* 111 Ark. 272, 164 S. W. 715; *Simonson* v. *Lovell,* 118 Ark. 81, 175 S. W. 407; and *St. L. I. M. & S. R. Co.* v. *Devanty,* 98 Ark. 83, 135 S. W. 802. Indeed, the instruction under consideration follows substantially the instructions that were considered and approved by the Supreme Court of the United States in the case of *Allen* v. *United States,* 164 U. S. 492-501, which were taken literally from a

charge approved by the Supreme Court of Massachusetts in *Commonwealth* v. *Tuey,* 8 Cushing 1, and by the Supreme Court of Connecticut in *State* v. *Smith,* 49 Conn. 376, 386.

4. We have carefully examined the record concerning the alleged error of the trial court in refusing to set aside the verdict on account of the alleged misconduct of one of the members of the jury. One of the plaintiffs lived in the same neighborhood with the juror whose conduct is challenged, both of them living in the country some ten or twelve miles from the county seat. This plaintiff, during the progress of the trial, and after the cause was finally submitted to the jury for its determination, allowed the juror whose conduct is challenged to ride back and forth in this plaintiff's car. Other persons accompanied them. The juror, as a return for this courtesy and kindness on the part of this plaintiff, paid for the plaintiff's dinner. It is not shown that there was any conversation between the juror and this plaintiff in regard to the case. All the parties who accompanied plaintiff back and forth in the car were required to be in attendance at court. Counsel for the appellant, who made the motion to set aside the verdict on this ground, stated that he knew the juror intimately and did not claim or allege any corruption or corrupt motives on his part; he was as far from that as any one, and counsel wanted the record to so show. Such being the facts, we are unwilling to say that the integrity of the trial was destroyed by the alleged misconduct of the juror. It cannot be said, under the showing made, that the plaintiff was endeavoring to influence in his favor the mind of this juror. It was conceded, and the court found, that the juror was a man of unimpeachable integrity.

In the case of *St. L. S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768, we quoted from *Brookhaven Lumber & Mfg. Co.* v. *Ill. Central Ry. Co.,* 68 Miss. 432, 10 So. 66, as follows: "While it cannot be too strongly insisted that the stream of justice shall be kept pure—so pure as to afford no suspicion of corrupt or improper

intermingling of any foreign or hurtful matter—yet it must not be forgotten that no mere irregularities of behavior in this day of greater and wiser freedom for jurors, at least in civil trials, will be permitted to disturb the stability of judicial procedure." See also *Bealmear* v. *State,* 104 Ark. 616, 150 S. W. 129. In *Jetton* v. *Toby,* 62 Ark. 91, 34 S. W. 533, we held that the "treating, feeding, or entertaining of jurors by the parties or their counsel during the progress of a trial in a cause in which they had been selected as a jury, whatever the motive might be, is highly improper and deserves severe condemnation." But in that case we did not set aside the verdict because of the alleged misconduct, and it occurs to us it would be going too far, under the facts proved in this case, to attribute a corrupt motive to the conduct of the plaintiff and the juror involved. Counsel for appellant could hardly expect the trial court and this court to believe that a corrupt motive instigated the conduct, when counsel himself did not so believe. This we would have to do before we would be justified in setting aside the verdict.

Upon the whole case we find no reversible error in the rulings of the trial court, and the judgment is therefore affirmed.

SULLIVAN v. WILSON MERCANTILE COMPANY.

Opinion delivered February 14, 1927.

1. EQUITY—CONCLUSIVENESS OF VERDICT.—The verdict of a jury in a chancery case is advisory to, but not binding on, the court.
2. EQUITY—SUBMISSION OF ISSUES TO JURY.—Where a decree was rendered in accordance with the verdict of a jury in an equity case, it will be assumed that the court concurred in the jury's finding, and that the verdict indicates what the court's finding would have been, in the absence of a jury.
3. LANDLORD AND TENANT—WRONGFUL DISPOSSESSION—DAMAGES.—The lessee of farm land, having been wrongfully dispossessed by a purchaser from the lessor, was entitled to recover the difference between the fair rental value of the demised promises and the rental value named in the lease.

4. LANDLORD AND TENANT—WRONGFUL DISPOSSESSION—DAMAGES.—A lessee wrongfully dispossessed from farm land is not entitled to recover damages for a rake purchased to use on alfalfa to be grown on the land or for loss on hogs or cattle purchased for pasturing on the land, such damages being too remote.

5. APPEAL AND ERROR—TRIAL OF EQUITY CASES.—On appeal in an equity case, the trial is *de novo*.

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

David L. King, for appellant.

G. G. Dent and *Walter L. Pope,* for appellee.

SMITH, J. Upon the former appeal in this case, reported in 168 Ark. 262, it was adjudged that appellant, Sullivan, had been erroneously enjoined from occupying a certain lease. The facts upon which that conclusion was based are stated in the former opinion, and need not be restated here. Appellant has asked a dissolution of the injunction and an award of damages, but that relief had been denied because, in the opinion of the trial court, appellant's lease was void. We reversed that finding, and, in doing so, said that, if appellant's cross-complaint had been an independent action for damages, his remedy was complete at law, and he could not have invoked the jurisdiction of a court of equity, but, as appellee had obtained an injunction which had deprived appellant of substantial rights, the latter was entitled, under the statute, to a restitution of the possession of the lease of which he had been deprived by the injunction and to an assessment of damages sustained by reason thereof. Sections 5822 and 5825, C. & M. Digest, were cited in support of the law as there stated.

We held that the effect of the dismissal of appellant's cross-complaint was to dissolve the injunction, and that appellant was entitled to the relief provided under the statute cited, and it was ordered that the decision of the court below be reversed, and the cause remanded with directions to the court to make an order of restitution and to assess the damages in accordance with the statute. That opinion was handed down March

23, 1925. Upon the remand the order of restitution was made at the September, 1925, term of the court, and it was ordered that a jury be selected and impaneled on the 26th day of October, 1925, to assess the damages.

The restitution appears to have been delayed and never made, by reason of an intervention filed by W. H. Kelley, which was later dismissed, so that, when the trial of the question of damages came on to be heard, appellee was still in possession of the land. The lease had therefore practically expired when the cause was heard.

Section 5822, C. & M. Digest, referred to in the former opinion of the court, provides that, upon the dissolution of an injunction, the court may, in its discretion, cause a jury to be impaneled to assess the damages, and this was done. Upon the trial before the jury there was a verdict in appellant's favor for the sum of one cent, and a judgment accordingly, from which is this appeal.

It may be first said that the verdict of a jury in a chancery case is advisory to, but not binding on, the court. *Hinkle* v. *Hinkle,* 55 Ark. 583, 18 S. W. 1049. But, inasmuch as the decree was rendered in accordance with the verdict of the jury, it must be assumed that the court coincided with and concurred in the finding of the jury, and that the verdict indicates what his own finding would have been, had he passed upon the question originally without the intervention of a jury.

It appears, from the facts stated, that appellant was never at any time in possession of the land leased. He had not expended any money in the cultivation or an attempt to cultivate the land. The measure of damages is therefore the difference between the fair rental value of the demised premises and the rental value named in the lease, and the court so instructed the jury. *Reeves* v. *Romines,* 132 Ark. 599, 201 S. W. 822; *Morrison* v. *Weinstein,* 151 Ark. 255, 236 S. W. 585.

The question presented on this appeal is therefore one of fact, and we will not review the testimony of the witnesses in detail.

The land leased embraced twenty-one acres, and the agreed rental was $10 per acre per annum. The lease covered the years 1923, 1924 and 1925. Seventeen acres of the land were in alfalfa and the remaining four acres in Bermuda grass. The testimony of all the witnesses appears to be that the land in Bermuda grass was worth about $10 per acre per year, which was the agreed rental, so we need not consider it further.

The testimony on appellant's behalf was to the effect that the alfalfa could have been cut from three to five times, and would have yielded in 1923 as much as sixty tons, which would have been worth from $25 to $30 per ton. Most of the alfalfa land was planted in corn in 1924, and all of it was so planted in 1925. The testimony was in conflict as to what the yield in corn for these two years would have been, but we think the preponderance of the testimony shows a production which would have made the rental value greater than the agreed value.

The testimony on the part of appellee concerning the rental value of the alfalfa land shows its value to be less than that stated by appellant and his witnesses, but we think the testimony in its entirety shows that this alfalfa land was worth substantially more than the agreed price.

In the case of *Reeves* v. *Romines, supra,* it was held that " 'rental value' is not the probable profits that might accrue to the tenant, but the value, as ascertained by proof of what the premises would rent for, or by evidence of other facts from which the fair rental value may be determined."

The value of the alfalfa was not therefore the measure of the rental value of the land, but the tenant was entitled to cut and appropriate it, and the probable yield of the crop and its value was therefore a proper circumstance to consider in determining what the rental value of the land was, its condition considered, at the time the lease was made. So also was the probable productivity of the land in corn, the crop which was subsequently planted, and, when these elements are all con-

sidered, we conclude that the lease for the three-year period of its duration was worth $300 more than the agreed price. Had appellant been allowed to occupy the land, as his lease entitled him to, he would have had the right to determine the kind of crops which he would plant and the right to plant the ones which would have been most profitable.

Appellant discusses various items, aggregating $1,650 which he says should be allowed him as damages. Among these are a rake which he bought to rake his alfalfa, and which became worthless to him when he lost the alfalfa field. Other items include a loss on hogs and cattle which he bought to pasture on the land. These items are not recoverable elements of damage, as they are too remote.

We conclude therefore that the judgment should have been rendered in appellant's favor for a substantial amount, and we have concluded, from a consideration of all the testimony, that three hundred dollars fairly represents the difference between the actual and the agreed value, and, as we try the case here *de novo,* the decree of the court below will be reversed, and a decree entered here in appellant's favor for that amount.

McKay v. McKay.

Opinion delivered February 14, 1927.

1. DIVORCE—FORMER DECREE AS BAR.—A decree dismissing a wife's suit for divorce on the ground of cruel and inhuman treatment, brought before a cause of action for desertion had accrued, did did not bar her subsequent suit on the ground of desertion brought after such desertion had continued for the required year.
2. DIVORCE—BAR OF CAUSE OF ACTION.—A decree of dismissal, in a wife's suit for divorce on the ground of cruel treatment, is conclusive of the fact that the wife was not driven from home by the husband's cruel treatment, in a subsequent action by her on the ground of desertion.
3. DIVORCE—EVIDENCE OF DESERTION.—In an action for divorce on the ground of desertion, evidence that the parties have been separated

for more than a year and that there was no justification for the desertion establishes a *prima facie* case.

4. DIVORCE—DESERTION—COMPLETED CAUSE OF ACTION.—If one spouse leaves another without cause and absents himself or herself from the innocent spouse for a year, a completed cause of action for divorce arises.

5. DIVORCE—DESERTION—OFFER TO RENEW COHABITATION.—One who without cause deserts his spouse for a year cannot, by offering in good faith to return, destroy the completed cause of action for a divorce.

6. DIVORCE—CONDONATION.—Desertion, like any other cause for divorce, may be condoned, but the right of condonation lies with the innocent, and not with the guilty, spouse.

7. DIVORCE—OFFER TO RENEW COHABITATION.—A wife's desertion did not entitle the husband to a divorce on that ground, where, before expiration of a year and maturity of the cause of action against her, she in good faith offered to return and live with her husband.

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

Price Shofner, for appellant.

B. S. Kinsworthy, for appellee.

SMITH, J. Appellant and appellee were married in 1917 and lived together until October, 1923, at which time they separated. Appellant brought suit for divorce, alleging cruel and inhuman treatment on the part of appellee, her husband. At the trial of this suit in March, 1924, the court denied appellant's prayer for divorce, and dismissed her complaint.

In October, 1924, appellant employed a different attorney and brought a second suit for divorce, alleging, in substance, the same grounds recited in the first complaint; but this suit appears to have been dismissed.

In May, 1925, appellant employed her present attorney and brought this, her third, suit for divorce, in which she alleged that appellee had deserted her. Appellee filed an answer and cross-complaint, in which he denied that he had deserted appellant, but alleged the fact to be that she had deserted him and had continued her desertion for the period of more than one year, and had annoyed him with frivolous suits for divorce, and he

pleaded the decree in the first suit as a bar to the present cause of action.

At the trial from which the present appeal comes the prayer of appellant for a divorce was refused and that of appellee granted. At this trial numerous witnesses were examined, but we think no useful purpose would be served in setting out this testimony in detail.

We think the present suit of appellant is not barred by the decree in the first suit, for the reason that she alleges a different cause for divorce, one which could not have existed when she filed her first suit—that of desertion—as the parties had not been separated a year when the first suit was commenced. I Nelson on Divorce and Separation, § 555.

It is true, as is insisted by counsel for appellee, that appellant left appellee without sufficient cause, and the parties have since been separated for more than a year. The decree in the first cause, wherein cruel treatment is alleged, is not, as we have said, a bar to the present suit, wherein desertion is alleged as the ground for divorce; but the first decree is conclusive of the fact that appellant was not driven from her home by appellee's cruel treatment. The court was correct therefore in holding that it was appellant who had deserted appellee, and not he who had deserted her.

It is true also that the parties have since been separated for more than a year. This makes a *prima facie* case of desertion, inasmuch as appellant had left appellee without justification for so doing, but we think it very clearly appears that, before the desertion had continued for a year—and thereby become a statutory cause for divorce—appellant attempted, in good faith, to effect a reconciliation with appellee. She expressed her willingness and desire to return to appellee and to live with him, and he has shown no cause for refusing to permit her to return, except that she left him and instituted a suit for divorce without having legal right to that relief.

If one spouse leaves another without cause and absents himself or herself from the innocent spouse for the period of a year, a completed cause for a divorce arises, and, when the cause of action has been thus perfected, the offending spouse cannot, by offering, in good faith, to return to the conjugal relation, destroy the right of action which the other has to sue for a divorce. Desertion, like any other cause for divorce, may be condoned, but the right of condonation lies with the innocent spouse, and not with the guilty one.

In the chapter on Divorce and Separation in 9 R. C. L., § 148, it is said: "If a statute declares that divorce may be granted for desertion for a time specified, there seems to be no dissent from the proposition that desertion continued for such period creates a perfect right to a divorce which it is beyond the power of the party in the wrong to destroy without the consent of the other. Hence an offer to discontinue the desertion and return to and live with the deserted spouse, though made in good faith and before the institution of any suit for divorce, cannot, unless accepted, constitute any defense to such suit." The cases cited in the note to the case of *Allen* v. *Allen,* 73 Conn. 54, 46 A. 242, 84 A. S. R. 135, sustain the text quoted.

But, before the desertion had continued for a year—and therefore before appellee's cause of action had matured—appellant offered more than once, and, we think, in good faith, to return to and live with appellee, and when she did this the desertion on her part ceased.

We conclude therefore that the court was in error in holding that appellant had deserted appellee.

In the case of *Griffin* v. *Griffin,* 166 Ark. 85, 265 S. W. 352, we said that "the court cannot grant a divorce because the parties have become dissatisfied with the marriage yoke. In such cases the parties must, by mutual concessions, make the yoke lighter."

Appellant, by her recantation and offer to return to appellee, terminated the desertion, and she did so before her desertion matured as a cause for divorce in appel-

lee's favor, and it was error therefore to grant him a divorce.

We have concluded that the decree granting appellee a divorce should be set aside, and it is so ordered, and the cause will be dismissed.

JOHNSON v. WHITE.

Opinion delivered February 14, 1927.

1. WILLS—TESTAMENTARY INTENT.—To constitute a will, a writing must itself evidence a present purpose to declare a bequest, and not merely intention to make such a provision in the future.
2. WILLS—TESTAMENTARY INTENT.—A husband's letter to his wife, expressing his intention to have his war risk insurance policy transferred to her, cannot be interpreted as a will, and is not entitled to probate as a holographic will.

Appeal from White Circuit Court; *E. D. Robertson,* Judge; affirmed.

J. N. Rachels and *Hays, Priddy & Rorex,* for appellant.

John E. Miller and *Culbert L. Pearce,* for appellee.

HUMPHREYS, J. This is an appeal from the judgment of the circuit court of White County dismissing the petition of appellant for the probate of a paper writing attached thereto as the holographic will and testament of Fred C. Johnson, deceased, and quashing the judgment of the probate court of said county, entered on January 12, 1925, of record in book N, at page 432, wherein appellee was contestant and appellant was contestee.

The writing or purported holographic will and testament is as follows:

"Oct. 7, 1918. Camp Pike, Arkansas. My darling little girl. How is my darling little wife tonight? Fine, I hope. I am just fine as I told you. I am going to have my policy changed from Esther to you, for it is my will and wishes is for you to have it. I told Arby to watch the mail

box and send it to me, for I wanted you to have it. I must go for this time. Hoping to see my dear little wife soon.

"From your H. Fred Johnson, C. C. H. First Tr. Reg."

There is nothing in the writing evidencing an intent on the part of the writer to bequeath by, through or under the instrument his war risk insurance policy to his wife, the appellant herein. The writing must itself evidence a present purpose of declaring a bequest before it can be characterized as a will. If it merely evidences an intention to make such a provision in the future, then such instrument cannot be interpreted as a will. *Cartwright* v. *Cartwright,* 158 Ark. 278, 266 S. W. 11. In the Cartwright case we interpreted the language used in a letter as being sufficient to meet the requirements of the rule announced above. The language in that case was as follows:

"I have to pay insurance and Liberty bonds out of my part, then you will get the $5,000 when I die, so you should not want for anything."

The language in the present case does not pretend to declare a present bequest of the writer's war risk insurance policy, but is merely a message to the effect that the writer intends at a future date to change the beneficiary in his policy from appellee, his sister, to appellant, his wife, because it was his will and wish for her to have it. He did not attempt to give it to her in the letter or to use the letter as a means of bequeathing it to her.

We are unable to interpret the letter in the instant case as being a testamentary document, hence it was not entitled to probate as a holographic will.

The judgment is therefore affirmed.

SOUTHERN SURETY COMPANY *v.* SIMON.

Opinion delivered February 14, 1927.

1. HIGHWAYS—SUIT ON CONTRACTOR'S BOND.—A complaint alleging that one of two defendants contracted with the county to build a highway and to pay for all labor performed and material furnished in constructing it, and to give bond therefor, and alleging that the other defendant became surety in the bond and liable for coal furnished to the contractor, and alleging that the contractor turned over to the surety all of its assets, the surety to discharge all debts incurred by the contractor in constructing the highway, *held* to base liability of the surety on the bond given by it under Crawford & Moses' Dig., §§ 6913, 6914.
2. HIGHWAYS—LIABILITY ON CONTRACTOR'S BOND.—A materialman's claim for coal furnished to a highway contractor and used in running a steam shovel to load shale on trucks for the purpose of hauling it out on the roadbed *held* not within the protection of the bond for payment by the contractor for labor and materials furnished in constructing the highway, under Crawford & Moses' Dig., §§ 6913, 6914.
3. HIGHWAYS—CONTRACTOR'S BOND—LIMITATION.—Suit on a highway contractor's bond for payment of claims of laborers and materialmen, brought eight months after the work was completed and accepted by the county, was barred by limitation, under Crawford & Moses' Dig., § 6914.
4. HIGHWAYS—LIABILITY OF CONTRACTOR'S SURETY.—Evidence *held* insufficient to go to the jury in suit by materialman against surety of the county highway contractor on the ground that the surety took over all of the contractor's assets and assumed its liabilities.

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

James B. McDonough, for appellant.

Webb Covington, for appellees.

HUMPHREYS, J. This suit was instituted by appellees against the Otto V. Martin Construction Company and appellant, in the municipal court of Fort Smith, to recover $192.10 for coal sold and delivered by them to said construction company and used by it in preparing materials for constructing a highway from Fort Smith to Greenwood, in Sebastian County. A judgment was obtained in the municipal court in favor of appellees herein, from which an appeal was prosecuted to the cir-

cuit court of Sebastian County, Fort Smith District, where, upon trial *de novo,* appellees again obtained a judgment for the full amount claimed, from which the Southern Surety Company has duly prosecuted an appeal to this court.

The gist of the complaint was that the Otto V. Martin Construction Company entered into a contract with Sebastian County to build a highway from Fort Smith to Greenwood according to certain plans and specifications, agreeing to pay for all labor performed and materials furnished in constructing same, and to furnish a satisfactory bond for the faithful performance of the contract and the payment of said labor and material; that appellant herein became a surety upon the bond and liable thereunder for coal of the value of $192.10 delivered to the Otto V. Martin Construction Company for use in working upon the highway, for which they were not paid; that the bond contained the following paragraph:

"In case of default on the part of the principal, the surety shall have the right, if it so desires, to assume and complete or procure the completion of said contract; and, in case of such default, the surety shall be subrogated and entitled to all the rights and property of the principal arising out of the said contract and otherwise, including all securities and indemnities theretofore received by the obligee and all deferred payments, retained percentages and credits due to the principal at the time of such default or to become due thereafter by the terms and dates of the contract."

That, after receiving the coal, the Otto V. Martin Construction Company turned over to appellant herein all its assets of every kind and description, the latter to pay off and discharge all the debts incurred by the former in the construction of the highway, including the pay for coal furnished by appellees herein.

The Southern Surety Company, appellant herein, admitted the execution of the surety bond, but controverted all the other material allegations in the complaint and any liability thereunder, and, as an additional

defense, pleaded that the suit upon the bond was barred under the statute for failing to bring suit thereon within six months after the completion of the road.

The facts in the case are undisputed. The alleged contract was entered into and a surety bond for the faithful performance thereof was executed by appellant herein under §§ 6913 and 6914 of Crawford & Moses' Digest. The coal was furnished by appellees to the construction company between August, 1923, and March, 1924, and was used by it in running a steam shovel to load the shale on trucks for the purpose of hauling same out on the roadbed. On January 10, 1924, the construction company breached its contract, and the appellant herein was notified by the county to take over the work and complete the road, which it did. As the work progressed it collected all money possible from the county, but received none that had been earned by the construction company before breaching the contract. It paid all debts which were liens upon the highway and turned the road over to the county on the first of August, 1924. It did not agree with the construction company or county to pay the debts incurred by the construction company when it took the highway over on June 10, 1924, to complete same. This suit was brought eight months after the work was completed and the county received the road.

We think the declaration was one upon the bond, and that no liability existed against appellant thereon, for two reasons. First, the claim for supplying coal was not within the protection of the bond; and second, the suit was barred for failure to bring it within six months after the improvement was completed.

(1). In construing language in a bond and statute given under § 5446, Crawford & Moses' Digest, similar to the language used in the instant case relative to the character of the claims covered, it was said, in the case of *Pierce Oil Company* v. *Parker,* 168 Ark. 400, 271 S. W. 24, that:

"We do not think that oil or other fuels used in operating motor trucks engaged in hauling stone for the construction of an improved highway can fairly and justly be said to be supplying materials to be used in the prosecution of the work. As above stated, oil so used is only incidental to the operation of the motor trucks, and can be no more considered materials used in the prosecution of the work than the motor trucks themselves or the repairs on them."

(2). The action of the bond was barred under § 6914 of Crawford & Moses' Digest at the time same was instituted. If the declaration could be interpreted as one of alleged liability on the ground that appellant took over all of the assets and assumed the liabilities of the construction company, the proof was insufficient to support such an allegation. The undisputed evidence revealed that appellant appropriated none of the assets of the construction company and made no independent agreement to pay the indebtedness of it. Appellant used some of the equipment of the construction company in finishing the highway, but returned it when the road was completed.

Under the undisputed proof the court should have directed a verdict for appellant.

On account of the error indicated the judgment is reversed, and the cause is dismissed.

O. L. GREGORY VINEGAR COMPANY v. NATIONAL FRUIT CANNING COMPANY.

Opinion delivered February 14, 1927.

1. DEPOSITIONS—RIGHT TO READ.—Depositions taken on notice by one party cannot be read in evidence by the other party.
2. DEPOSITIONS—RIGHT TO READ.—Depositions taken by agreement of the parties become the property of both parties, and either had a right to read it in evidence, though the agreement stated that the deposition might be read in evidence in defendant's behalf.
3. SALES—INSTRUCTION.—In an action for the price of apple juice sold for making vinegar, an instruction to find for plaintiff if

the apple juice at the time of placing same in barrels was reasonably suitable for vinegar making, *held* not error.

4. TRIAL—CONFLICT IN INSTRUCTIONS.—In an action for the sale price of apple juice sold for making vinegar, an instruction to find for the plaintiff if the juice at the time of its manufacture was reasonably suitable for vinegar making was not in conflict with defendant's instructions that the juice must be suitable for vinegar.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; affirmed.

James B. McDonough, for appellant.

Hill & Fitzhugh, for appellee.

MEHAFFY, J. This is the second appeal in this case. The opinion in the case on the former appeal is in the 167 Ark. 435, 258 S. W. 598.

The court, in the former appeal, construed the contract and held that it was one to furnish a commodity for a particular use, and that there was an implied warranty that it was suitable for the particular use for which it was purchased, unless the purchaser actually inspected the method by which the commodity was to be produced or was advised as to such methods and what the contents of the juice would be. The court also stated that the purchaser of an article to be manufactured is not denied the benefit of an implied warranty merely because he may have had an opportunity to inspect the process of manufacture, but, if the purchaser does in fact inspect, and knows at the time he makes the contract what the article is to be, there is no implied warranty. The purchaser has the right to assume, when he has no opportunity to inspect the article itself, that it will be manufactured so as to be fit for the use for which it is intended.

The contract stated that the purchase of the apple juice was not for beverage purposes, but for making vinegar; hence, under the ruling of the court in the former appeal, the contract provided for the furnishing of a commodity for that particular use, that is, for vinegar making.

It would serve no useful purpose to set out the testimony at length in this case. It was sufficiently set out when the case was here before.

The appellant's first contention is that the court erred in admitting in evidence the deposition of J. P. Harris. It is contended that the deposition was not taken on any agreement that it might be read by the appellee, and it therefore contends that the appellee could not read the deposition, although it was taken by agreement, because it was agreed that it might be taken and read in evidence on behalf of defendants. Although the agreement stated that the deposition might be read in evidence in behalf of the defendant, it was nevertheless taken by agreement, and the agreement contemplated that the deposition would be read at the trial, and, if it did, then either party could read it. This court has said with reference to the depositions taken by agreement:

"The plaintiff, during the introduction in chief of her testimony, had a right to assume that the defendant would read the deposition which it had caused to be taken; and, after the defendant failed to do so, it was not an abuse of the court's discretion to allow the plaintiff to read the deposition after the defendant had concluded the introduction of testimony." *Western Union Tel. Co.* v. *Hanley,* 85 Ark. 263, 107 S. W. 1168.

Depositions taken upon notice by one party cannot be read in evidence by the other party. There would seem to be no reason for holding that depositions taken by agreement might not be introduced in evidence by either party. Certainly one need not sign an agreement to take depositions unless he has ample opportunity to examine the witness, and unless he is willing that the deposition may be read by the other party. This court has said:

"It is only where depositions are taken pursuant to agreement that they are to be read at the trial, that they become the property of both parties, so that either party may read them, if taken for their joint benefit, or compel

his adversary to do so if taken in his behalf." *Greenville Stone & Gravel Co.* v. *Chaney,* 129 Ark. 95, 195 S. W. 13.

Again: "It is insisted, however, that the evidence of Hannah Norman, to the effect that she paid the purchase price, cannot be considered because her deposition was taken by the plaintiffs, and counsel invokes the rule that a party to an action has no right to read a deposition taken by his adversary. Her deposition was taken pursuant to an agreement between the attorneys for the respective parties, and therefore did not fall within the rule invoked by counsel for the plaintiffs. The deposition, having been taken by agreement, became the property of both parties, and either party had the right to read it to the jury." *Shenoy* v. *Phipps,* 145 Ark. 121, 224 S. W. 393.

The deposition in this case was taken by an agreement of parties, and, under the law as announced by this court in numerous cases, when so taken it became the property of both parties, and either had a right to read it in evidence.

The appellants' next contention is that the court erred in giving instructions. Instruction No. 1, given at the request of plaintiffs, was merely a statement of the issues as stated in the pleadings, and no specific objection was made to it, and there is no discussion of it here by the appellant. No objection is made by appellant to instruction No. 2, except that it is in conflict with other instructions. Defendant only made general objections to the ruling of the court, no specific objections or exceptions having been made when the instructions were given.

It is earnestly insisted that instruction No. 3, requested by the plaintiffs and given by the court, is erroneous, and violates the rule laid down by this court on the former appeal. We do not agree with the counsel in this contention. Certainly the latter part of said instruction, which reads as follows: "And, if you further find that the juice, at the time of its manufacture and the placing of the same in barrels by the plaintiff at Seattle, Washington, was reasonably suitable for vine-

gar making, then your verdict must be for the plaintiff,'' is a correct statement of the law, and the objection to the instruction made in the court below was a general objection, and, if the appellant thought at the time that it was open to the objection now urged by it, it was its duty to call the trial court's attention to the objection, and this it did not do.

The same objection is urged to instruction No. 4, to which the same answer may be made; that is, that the specific objection should have been called to the attention of the trial court, and a request there made for a correction of the instruction or the elimination of the objectionable part of it. In other words, the objection should have been made specific. All of the instructions given at the request of the plaintiff, we think, substantially comply with the ruling of the court when this case was here on former appeal, they were given to understand clearly that the juice must be such as was reasonably suitable for making into vingar; that is all that the contract required. Moreover, an instruction requested by defendant and given by the court submitted the same issue to the jury, and we do not think there was any necessary conflict in the instructions given. They were told, in defendant's first instruction, that the plaintiff had obligated itself to sell apple juice pressed from peelings, core and waste, and that said juice must be suitable for vinegar making; and also this instruction contained the statement that, if the juice contained a sufficient quantity of salt, so as to render it unusable for vinegar making, then the plaintiff cannot recover.

Appellant's instruction No. 2 also contained a similar statement. It would serve no useful purpose to comment on all the instructions given and the instructions refused by the court. We have reached the conclusion that the issues were fairly submitted to the jury and that the instructions, when considered together, clearly stated the law as laid down in the former appeal in this case.

When this case was in this court before, all the principles of law governing it were announced. In this case

the instructions given as a whole were at least a substantial compliance with the rulings there announced, and we find no reversible error, and the case is therefore affirmed.

SHAUL v. KATZENSTEIN.

Opinion delivered February 14, 1927.

1. APPEAL AND ERROR—DIRECTED VERDICT—PRESUMPTION.—When there has been a directed verdict, the evidence must be viewed in the light most favorable to the unsuccessful party.
2. DESCENT AND DISTRIBUTION—PRESUMPTION OF ADVANCEMENT.—Where decedent furnished the money to pay for property, and took the conveyance or title to his child or wife, in the absence of evidence to the contrary, it will be presumed that the purchase of the property was intended as a gift or advancement.
3. EVIDENCE—NATURE OF PRESUMPTION.—A presumption is merely an inference as to the existence of one fact from the known or proved existence of some other fact, founded on a rule or policy of the law.
4. DESCENT AND DISTRIBUTION—PRESUMPTION OF ADVANCEMENT.—The presumption that money furnished by a father for property, of which the title was taken to his child, was intended as a gift or advancement may be rebutted.
5. DESCENT AND DISTRIBUTION—PRESUMPTION OF ADVANCEMENT.—The contention that a gift or advancement was intended by a father in taking a deed to land to his daughter was inconsistent with a plea that the daughter had paid for the property, in an action by an executrix to recover such purchase money.

Appeal from Lee Circuit Court; *E. D. Robertson,* Judge; reversed.

Mann & Mann, for appellant.

R. D. Smith and *W. G. Dinning,* for appellee.

MEHAFFY, J. Plaintiffs filed complaint in the Lee Circuit Court, alleging that Mrs. Louisa Shaul was executrix of the estate of Jake Shaul, also his widow, and that the other plaintiffs were children and next of kin; that, in October, 1923, defendants became indebted to Jake Shaul for money borrowed in the sum of $4,476, evidenced by check exhibited; that, in January, 1925, defend-

ants paid on said indebtedness the sum of $1,000, leaving a balance due of $3,476; and that Jake Shaul died testate in February, 1925.

Defendants answered, denying that they became indebted to Jake Shaul for money borrowed for sum mentioned, or any other sum, and denied that they paid $1,000 on indebtedness, but alleged that J. B. Katzenstein paid Jake Shaul a thousand dollars in complete and full satisfaction of any and all claim or indebtedness owing by either defendant herein to the said Jake Shaul, and denied they were indebted to plaintiff in any sum.

Witness Robinson testified that he was engaged in the banking business, and identified the check, and stated that it was given in payment of a note that Mr. Shaul gave to the bank; that a piece of property was purchased from Friedman, and that Shaul made the note for it, and that the note was made in December and a check given to take up the note. Witness did not know, but it was his understanding that the property that Mr. Shaul was buying, he was buying for them; that, at the time, Friedman owed them the amount, or approximately the amount, for which they held the mortgage, and that the Shaul note was given in substitution of the Friedman note; that the check was paid by the Marianna bank; that Mr. and Mrs. Katzenstein lived on the property after that, and are now residing on the property, and have been ever since the check was given (check was then introduced in evidence); that Mr. Friedman owed the bank, and that Katzenstein had made a deal with Friedman, and talked to witness about it. "The only fact I know is that Shaul gave the bank a note which was accepted as part payment of indebtedness to bank by Mr. Friedman. As I recall now, Katzenstein moved into the property about the time of the transaction. Note was a lien on the property and was taken up by the check of Mr. Shaul."

Lee Shaul testified that Katzenstein was in possession of the property; that his father paid the Lee County Bank for the Katzensteins; that he knew the check introduced was the check paid for the transaction; that his

sister has title to the property, and it was the same property testified about by Mr. Robinson; that the note was in his father's vault-box, and that, after his father died, Katzenstein had the key, and the note disappeared; the note was in there, and Mr. Katzenstein had access to it later, and that he was the only one who had the keys after witness' father took sick. "The note he speaks of was one my father gave to the Lee County Bank to take up the Katzenstein note, the amount my sister and Mr. Katzenstein owed the bank. The note was in the vault in the Bank of Marianna." Witness did not have access to the vault; his father took sick at the home of Mr. Katzenstein; he had some money on him, and Mr. Katzenstein took the money and the keys. "I have a box of my own; after my father died we had to demand the keys of Mr. Katzenstein before we could get to the will."

Mr. Lee Mixon identified the check, and testified that it was paid. This was all the testimony, and the court then directed a verdict for the defendants.

The evidence in this case was not very strong, but the testimony of the witnesses, together with all the circumstances in the case, were, we think, sufficient to justify the court in submitting it to the jury. This court has many times held that not only questions of fact are to be determined by jury, but, when there is a directed verdict, the evidence must be viewed in the light most favorable to the unsuccessful party.

The undisputed proof was that Shaul gave this note in payment of the indebtedness of Friedman; that Friedman's indebtedness was a lien on the land; that Shaul afterwards paid this note with his check, and that the title was made to the Katzensteins, and that they are now living on it. It is also uncontradicted that this note was kept in Shaul's box in the bank; that he took sick at Katzenstein's home, and that Katzenstein took his money and his keys to the box, and that the note disappeared.

Defendants, in their answer, denied the indebtedness sued on, but stated that they paid Shaul $1,000 and that this was payment of all claims and indebtedness. If they

paid this $1,000, and it was in payment of indebtedness, then certainly they were indebted to Shaul, or they would not have paid him $1,000.

From the evidence and pleadings the jury might have found that the money that Shaul paid for the place the Katzensteins lived on was a loan of money to Katzenstein and the payment of $1,000 was a payment on this indebtedness. At any rate, there was sufficient evidence to require the submission of the case to the jury, and the court therefore erred in instructing the jury to render a verdict in favor of the defendant. This court has recently said:

"We must give the testimony its strongest probative force in favor of the appellant. When this is done, it occurs to us that, under the testimony, it was an issue of fact for the jury to determine as to whether or not the claim of the appellee against the appellant was disputed. If the jury found that the claim was disputed it was also an issue for the jury as to whether or not there had been an accord and satisfaction." *Davenport* v. *Gray,* 157 Ark. 1, 247 S. W. 81.

It has been said recently by this court that, in determining the sufficiency of evidence to support a verdict against a defendant, the Supreme Court will view the testimony in the light most favorable to plaintiffs and give it such force as the jury might have given it. *St. L. S. F. R. Co.* v. *Whitfield,* 155 Ark. 560, 245 S. W. 323.

It is contended by the appellee that, even if it were admitted that the funds in question were expended by Mr. Shaul for the purpose of purchasing the property for his daughter, even then it must be presumed that the father intended this as a gift, or at least as an advancement. Appellee calls attention to the case of *Wood* v. *Wood,* 116 Ark. 142, 172 S. W. 868, and the case of *Johnson* v. *Johnson,* 115 Ark. 416, 171 S. W. 475. These cases and many other Arkansas cases hold that, where the father furnishes the money to pay for property, and the conveyance or title is made to the child or wife, in the absence of evidence to the contrary, the money that he

furnished at the time for the purchase of the property will be held as intended by him as a gift or advancement.

It is stated in the 115 Arkansas case cited: "The law in such cases will not imply a promise or obligation on her part to refund the money or to divide the property purchased, or to hold the same in trust for him. His conduct will be referable to his duty and affection, rather than to a desire to cover up his property or to any intention on his part to have her hold as trustee for him. The presumption that, when a man purchases property and takes the title in the name of his wife, he intends the same as a gift to her, is not a conclusive presumption. It may be overcome by testimony of antecedent or contemporaneous declarations or circumstances." *Johnson* v. *Johnson,* 115 Ark. 416, 171 S. W. 475.

A presumption is merely an inference as to the existence of one fact from the known or proved existence of some other fact, founded on a rule or policy of the law, and presumption in cases like this may always be rebutted; but this case was not tried in the court below on any theory that there was a gift or advancement. We think the pleading of the defendant itself contradicts any idea of gift or advancement.

If the defendants had answered that the father paid the money but that it was a gift or advancement, there would have been a presumption which the plaintiffs, in order to recover, would have had to overcome by evidence, but the defendants not only did not file an answer of this kind, but they admitted that there had been an indebtedness by pleading payment. A plea of payment, of course, can mean nothing else but that there was a debt to pay. They denied, of course, that they owed this indebtedness, but they answered the statement in plaintiff's complaint as to the $1,000 by stating that they had paid to the said Jake Shaul $1,000, which was in full and complete satisfaction of any and all claim or indebtedness owing by either defendant to the said Jake Shaul. It would be unreasonable and contradictory to say that they paid $1,000 in full and complete satisfaction of all claim or

indebtedness owing to the defendant, when they in fact did not owe him anything. It may be that they owed him some other money, or because of some other transaction, but their answer certainly shows that they were indebted to him, and paid him $1,000.

We think other circumstances which were testified to in the case contradicted the idea that there was a gift or an advancement. These circumstances alone might not overcome the presumption of law, but, when you consider them together with the answer of the defendant, which admitted indebtedness and claimed payment, we think this contradicts the idea of a presumption that it was a gift or advancement.

The court therefore erred in directing a verdict for the defendants, and the case is reversed, and remanded for a new trial.

KNIGHT v. WOLPERT.

Opinion delivered February 14, 1927.

1. ACCORD AND SATISFACTION—PART PAYMENT—CONDITIONAL ACCEPTANCE.—To constitute an accord and satisfaction, a part payment must be made in full satisfaction of the demand or claim of the creditor and be accompanied by such acts or declarations as amount to a condition that, if the money is accepted, it must be accepted in full satisfaction, and be of such character that the creditor is bound to so understand the offer.
2. ACCORD AND SATISFACTION—PART PAYMENT.—Where a debtor told his creditor that the amount of a check tendered was all he was going to pay and that it was payment in full, and the creditor disputed this, stating that the debtor owed him more and that he was going to sue the debtor, the fact that the creditor accepted the check and cashed it did not constitute an accord and satisfaction.
3. TRIAL—SUFFICIENCY OF INSTRUCTIONS.—The refusal of correct instructions was not error where the court's charge fairly instructed the jury on all theories of both parties.

Appeal from Craighead Circuit Court, Jonesboro District; *G. E. Keck*, Judge; affirmed.

Horace Sloan, for appellant.

Penix & Barrett, for appellee.

MEHAFFY, J. The plaintiff brought suit in the circuit court, alleging that the defendant had agreed to pay 5 per cent. of the total cost of the proposed work for his services as an architect in preparing plans and specifications for remodeling a house in Jonesboro; that the total cost of the proposed work was $6,890.60; that the fee to appellee at 5 per cent. was $344.53, upon which there had been a payment of $200, leaving a balance of $144.53, and asked judgment for that amount.

Defendant answered, denying that he entered into the agreement as alleged by plaintiff, and alleged that he instructed the plaintiff that the plans and specifications must entail a cost of not more than $4,000, that the plans and specifications prepared would have required the expenditure of a much greater sum, and that, for that reason, they were worthless to defendant; that the $200 paid plaintiff was in full settlement and satisfaction of all amounts due.

The testimony is conflicting, the plaintiff's testimony tending to establish the allegations of his complaint, and that of the defendant tending to establish the allegations of the answer.

Appellant's first contention is that the court erred in not directing the verdict for the defendant, and this, it is contended, the court should have done because appellant contends that the last payment of $50 that he made plaintiff was given in full satisfaction and settlement of all amounts due. The plaintiff, testifying on that question, said in substance that he never agreed to accept $200 in full payment; that he called Mr. Knight, and also went to his house and got the last check, and told him that he still considered that he owed him $144.

The defendant testified that the last check he gave him was some time in March, and after he learned that the lowest bid on the work was $6,000; that defendant was sick in bed for about a week, and, realizing that the plaintiff would want some money, called him up and stated to him that if he would send up to the house he would give

him a check; that the plaintiff asked him to please make it as liberal as possible; that the defendant told him he owed him $50 and would send him $50 in full payment, and that plaintiff said, "You owe me more than that," and defendant told him that was all he owed him and all that he was going to pay; that plaintiff came up to the house, and that he told plaintiff that that was all he was going to pay. "I told him that, when I handed him the check, that it was in full payment. He took the check and cashed it. When I handed him that last check I told him I was paying him in full; I told him that was all I was going to pay, and he stated he was going to sue me, and I said 'That is all you can do.' He then accepted the check and went out with it, but he told me at the time he was going to sue me. I told him at the time that he took the check that it was in full settlement. He went out and cashed it."

The above is practically all the testimony on the question of the last payment, and the real question in the case is whether or not, as a matter of law, it was such a settlement as would bar any recovery of any further sum. If that evidence showed accord and satisfaction, then the instruction should have been given; if not, it should not have been given.

"Where a claim is not a money demand, or, if so, is unliquidated, or, if liquidated, there is a *bona fide* dispute as to the sum actually due, or a *bona fide* doubt or controversy as to whether anything is due, then an accord and satisfaction may be established and held binding, though there is a payment of a less sum than that claimed by the creditor, or even a less sum than, on an actual computation, might be found due to the creditor. The adequacy of the payment is entirely immaterial, and will not be inquired into even by a court of equity. Of course there must be an acceptance by the creditor of the money offered in full discharge of the claim. This acceptance, however, may be implied as well as express. Thus, if the debtor tenders the amount he claims to be due, but upon the condition that it be accepted in discharge of the whole

demand, and it is accepted, there is an accord and satisfaction, on the principle that one accepting a conditional tender assents to the condition. And the fact that the creditor protests against accepting the tender in full payment will not prevent the transaction from constituting a good accord and satisfaction when the debtor still insists that it must be accepted in full payment or not at all. * * * To constitute an accord and satisfaction in law, dependent upon the offer of the payment of money, it is necessary that the offer of money be made in full satisfaction of the demand or claim of the creditor and be accompanied by such acts or declarations as amount to a condition that, if the money is accepted, it is to be in full satisfaction, and be of such a character that the creditor is bound to so understand the offer." R. C. L., 194.

In a note in 20 L. R. A., 800, is the statement from a Kansas case on this subject, which is as follows: "In *St. Louis, Ft. S. & W. R. Co.* v. *Davis,* 35 Kansas 464, when the question arose upon the claim of the appellee for services, which the appellant claimed was satisfied by an accord and satisfaction by receipt by the appellee of a smaller sum than claimed, for which a receipt was given 'in full for all services rendered,' the appellee claiming that, at the time of signing and giving the same, he protested both verbally and in writing that it was not a complete satisfaction, and that he still claimed compensation for services in other named cases, which were those involved in the present action, the court held that the part payment was no extinguishment of the debt, stating that, before the payment could operate as a satisfaction, it must not only appear that there was some new consideration for the agreement to accept a smaller sum in extinguishment, but also that there was a mutual agreement that the same should be accepted in discharge of the entire debt."

The defendant in the case at bar made his payment with the statement, according to his testimony, that it was in full payment, but he did not state that it must be

accepted in full payment or not accepted at all. We think that he would have to make it clear to the creditor that, if accepted, it must be accepted in full satisfaction. While he told the plaintiff that it was all he was going to pay and it was a payment in full of all he owed him, the plaintiff disputed this, stating that he owed him more, and that he was going to sue him. The defendant did not pay him on condition that he accept it in full satisfaction of the debt.

It was said in a recent case by this court: "But appellee did not, in its letter, or in its statement of the account, or in the check, give the appellant to understand that an acceptance of the check and cashing of the same would be considered by the appellee as a recognition by the appellant of appellee's claim for damages and an approval and settlement thereof. The burden was upon the appellee to prove the contract of accord and satisfaction. It was essential for it to show either an express agreement upon the part of the appellant of accord and satisfaction, by which the amount of appellant's claim against the appellee was settled, or else to prove facts and circumstances by which an agreement on the part of the appellant to settle its account by allowing the claim of the appellee for damages could reasonably be inferred. There is nothing in the statement of facts to indicate a meeting of the minds of the parties upon any such terms. There is nothing to justify the conclusion that the appellant was notified by the appellee that, if the appellant cashed the check, it would do so with the understanding that appellee's claim for damages had been allowed and that appellant's account against the appellee had in that manner been satisfied." *Western Union Tel. Co.* v. *Ark. Milling Co.*, 156 Ark. 370.

In the case at bar the appellee not only did not receive the check, agreeing that it was a satisfaction of the claim, but he stated at the time that he was going to sue appellant for the balance, and, while appellant told appellee that it was in full settlement, he did not tell him, and, we think, did not say anything to justify appel-

lee to think or believe that, if he accepted the check, he would accept it on that condition that it was a full satisfaction. If defendant had offered the payment on condition that it was a full settlement and appellee had accepted it with this condition, this would have been a complete settlement, and a bar to a recovery.

Appellant complains at the action of the court in giving instructions and in refusing instructions requested by appellant. All the objections, however, are general, and there are no specific objections, and, while some of the instructions requested by the appellant correctly stated the law, yet we do not think there was any error, for the court fairly instructed the jury on all theories of both parties, and the question of whether there was accord and satisfaction, as well as other questions of fact, were matters for the jury to determine, and we cannot disturb their verdict if there is any substantial evidence to sustain it. We think the evidence was sufficient to sustain the verdict, and the judgment must be affirmed.

MILLER LEVEE DISTRICT NUMBER 2 *v.* DALE.

Opinion delivered February 14, 1927.

1. PARTIES—REAL PARTY IN INTEREST.—In an action against a levee district for damages for land taken, in which the district contended that plaintiff was not the owner of the land and therefore not the real party in interest, evidence *held* to show that the plaintiff was the real party in interest.
2. EMINENT DOMAIN—DEDUCTION OF BENEFITS TO LAND TAKEN.—The owner of land across which a levee was constructed is entitled to the damages sustained, without deductions of benefits therefrom, since the owner pays for the benefits like any other landowner.
3. LEVEES—PERCENTAGE ASSESSMENT OF BENEFITS.—Though the benefits to lands in a levee district are arrived at by multiplying the valuation of the lands on the county tax books by 6 per cent., the assessment is on a basis of benefits, and is not an *ad valorem* tax.

Appeal from Miller Circuit Court; *James H. McCollum,* Judge; affirmed.

Henry Moore, Jr., for appellant.

Shaver, Shaver & Williams, for appellee.

MEHAFFY, J. The appellee brought suit against the appellant in the circuit court of Miller County, alleging that, in 1924, on account of the caving of the banks of the Red River, it became necessary for the levee district to build a new line of levee over and across plaintiff's land and that the defendant built a new levee across plaintiff's land, occupying about eight acres, and that appellant refused to pay appellee damages, and asked for judgment for the value of the land taken in the sum of $827. Defendant filed a motion to dismiss, alleging that the suit was not brought in the name of the real party in interest, and that J. R. Dale, husband of May B. Dale, was the owner of the land at the time of the taking. Defendant also filed an answer, denying that the land was the property of the plaintiff at the time the levee was built. It alleged that the property belonged to J. R. Dale, and that J. R. Dale was a member of the board of directors of the district, and, as such, he knew of and acquiesced in the taking of the land, and was estopped from claiming damages.

Appellant admitted taking about seven acres of land belonging to J. R. Dale, alleging that the land taken was only rough, bermuda land, fit only for pasture, and that the value for that purpose had been increased by the building of the levee, and claimed that it was entitled to offset any damages by the benefits that were special and peculiar to the remainder of the land owned by plaintiff, or by her husband, and alleged that such benefits to the land exceeded the damages to the land occupied by the new levee.

The testimony showed that J. R. Dale deeded to his wife, May B. Dale, about 3,000 acres of land, including that taken by the levee, the date of said deed being May 31, 1923, recorded January 15, 1925, consideration being $50,000. J. R. Dale testified, as the agent of appellee, that he was down at the river while the levee was being built; that the land had bermuda and bushes on it, that he had authorized it to be cleared, and he was to pay $20 an

acre for clearing same; that he was a member of the levee board, and that one of the members, Judge Friedell, said that the land would never be paid for until they were forced to pay for same, advising him that he would have to bring suit; that he had been a member of the levee board since its organization, and knew that the levee was to be set back; did not know if he claimed that it was May B. Dale's land before the suit was brought; did not know when the deed was recorded; there was never any special statement made to any member of the board before the deed was recorded; she had a deed to it, and he was her agent; did not remember when the deed was delivered. All of his acts since the deed was delivered and recorded have been as agent for May B. Dale, and they were prior to that time, as she had a mortgage on it all the time for $100,000.

An engineer testified that 7.2 acres were taken by the levee. Work was completed the latter part of May, 1924. It was also shown that Dr. Dale paid another witness $10 apiece for driving two pumps and $7.50 for repairing a flue on a house that was moved by the levee board.

Witness Dean testified that he was familiar with the value of the land in the neighborhood, and that the land through which the levee was built was worth between $75 and $100 per acre. Part of the land was grown up in bushes, part had washed out, and there were ridges of sand and holes made by previous overflows. He said he did not value the particular land taken at anything by itself, but, in connection with the other land, he would average it, and that he had offered Dr. Dale $50 per acre. It was also testified that the loan value on the land would be 50 per cent. of $100 per acre, and that this land was covered with pecan sprouts, and fit only for pasture.

There was considerable testimony about the value of the land taken, and about the land being covered with bermuda grass and bushes. Testimony also tended to show that the land occupied by the levee could still be

used for a pasture, and that the levee board only took an easement, and that, if oil was found, it would belong to the owner.

Appellant offered to prove special benefits that would be received by plaintiff to the land, but was not permitted to make such proof. One witness testified that the land was rough land, covered with bushes, worth about $25 or $30 an acre; that it was worth nothing except for pasturage, and is worth more now than before the levee was built.

It is contended by appellant that appellee was not the owner of the land, and, for that reason, had no right to maintain this suit. We think the proof is ample to show that the appellee was the real party in interest and therefore had a right to maintain this suit.

It is also contended by the appellant that the measure of damages should be the difference in the value of the land of plaintiff before being occupied by the levee and the present value of such land, and contended that, because of the peculiar benefits accruing to plaintiff's land, these benefits should have been taken into consideration in arriving at the damage sustained by plaintiff. It is contended that this is the correct rule, because appellant says that no benefits have been levied against the land in the district, but that all the lands in the district are placed on the taxbooks as they appear on the real estate books of the county, and that the amount of levee taxes is arrived at by multiplying such value by 6 per cent., and that therefore the levee taxes are collected on an *ad valorem* rather than a benefit basis, and that it is entirely different from the system of assessment ordinarily used in improvement districts. Appellant contends that, because of these things, no special benefits were taken into consideration in the levying of taxes for levee purposes.

If appellant was right in its contention that this was an *ad valorem* tax and that the benefits to the property were not taken in consideration, then it would be correct in its claim that the damages should be offset by the bene-

fits. We do not agree with counsel for appellant in this contention. The section of the act creating this district providing for assessments is an exact copy of the section of the act of 1905 creating a levee district, and the court, in construing that act, said: "Appellant makes an attack upon the validity of the statute in so far as it attempts to authorize a tax on the railroad, on two grounds, viz: First, that it is an attempt to impose a tax regardless of any benefit derived from the improvement; and, second, that the method authorized by the statute of assessing railroad property is invalid. We will dispose of these two questions in order in which they are presented by appellant's counsel. * * * The act provides that the board of directors shall annually assess and levy a tax not to exceed 4 per cent. on the real estate in the district, according to the valuation of lands on the taxbooks for State and county purposes, and upon railroad track of all railway companies as appraised by the State Board of Railroad Commissioners. In other words, that the assessment shall be according to value as appraised for State and county taxation. This is the method of assessment for local improvements which was approved by this court in *Ahern* v. *Board of Improvement, supra,* and *Porter* v. *Waterman,* 77 Ark. 383. * * * The fact that the assessment is made upon the whole value of the property does not imply that it is not also according to the benefits to accrue from the improvement, for it is not an arbitrary or unreasonable method of ascertaining the amount of the benefits to assume that they will accrue in proportion to the actual value of the whole property. The Legislature acted upon this assumption in providing that the assessments should be fixed according to value, and we cannot say it is arbitrary or unreasonable." *St. L. S. W. Ry. Co.* v. *Board of Directors,* 81 Ark. 562, 99 S. W. 843.

It follows, from the rule announced in the above case, that the land in appellant district is, in fact, assessed according to its benefits. It must be assessed annually, and, although it is provided that the annual

tax must be levied on the valuation of the lands as they appear on the assessment books of the county, still, as held by this court in the case above cited, this is an assessment on a benefit basis. This being true, appellee will have to pay annually for all the benefits received by the construction and maintenance of the levee, and it would therefore have been improper to deduct the benefits from the amount of damages to plaintiff's land in this case. Her land is benefited by the levee, but she pays these benefits in annual installments, so that there would be no reason or justice in offsetting the damages with benefits accruing to the land. She must pay the assessments for the benefits received like any other landowner, and, if the district took or damaged her land, it necessarily follows that it would have to pay whatever amount she was damaged by reason of the taking.

Appellant's counsel calls attention to a number of cases where land is taken for public use and the damages caused thereby are offset by the benefits to the land, but these are cases where the landowner was not paying for the benefits. Of course, where land is taken and the taking benefits the other lands of the party, whatever benefits accrue to the landowner are deducted from the amount of damages caused by the taking, but these cases have no application where the landowner pays for the benefits, as in this case. There was ample evidence to sustain the verdict, and the case is therefore affirmed.

GIBSON OIL COMPANY v. SHERRY.

Opinion delivered February 21, 1927.

1. EXPLOSIVES—DUTY IN USE OF GASOLINE.—One handling gasoline who fails to use a degree of care to prevent its escape proportionate to the danger therefrom is liable for any resulting injury, provided the person suffering the injury, either in person or property, is free from contributory negligence.
2. EXPLOSIVES—NEGLIGENTLY PERMITTING ESCAPE OF GASOLINE.—The negligence of employees of a filling station, allowing gasoline to

run into the street, *held* the proximate cause of the destruction by fire of plaintiff's automobile, caused by a match thrown into the street by plaintiff, thereby igniting the gasoline stream.

3. EXPLOSIVES—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.—Whether plaintiff was guilty of contributory negligence in throwing a lighted match into the street, which ignited a stream of gasoline, negligently allowed to flow there, and burned plaintiff's automobile, *held* under the evidence for the jury.

4. APPEAL AND ERROR—GENERAL OBJECTION TO INSTRUCTION.—Where no specific objection was made to an instruction on the ground that it did not limit the jury's consideration to acts of negligence causing the injury complained of, appellant cannot complain on that ground on appeal.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; affirmed.

STATEMENT OF FACTS.

M. J. Sherry sued the Gibson Oil Company to recover the sum of $500, alleged to be the value of an automobile which was negligently destroyed by fire while at one of the filling stations of the defendant. The defendant denied negligence on its part, and pleaded contributory negligence on the part of the plaintiff as a defense to the action.

M. J. Sherry was a witness for himself. According to his testimony, he took his car to the filling station of the defendant, at Fifteenth and Gaines Street, in the city of Little Rock, and had it filled with gasoline. He then started home, and, after going a short distance, his car stopped. He called a mechanic, who informed him that the fluid which had been sold him was not gasoline. The mechanic towed the plaintiff's car back to the filling station at Fifteenth and Gaines Streets. The defendant's employees in charge of the filling station took off a nut underneath the gasoline tank and began draining the gasoline on the concrete floor of the filling station. The gasoline flowed on the floor into the gutter on Fifteenth Street, about twenty feet away. Sherry knew they were draining the gasoline out of the tank of his car, but did not know that it would run out across the sidewalk into the gutter. While the gasoline was being

drained out of the tank, Sherry walked out on the sidewalk, and lit his pipe with a match. He then threw the lighted match into the street, and it ignited the gasoline. The flame followed the track of the flowing gasoline, and burned up his car, which was worth $500.

According to the testimony of several witnesses for the defendant, the plaintiff knew that the gasoline was being drained out of the tank of his car on to the concrete floor of the filling station. The employees were draining the tank of his car for the purpose of refilling it with gasoline. The plaintiff told them that it was not necessary to get a container to drain the gasoline in, for the reason that it would not burn if set on fire. The plaintiff then struck a match, and ignited the gasoline which was flowing from the tank on to the concrete floor of the filling station. The flame followed the track of the flowing gasoline, and burned up his car.

The jury returned a verdict for the plaintiff in the sum of $500, and, from the judgment rendered, the defendant has duly prosecuted an appeal to this court.

W. R. Donham, for appellant.

Robert L. Rogers and *Sam Robinson,* for appellee.

HART, C. J., (after stating the facts). The main reliance of counsel for the defendant for a reversal of the judgment is that the evidence is not legally sufficient to support the verdict. In making this contention counsel insists that the court should have declared as a matter of law that the plaintiff was guilty of contributory negligence, and therefore not entitled to recover. This court has held that, in view of the highly dangerous character of gas and its tendency to escape, a gas company must use a degree of care to prevent the escape of gas from its pipes proportionate to the dangers which it is its duty to avoid, and that, if it fails to exercise this degree of care and injury results therefrom, the company is liable, provided the person suffering the injury, either in person or in property, is free from contrib-

utory negligence. *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576, 134 S. W. 1189; and *Little Rock Gas & Fuel Co.* v. *Coppedge,* 116 Ark. 334, 172 S. W. 885. Many other cases from other States are cited in support of the rule in 25 A. L. R. 262.

Gasoline becomes volatile when exposed to the air, and is easily ignited when it comes in contact with a flame. Therefore gasoline is also a highly dangerous substance, and the same rule applies to it as above stated with regard to gas. *Waters-Pierce Oil Co.* v. *Knisel,* 79 Ark. 608, 96 S. W. 342; and *Magnolia Petroleum Co.* v. *Johnson,* 149 Ark. 553, 233 S. W. 680.

When the gasoline was drained from the tank of the plaintiff's car and was allowed to flow on the concrete floor of the filling station, it became exposed to the oxygen of the air and formed a gaseous substance which was easily ignited when a flame was applied to it. The defendant should have drained the gasoline into a container, and not have allowed it to flow across the concrete floor of the filling station into the gutter of the street. This was a highly populous neighborhood, and the defendant should have anticipated that some one passing by might throw a lighted match into the gutter, which would ignite the vapor formed by the gasoline coming in contact with the air and thereby destroy the plaintiff's automobile. Thus it will be seen that the negligence of the defendant was the proximate cause of the destruction of the plaintiff's property.

This brings us to the question of the plaintiff's contributory negligence as a bar to his right to recover. This we regard as a very close question, but, under the circumstances, we do not think the court erred in refusing to declare as a matter of law that the plaintiff was guilty of contributory negligence. In reaching this conclusion it must be remembered that the jury were the judges of the credibility of the witnesses, and had a right to view the evidence in the light most favorable to the plaintiff, if they believed that he was telling the truth

about the matter. *St. Louis Southwestern Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768. The plaintiff denied that he told the employees of the defendant or the persons present that the gasoline which was drained from the tank of his automobile would not burn and that he deliberately stuck the flame of a match to it to demonstrate that it would not burn. On the other hand, he says that he walked out on the sidewalk twenty feet away from his automobile and lit his pipe and threw the lighted match into the street, not anticipating that the defendant's employees would allow the gasoline which was being drained from the tank of his automobile to flow across the sidewalk into the street. Under these circumstances it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence in throwing the lighted match into the street.

The next assignment of error is that the court erred in giving instruction No. 2, which reads as follows: "If you find that the defendant was negligent and that, by virtue of such negligence, the plaintiff's automobile was destroyed, then you must find for the plaintiff, unless you find that the plaintiff was himself negligent and that his negligence contributed to the cause of the damage."

At the request of the defendant the court instructed the jury that, before the plaintiff was entitled to recover, he must prove every material allegation of the complaint by a preponderance of the evidence. Under the allegations of the complaint the negligence of the defendant was substantially as established by plaintiff's own testimony. Hence, if counsel for the defendant thought that the instruction now complained of did not limit the jury to a consideration of such acts of negligence as might have been the proximate cause of the destruction of the automobile, a specific objection should have been made to the instruction. Not having made a specific objection and pointed out wherein it was objectionable, the defendant is not now in an attitude to complain of the action of

the court in giving the instruction. *Pine Bluff & A. R. Ry. Co.* v. *Washington,* 116 Ark. 179, 172 S. W. 872, and *Magnolia Petroleum Co.* v. *Freudenberg,* 168 Ark. 616, 271 S. W. 15.

It follows that the judgment was correct, and will therefore be affirmed.

SLAUGHTER *v.* CORNIE STAVE COMPANY.

Opinion delivered February 21, 1927.

1. LOST INSTRUMENTS—SUFFICIENCY OF PROOF.—Parol evidence to prove the contents of a lost deed should show that the deed was duly executed as required by law and show substantially all its contents by clear, convincing and satisfactory evidence.
2. LOST INSTRUMENTS—SUFFICIENCY OF PROOF.—In a suit to quiet title where defendant's claim under mesne conveyances from plaintiff, a finding that the contents of an alleged lost deed from plaintiff to defendant's predecessor were not established *held* not against preponderance of the evidence.
3. ADVERSE POSSESSION—PAYMENT OF TAXES.—The title to unimproved and uninclosed lands will not be barred by the payment of taxes thereon by one claiming under color of title for a period of less than seven consecutive years, and such continuity is broken where the owner brings suit for the land within seven years from the date of the first payment.
4. ESTOPPEL—CONDUCT OF PLAINTIFF.—Where plaintiff did nothing either by its silence or conduct to lead the defendant to believe that it would not assert its title to the land in controversy, it will not be estopped to assert its title.

Appeal from Union Chancery Court, First Division; *J. Y. Stevens,* Chancellor; affirmed.

STATEMENT OF FACTS.

The Cornie Stave Company brought this suit in equity against A. E. Slaughter and others to cancel, as a cloud on its title, certain deeds to forty acres of land in Union County, Arkansas. The suit was defended on the ground that the plaintiff had conveyed its title to the grantor of the defendant Slaughter.

According to the evidence for the plaintiff, the forty acres of land in controversy was purchased by the Cornie Stave Company from J. L. Goodwin on the 10th day of March, 1907, for $120. The plaintiff had large tracts of timber land, and was not selling any land during 1907 and 1908. The plaintiff paid the taxes on the land from 1907 to 1914 inclusive. After that time, when the plaintiff went to pay its taxes, it was always informed by the collector that the taxes had been paid by A. E. Slaughter. The plaintiff kept a record of the lands owned by it, showing the date on which each tract was purchased and the date on which it was sold. The records did not show the sale of any land belonging to the plaintiff from 1907 to 1915. The matters above set forth were testified to by the president and two vice presidents of the plaintiff company.

According to the testimony of the president of the company, if any deed had been executed between the 18th of March, 1907, and the 8th of December, 1907, the date on which R. E. L. Combs died, he would have had to sign it. He did not sign any deed during that time. He kept a minute-book showing the minutes of the meetings of the stockholders and board of directors of the Cornie Stave Company during this time. This record did not contain a recitation authorizing the sale of the tract of land in controversy. All three of the witnesses testified that, if the tract of land in controversy had been sold to R. E. L. Combs or to any one else, the records of the company would have shown the date of the sale, the person to whom sold, and the amount for which the land was sold.

According to the testimony of Annie A. Combs, her husband died December 8, 1907. He had been in the service of the plaintiff company since that company was organized. She became the administratrix of her husband's estate, and sold this tract of land along with other lands belonging to her husband's estate, acting as such administratrix. Her brother became the purchaser at the sale, and, after holding the land for a year or two and paying taxes on it, he conveyed it to her. The record

shows that her brother conveyed the land in question to Mrs. Annie A. Combs on August 1, 1910, and that the deed was duly filed for record. On November 10, 1913, Mrs. Annie A. Combs conveyed the land to A. E. Slaughter. This deed was duly filed for record. The record also shows that this suit was instituted April 27, 1921, and that A. E. Slaughter paid taxes on the land in controversy for the years 1915 to 1920 inclusive. Mrs. Annie A. Combs also testified that there was a deed on record from the plaintiff to her husband to the land in controversy.

The attorney who represented the estate of R. E. L. Combs when the lands belonging to that estate were sold at administrator's sale testified that, according to his recollection, he made an examination into the title of this particular tract of land and found the title to be clear, and recollected that there was a deed from the Cornie Stave Company to R. E. L. Combs. At that time the plaintiff was not trying to acquire land, but timber. Combs was buying land for the plaintiff.

Another witness for the defendants testified that R. E. L. Combs was a timber buyer for the plaintiff, and he recollected seeing a deed from J. L. Goodwin to the plaintiff for the land in controversy. The witness, at that time, was keeping the books of the company, and carried it along as belonging to the company. In 1914 he severed his connection with the company. Prior to his death Combs had a settlement with the plaintiff, and several tracts of timber were deeded to him by the plaintiff. Other facts will be stated or referred to in the opinion.

The chancellor found the issues in favor of the plaintiff, and a decree was entered of record canceling the deeds as prayed for in the complaint, and quieting the title in the plaintiff in so far as the rights of the defendants are concerned. The case is here on appeal.

Betts & Betts, for appellant.

Patterson & Rector, for appellee.

HART, C. J., (after stating the facts). A. E. Slaughter seeks to reverse the decree quieting the title in the Cornie Stave Company upon the ground that it conveyed the land in controversy to R. E. L. Combs; that, after Combs' death, the tract was sold with other lands belonging to his estate at administrator's sale; and that the defendant, Slaughter, acquired title by mesne conveyances from the purchaser at the administrator's sale. It is claimed by counsel for the defendants that a deed from the plaintiff to R. E. L. Combs was executed prior to his death, and that the deed had been lost, and, for that reason, could not be produced at the trial.

It is the settled rule in this State that parol evidence to prove the contents of a lost deed should show that the deed was duly executed as required by law, and should show substantially all its contents by clear, convincing and satisfactory evidence. *Hooper* v. *Chism,* 13 Ark. 496; *Nunn* v. *Lynch,* 73 Ark. 20, 83 S. W. 316; *Kennedy* v. *Gilkey,* 81 Ark. 147, 98 S. W. 969; *Queen* v. *Queen,* 116 Ark. 370, 172 S. W. 1018; *Wasson* v. *Walker,* 158 Ark. 4, 249 S. W. 29; and *Langston* v. *Hughes,* 170 Ark. 272, 280 S. W. 374.

An excellent statement of the rule was made by Chief Justice Marshall in *Tayloe* v. *Riggs,* 1 Pet. 591. It is as follows: "When a written contract is to be proved, not by itself but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily, and, if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement." This rule

was quoted with approval in *Hooper* v. *Chism,* 13 Ark. 496, and has been followed by the court ever since.

It is evident that, if any loose requirement was sufficient to establish a lost instrument, the very object which the statute of frauds seeks to prevent would be encouraged. Tested by this rule, the contents of the deed claimed to have been lost was not established to the satisfaction of the chancellor, and it cannot be said that his finding of fact on this point is against the clear preponderance of the evidence. *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160.

It is true that Mrs. Combs says there was a deed on record from the plaintiff to her husband to the tract of land in controversy. Her husband owned a good many tracts of land, and she was obviously mistaken. If the deed was upon the records in the clerk's office, it would have been a very easy matter to have introduced a certified copy of it in evidence. It is also true that the attorney who represented Mrs. Combs in the administrator's sale testified that, according to his recollection, there was among the title papers exhibited to him at the time a deed from plaintiff to Combs. It is not to be expected that a busy lawyer could definitely and certainly recollect a matter which occurred so many years ago, and especially where numerous other tracts were offered at the same sale. The proof on the part of the plaintiff shows that a record was kept of the lands purchased and sold by the plaintiff, and that this record does not show any sale of this particular land. The record does show the date of its purchase by the plaintiff, as well as the person from whom it was purchased and the price paid for it. The president of the company testified that he did not sign a deed to any land between the date of the purchase by the plaintiff of the tract of land in controversy and the date of the death of R. E. L. Combs. Then, too, both of the vice presidents of the company say that there was no sale of any land belonging to the company during the years of 1907 and 1908.

Again, it is insisted by counsel for the defendants that Slaughter has acquired title by adverse possession. We cannot agree with counsel in this contention. The present suit was instituted on April 27, 1921. Slaughter paid the taxes on the land from the year 1915 to 1920, both inclusive. The lands were wild and unoccupied, and there were not seven years from the date of the first payment of taxes by Slaughter until the institution of the present suit.

In *Updegraff* v. *Marked Tree Lumber Co.,* 83 Ark. 154, 103 S. W. 606, the court said: "And we think it necessarily follows from that conclusion that there must be an unbroken possession for a period of seven years from the date of the first payment, and that the mere payment of taxes seven times is not of itself seven years' possession, where the possession is broken by the commencement of an action within seven years after the date of the first payment. We are therefore of the opinion that the appellee failed to show title by limitation."

To the same effect see *Bradley Lumber Co.* v. *Langford,* 109 Ark. 594, 160 S. W. 866; *Fenton* v. *Collum,* 104 Ark. 624, 150 S. W. 140; and *Paragould Abst. & Real Est. Co.* v. *Coffman,* 100 Ark. 582, 140 S. W. 730, L. R. A. 1915B 1006.

As we have just seen, the plaintiff brought this suit within the period of time allowed by law, and he could not in any event be barred on account of laches until payment of taxes had been made for at least seven years by one making same under color of title. *Fordyce* v. *Vickers,* 99 Ark. 507, 138 S. W. 1010.

In the present case the plaintiff had the paper title to the land in controversy, and brought this suit to enforce its legal title. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although, under the name of laches, it may afford a ground for refusing relief under some peculiar circumstances. *Davis* v. *Neal,* 100 Ark. 399, 140 S. W. 278;

Beattie v. *McKinney,* 160 Ark. 81, 254 S. W. 338; and *Galloway* v. *Battaglia,* 133 Ark. 441, 202 S. W. 836.

In the case at bar the plaintiff did nothing either by silence or conduct to lead the defendant to believe that it would not assert its title to the land and thereby suffer the defendant to enter into obligations or incur liabilities which he would not otherwise have done. In short, the plaintiff did nothing whereby the defendant was prejudiced and which might make it inequitable to assert title, as was the case in *Avera* v. *Banks,* 168 Ark 718, 271 S. W. 970.

On the question of estoppel, argued by counsel for the defendants, but little need be said. The record title to the land in controversy is in the plaintiff. There is no fact in the record tending to show that the defendants were in any manner deceived by any act or conduct on the part of the plaintiff. No grounds of equitable estoppel are proved by the defendant. See *Watson* v. *Murray,* 54 Ark. 499, 16 S. W. 292; *Waits* v. *Moore,* 89 Ark. 19, 115 S. W. 931; *Brown* v. *Norvell,* 96 Ark. 609, 132 S. W. 922; and *Davis* v. *Neal,* 100 Ark. 399, 140 S. W. 278.

It follows that the decree must be affirmed.

AMERICAN NATIONAL INSURANCE COMPANY *v.* HALE.

Opinion delivered February 21, 1927.

1. INSURANCE—BREACH OF CONDITIONS—WAIVER.—Where the insurer, at the time of issuance of a policy, has knowledge of existing facts which, if insisted upon, would invalidate the contract from its very inception, such knowledge constitutes a waiver of conditions in the contract inconsistent with the known facts, and the insurer is estopped thereafter from asserting the breach of such conditions.
2. INSURANCE—AGENT'S KNOWLEDGE IMPUTED TO INSURER.—Knowledge affecting the rights of the insured, such as matters relating to the state of his health, which comes to the agent of the insurer while he is performing the duties of his agency, in receiving appli-

cations for insurance and delivering policies, becomes the knowledge of the company.

3. INSURANCE—INSTRUCTIONS APPROVED.—Issues in an action on a life insurance policy as to whether insured was in sound health at the date of the application and delivery of the policy and whether insured had knowledge of the state of his health, *held* correctly submitted to the jury.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; affirmed.

J. C. Marshall, for appellant.

Downie & Schoggen, for appellee.

WOOD, J. This is an action by Laura S. Hale against the American National Insurance Company on two policies, one dated March 24, 1924, for $240, and the other dated October 6, 1924, for $94. The insurance company defended the action on the ground that the assured was not in sound health at the time the policies were issued. It was in evidence, and not denied, that the policies had been issued and delivered by the agent who took the application for insurance, and the premiums had been paid. The appellee testified that, at the time the applications were made and the policies delivered, there was nothing the matter with the assured. Previously he had had high blood pressure. It was discussed with the agent. The insured communicated this fact to the agent at the time of the application, and the agent replied that it did not matter—that he had had high blood pressure himself. The assured looked healthy. He was working every day, and his health was fine at the time the policies were delivered. The assured had been treated for high blood pressure between the time of the issuance of the first policy and the last. This fact was communicated to the agent when he took the application for the second policy, and the agent stated that that did not amount to anything. The medical examiner for the insurance company testified that he made a careful examination of the physical condition of the insured in November, 1923. At that time the assured was suffering from an incurable disease—chronic nephritis, or Bright's

disease. He reported that fact to the company, and recommended that the policy be not issued. The policies sued on were issued without a medical examination. The company did not require it. The life insurance under these policies was for a small amount, and is paid weekly. Other testimony on behalf of the company tended to prove that the insured, at the time the policy was issued, was not in sound health.

The application for the policies contained a provision to the effect that the insured warranted that the answers to the questions in the application were complete, correct and true, to the best of his knowledge and belief, and made these answers a part of the contract of insurance. The application further contained a provision that none of the officers or agents of the company were authorized to make, order, or discharge the insurance contracts, or to waive forfeitures.

The court, over the objection of the insurance company, on its own motion instructed the jury that, if they found that the deceased was not in sound health and that the agents of the defendant had knowledge of such fact, which knowledge they had obtained in the scope of their employment, then the defense of unsound health would not be available, and their verdict should be for the plaintiff; but, if they found that the insured was not in sound health, and the agents of the company, acting within the scope of their employment, had no knowledge of such fact, then the verdict should be in favor of the defendant. The insurance company asked the court to instruct the jury that, if the insured was not in sound health on the day the policies were issued, their verdict should be in favor of the defendant, even though the jury should find that the agents of the company knew that he was not in sound health when the policy was issued. The company duly excepted to the ruling of the court in refusing its prayer for instruction, and in giving instruction as above set forth on its own motion. The jury returned a verdict in favor of the plaintiff, and from a judgment rendered in her favor is this appeal.

In the case of *National Life Insurance Co. of U. S. A.* v. *Jackson,* 161 Ark. 597, 256 S. W. 378, there was a provision in the policy to the effect that "no liability is assumed by the company for any accident, illness or disease incurred or contracted prior to the date hereof, or any death arising therefrom." The testimony in that case tended to show that the insured died from tuberculosis. He had been afflicted for several months prior to the date of the issuance of the policy, and there was testimony from which the jury might have found that the agent of the insurance company had knowledge of the fact that the insured was sick at the time he took the application. But there was no testimony tending to show that the agent of the insurance company knew that the insured was afflicted with tuberculosis at the time of the issuance of the policy. On the contrary, the agent who took the application testified that he did not know that the insured had tuberculosis at the time he applied for the policy or at the time the policy was delivered to him. He further testified that, if he had known this fact, he would not have taken the application, and that there was nothing in the physical appearance of the insured to indicate that he had tuberculosis. Commenting upon the instruction given in that case, in view of the facts disclosed, we condemned the instruction, and, in doing so, stated:

"It is true that the general rule of law imputing to a principal notice of facts learned by his agent in the discharge of his duties applies to insurers; but this principle has no application under the terms of the policy sued on. As will be seen from our statement of facts, one of the conditions of the policy is that no liability is assumed by the company for any accident, illness or disease occurring or contracted prior to the date thereof, or any death arising therefrom."

This court correctly condemned the instruction in the case of *National Life Insurance Co. of U. S. A.* v. *Jackson, supra,* because there was no testimony to sustain it, and further correctly held that there was no

liability under the contract of insurance in that suit because of the particular language of the contract, and because the undisputed evidence showed that the insured had tuberculosis at the time the policy was applied for and was issued, and that he died from that disease. But we did not mean to hold in the above case that the provisions in a policy such as we now have under review could not be waived. There was nothing in the facts of the above case to warrant this court in announcing a doctrine contrary to the rule recognized by this court in the above case and many other cases and by the authorities generally. That rule is as follows:

"Where an insurer, at the time of the issuance of a policy, has knowledge of existing facts which, if insisted upon, would invalidate the contract from its inception, such knowledge constitutes a waiver of conditions in the contract inconsistent with such facts, and the insured is estopped thereafter from asserting the breach of such conditions." *Life & Cas. Ins. Co.* v. *King,* 137 Tenn. 885, 195 S. W. 585.

The cases of *Carland* v. *General Accident, Fire & Life Assurance Corp.,* 122 Ark. 468, 183 S. W. 965, and *American National Insurance Co.* v. *Otis,* 122 Ark. 219, 183 S. W. 183, were both cases where there was no waiver or estoppel by acts and conduct of agents of the insurer, and it is expressly so stated in the opinions. In the other case of *Metropolitan Life Ins. Co.* v. *Fitzerald,* 137 Ark. 366, 209 S. W. 77, cited in *National Life Insurance Company of U. S. A.* v. *Jackson, supra,* the question of waiver and estoppel by conduct on the part of the agents of the insurance company was not involved; and these cases were not cited in the *National Insurance Co.* v. *Jackson,* above, on the question of waiver and estoppel. Counsel for appellant also cite the cases of *Insurance Co.* v. *Howle,* 62 Ohio, St. 204, 56 N. E. 508; *Murphy* v. *Ins. Co.,* 106 Minn. 112, 118 N. W. 355; *Ins. Co.* v. *King,* 137 Tenn. *supra; Gallant* v. *Ins. Co.,* 167 Mass. 79, 44 N. E. 1075; and *Packard* v. *Ins. Co.,* 72 New Hamp. 1, 54 A. 287, as sustaining their contention that the provision of the

policy under review as to sound health at the time of the issuance of the policy cannot be waived; but these authorities, as we read them, do not sustain this contention. On the contrary, they recognize the general rule of waiver and estoppel as above set forth.

The above doctrine of waiver and estoppel, quoted from the syllabus of the case of *Ins. Co.* v. *King, supra,* has been too firmly imbedded in our law and is too well grounded in reason and justice to be overruled, modified or impaired by announcing any doctrine to the contrary. Since the language quoted from *National Life Ins. Co.* v. *Jackson, supra,* can be construed to have that effect on policies like that under consideration, we hereby disapprove the same. In the early case of *Ins. Co.* v. *Brodie,* 52 Ark. 11, 11 S. W. 1016, this court, speaking through Mr. Justice BATTLE, said:

"The issue of a policy by an insurance company, with a full knowledge or notice of all the facts affecting its validity, is tantamount to an assertion that the policy is valid at the time of its delivery, and is a waiver of the known ground of invalidity. From such conduct the insured might fairly infer that he is protected."

In American National Ins. Co. v. *Otis, supra,* we said:

"This court has often held that the doctrine of waiver and estoppel applies to insurance contracts, and that these principles will be liberally applied when it is necessary to prevent injustice and fraud being perpetrated by insurance companies upon their policyholders, when the latter have been misled or imposed upon by such companies."

We have held that the general rule above stated of waiver and estoppel applies to knowledge acquired by soliciting agents. In *Blacknall* v. *Mutual Aid Union,* 129 Ark. 450-455, 196 S. W. 792, we quoted from 14 R. C. L. § 340, p. 1159, as follows:

"It is usually held that, in the absence of policy provisions to the contrary, knowledge affecting the rights of the insured, which comes to an agent of an

insurance company while he is performing the duties of his agency in receiving applications for insurance and delivering policies, becomes the knowledge of the company." See numerous cases there cited, and also *Ins. Co.* v. *Rideout,* 147 Ark. 563, 228 S. W. 55; *Walker* v. *Ill. Bankers' Life Asso.,* 140 Ark. 192, 215 S. W. 598; *Amer. Ins. Co.* v. *Mordic,* 168 Ark. 795, 271 S. W. 460.

It follows from the doctrine of these cases that the court did not err in giving the instructions on its own motion and in overruling appellant's prayer for instruction. The issue as to whether or not the insured was in sound health at the date of the application and delivery of the policy was correctly submitted to the jury. The jury was also correctly instructed to the effect that, if they found that the insured was not in sound health at the time of the application and delivery of the policy, and the appellant had knowledge of that fact, the verdict should be in favor of the appellee.

We find no error in the rulings of the trial court, and its judgment is therefore affirmed.

SMITH and KIRBY, JJ., dissent.

NEW ENGLAND SECURITIES COMPANY *v.* AFFLICK.

Opinion delivered February 21, 1927.

1. APPEAL AND ERROR—RIGHT OF INTERVENER TO APPEAL AFTER WITHDRAWAL.—Where a mortgagee of land, which had intervened in a receivership proceeding and had a right to appeal from an order approving a bid for the sale of such land, withdrew from the proceeding on the day the order was made, it cannot appeal from a subsequent order of the chancery court confirming such sale, made pursuant to the mandate of the Supreme Court on appeal by another from the prior order of confirmation.
2. APPEAL AND ERROR—EFFECT OF REMAND FOR FURTHER PROCEEDINGS.—A direction to a trial court, upon reversal and remand of a chancery case for further proceedings according to law and not inconsistent with the opinion of the Supreme Court, means nothing more than to render a decree in accordance with the record made, and the court had no power to reopen the case and allow new parties to be made and new questions litigated.

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

P. R. Andrews and *Roy D. Campbell,* for appellant.

W. R. Satterfield and *J. G. Burke,* for appellee.

WOOD, J. The facts are substantially as follows: The West Helena Consolidated Company was placed in the hands of a receiver on or about the 20th day of November, 1921, by orders of the Phillips Chancery Court. A. G. Burke was appointed receiver. The assets of the company passing into the hands of the receiver consisted of a street railway, waterworks system, approximately 1,751 acres of farm lands, 549 lots and 20 houses in the city of West Helena, Arkansas. The receiver was directed by the court to operate said company for the purpose of ascertaining whether or not the indebtedness of the company could be liquidated without sale of its properties.

Several years prior to the appointment of a receiver to take charge of the affairs of the West Helena Consolidated Company, the company had mortgaged the farm lands in controversy to the appellant, New England Securities Company, to secure an indebtedness of approximately $50,000, said mortgage indebtedness being evidenced by notes made by the company and secured by four or more separate mortgages on different tracts of land owned by the company. At the time of the receivership proceedings the company was in default in its payment with the appellant.

On December 16, 1922, the appellant, New England Securities Company, obtained permission from the chancery court to file its intervention, and did become a party to said proceedings for the purpose of foreclosing its mortgages. This intervention was filed, and the receiver was made a party defendant. A decree of foreclosure was taken on the 24th day of January, 1923, foreclosing all of said mortgages and subjecting the farm lands to the payment of the mortgage indebtedness due the appellant. On April 9, 1923, the receiver filed his petition to vacate the decree of foreclosure rendered on

the 24th day of January, 1923. On July 24, 1923, the court sustained the motion to vacate the decree of foreclosure, and did enter of record an order vacating and setting aside said decree. On July 25, 1923, the New England Securities Company, in order to clear the record, filed its four separate amended interventions. These amended interventions were pending in said court in this case when the sale of the properties was ordered and the receiver directed to make the sale. The decree ordering the sale of the property was entered August 29, 1923, and the sale was had November 1, 1923. At this sale the following parties were the highest bidders for certain property belonging to the company, as shown by the receiver's report of sale, to-wit:

(1). Edwin Bevens was the highest bidder for the waterworks system.

(2). Home Mutual Building & Loan Association was the highest bidder for the street railway system.

(3). The farm lands (the property now in controversy) were offered for sale, and, no person having bid at said sale, the property remained unsold.

(4). Fannie M. Hornor was the highest bidder for certain lots in Richmond Hill.

(5). J. T. Hornor was the highest bidder for blocks 29 and 30 in West Helena, Arkansas.

(6). E. M. Polk was the highest bidder for lot 5, block 94.

(7). E. M. Polk was the highest bidder for city property.

The report of sale held on November 1, 1923, was duly filed on the 26th of November, 1923. The receiver's report discloses that there were bidders at the receiver's sale for all of the properties of the West Helena Consolidated Company, except the lands now in controversy..

On the 20th of December, 1923, C. W. Afflick filed in open court his bid offering to purchase, and did bid the sum of $5,000 for all right, title and interest of the West Helena Consolidated Company in all real and personal property, except the street railway and waterworks prop-

erty, book accounts and notes, and the cash funds on hand belonging to the company in the hands of the receiver. These items were omitted from the bid of C. W. Afflick. In other words, Afflick's bid covered and included only the right, title and interest to certain real estate belonging to the West Helena Consolidated Company, which bid included the lands now in controversy.

The bid of Afflick also included the city property offered by the receiver at the receiver's sale held on November 1, 1923, for which E. M. Polk was the highest bidder, and on the 12th of January, 1924, Polk filed a protest against the acceptance of the bid of Afflick in so far as Afflick's bid related to the property for which he was the highest bidder.

On the 24th day of January, 1924, the Phillips Chancery Court approved the bid of C. W. Afflick, and from this decree of the court E. M. Polk, who was the highest bidder for the city property at the receiver's sale, prosecuted an appeal to this court. This appeal resulted in the decision of the case of *Polk* v. *Afflick,* 168 Ark. 904, 271 S. W. 962. The New England Securities Company was, at the time of said sale, and for several years prior thereto, a party to this proceeding, and did not bid at this receiver's sale, nor did the appellant, New England Securities Company, appeal from the court's decree accepting the bid of C. W. Afflick. E. M. Polk was the only party to this proceeding that prosecuted an appeal from the orders of the chancery court rendered on the 24th day of January, 1924. But, on the same day, the court entered a decree allowing appellant to withdraw its interventions and to institute separate foreclosure proceedings.

The decision in the case of *Polk* v. *Afflick, supra,* was rendered by the court on May 18, 1925, and in that case the court held that Polk, being the highest and best bidder at the receiver's sale, acquired rights which could not be divested because some other party had offered to advance the bids, and further held that the chancellor erred in rejecting the bid of Polk and accepting the bid

of C. W. Afflick. The case was reversed, and the cause remanded for further proceedings in accordance with the decision as rendered by this court.

On the 27th day of July, 1925, the case was again submitted to the lower court upon the decision and mandate of the Supreme Court rendered in the case of *Polk* v. *Afflick,* and, in pursuance to the mandate of the Supreme Court, the lower court declared E. M. Polk to be the purchaser of all of the city property embraced in the bid of E. M. Polk at the receiver's sale held on November 1, 1923, and the receiver was directed to make a deed to E. M. Polk for said property. The court, in this same decree as to the farm lands now in controversy, made the following order:

"That the former order and decree of this court approving the bid and confirming the purchase of C. W. Afflick of certain real estate, equities of redemption or choses in action, formerly belonging to the West Helena Consolidated Company, be hereby modified so far as the same covers the above described real estate herein decreed to have been purchased by E. M. Polk, but that in all other respects the said original bid and purchase by C. W. Afflick and said original order and decree of this court approving said bid and confirming said purchase are hereby renewed, approved, ratified and confirmed for all the remaining part of said estate, assets, equities of redemption and choses in action."

And the receiver was directed to convey to C. W. Afflick the property purchased by his bid, including the lands now in controversy on this appeal. The court, in this same decree, made final disposition of all rents that had been collected, and made adjustments as to the bid of C. W. Afflick, in so far as the same was in conflict with the bid of E. M. Polk. The appellant, New England Securities Company, asked and was granted permission to intervene. It excepted to the decree as rendered by the court on the 27th day of July, 1925, and prosecutes this appeal.

1. The appellant has no standing in this court, on the facts as above stated, for two reasons. First, the appellant was a party to the action in which the receiver was appointed to take charge of the West Helena Consolidated Company from the time of the filing of its intervention on December 16, 1922, until January 24, 1924, the day of the final decree, when the bid of the appellee was approved. While the appellant, on July 23, 1923, filed amended interventions, asking to be permitted to withdraw from the proceedings and to institute separate and independent actions of foreclosure against the West Helena Consolidated Company, these interventions were pending when the receiver's sale was had on November 1, 1923, and when the appellee's bid was made for the property in controversy on the 20th day of December, 1923, and without any protest whatever being filed by the appellant against such bid. The chancery court had jurisdiction to order the sale of the property in controversy by its receiver and to direct its receiver to accept the bid of the appellee and to make deeds to him for the property. The appellant was therefore in the attitude of being a party to the proceedings until the very day that appellee's bid was approved by the court. On that day the appellee elected to withdraw, and was by the court permitted to do so without having registered any objection, as we have already stated, to the approval by the court of the appellee's bid. Under these circumstances, it occurs to us that the appellant should be held as a party to the receiver proceedings in which the appellee's bid was made and approved. If we are correct in this conclusion, it was the duty of appellant, if it wished to challenge in any manner the bid of the appellees, to make its objections in that proceeding and to appeal from the decree of January 24, 1924, which it now claims was adverse to its interests. If the appellant was a party to that proceeding, then it should have taken the same course to protect its rights as was taken by Polk, another party to the proceeding, by appealing from that decree to this court. By failing to do so, the appellant lost its

right to appeal from that decree and to have the alleged error of the court in receiving and approving appellee's bid in the receivership proceeding reviewed by this court.

2. But, second, if we are mistaken in this conclusion; and if the decree of the chancery court of January 24, 1924, should be construed as having been entered prior to the decree of the same day approving appellee's bid, then appellant, by the decree permitting it to withdraw as a party to the receivership proceeding, was no longer a party thereto and not bound thereby, nor did the appellant thereafter have any right to further intervene therein. Such being the case, appellant had no right to intervene further in that branch of the cause still pending in the chancery court between the appellee and Polk, to be finally determined between them on the mandate from this court.

In the case of *Polk* v. *Afflick, supra,* the decree was reversed, and the cause remanded for further proceedings in accordance with the principles of equity and not inconsistent with the opinion. That was a final determination of that litigation, and the appellant certainly had no right to intervene therein, and the chancery court erred in permitting him to do so and in allowing him to prosecute an appeal to this court from the decision in that cause. It will be observed that the mandate did not reopen the case for a new trial, but only for further proceedings not inconsistent with the opinion.

In *Deason & Keith* v. *Rock,* 149 Ark. 401-405, 232 S. W. 583, we said: "We think a direction to a trial court, upon reversal and remand of a chancery decree for further proceedings according to law and not inconsistent with the opinion, means nothing more than to render a decree in accordance with the record made." See also *Gaither* v. *Campbell,* 94 Ark. 329, 126 S. W. 1061; *Rushing* v. *Hornor,* 130 Ark. 201, 204 S. W. 1145.

In the case of *Polk* v. *Frierson,* 113 Ark. 582, 168 S. W. 1082, we said: "The chancery court had no power, after mandate of this court was filed directing it to enter a decree canceling and annulling the deed in question,

to reopen the cause and allow new parties to be made and the question relitigated as far as the Stephenses were concerned."

While the court erred in allowing the appellant to intervene and to prosecute this appeal, the error does not and cannot avail appellant to the prejudice of the appellee. It follows that the appellant has no right to call in question the decree of the trial court in favor of the appellee. The decree is therefore affirmed.

HARTFORD FIRE INSURANCE COMPANY *v.* FERGUSON.

Opinion delivered February 21, 1927.

1. INSURANCE—WAIVER OF PROOF OF LOSS.—The insured may prove by parol testimony that proof of loss by fire was waived by the conduct of the insurer, notwithstanding the insured signed an agreement that any action by insurer in investigating the cause of the fire and in ascertaining the amount of the loss should not waive rights of either party.
2. INSURANCE—WAIVER OF PROOF OF LOSS—JURY QUESTION.—Whether the proof of loss required by the terms of a fire insurance policy was waived by the conduct of the insurer's agent *held* under the evidence for the jury.

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

J. A. Watkins, for appellant.

Bogle & Sharp, for appellee.

WOOD, J. This is an action by the appellees against the appellant to recover damages for the loss by fire of a stock of merchandise, furniture and fixtures on a policy issued by the appellant to appellee, S. W. Ferguson.

The only issue here is whether or not the appellant waived the provision of the policy concerning proof of loss. The policy contained the following provision:

"If fire occurs, the insured shall, within sixty days after the fire, unless such time is extended in writing by the company, render a statement to this company, signed and sworn to by the assured, stating the knowledge and

belief of the insured as to the origin of the fire; the interest of the assured and all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any change of title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire."

Appellee, Ferguson, testified substantially as follows: He notified the insurance company of the fire, and in a day or two the adjuster came over. He and the witness were in the building where the fire had been for possibly two hours, checking over the stuff. Witness took an inventory in October before the fire in November. This inventory was introduced in evidence, and showed a total valuation of merchandise of over $3,000, and the value of witness' fixtures destroyed by fire was over $2,000. The adjuster examined the stock of goods that had been partially destroyed by the fire. Witness asked the adjuster, after handing him the inventory and telling him of the loss of the fixtures, if there were anything else witness could do. The adjuster stated that he would be back in ten days or two weeks. Witness waited two or three weeks, and did not hear from the adjuster. Witness then took the matter up with the appellant's agent in Little Rock, trying to get the adjuster to come back. He did not come back. The appellee made purchases of something like $500 between the time of taking the inventory until the fire. He gave the inventories of these purchases to the agent of the insurance company, and they were afterwards sent back to the appellee. When the adjuster came he went over everything carefully, took the inventory, and the appellee gave him the list of creditors that he owed and those he had bought goods from. He thought the adjuster got everything that was necessary. Witness did not think that he had to furnish

the company anything after he furnished the inventories to the adjuster and asked him if there were anything else he could do to help settle the matter, when he said that he would be back in two weeks. The witness signed a non-waiver agreement to the effect that any action taken by the insurance company in investigating the cause of the fire and ascertaining the amount of the loss and damage to the property shall not waive or invalidate any rights of either party, the intent of the agreement being to preserve the rights of all parties and to provide for an investigation of the fire and the amount of the loss or damage, without regard to the liability of the insurance company. Witness did not make up any additional list or proof of loss and did not do anything more with reference thereto than as above set forth.

The adjuster testified, on behalf of the appellant, that he did not make Ferguson any promise to come back and settle up his insurance. The appellant asked the court to give the following instruction, which is a copy of the provision of the policy as to proof of loss, and concludes as follows:

"If the plaintiff failed to furnish to the defendant company a statement like the foregoing within sixty days after the fire, then your verdict will be for the defendant."

The court modified the instruction by adding thereto the following words:

"Unless you further find that such proof of loss was waived by the defendant company, through its adjuster's representations claimed by the plaintiff to have been made to him on the occasion of the visit of the adjuster Overstreet shortly after the fire occurred."

The appellant excepted to the ruling of the court in refusing the above instruction as asked and in modifying the same and giving it as modified.

This court, in a long line of cases, has held that, notwithstanding the written non-waiver agreement signed by the assured and the insurer, the assured may prove by parol testimony that the proof of loss was waived by

the conduct of the insurer. *Burlington Fire Ins. Co.* v. *Kennerly,* 60 Ark. 532, 31 S. W. 155; *Burlington Fire Ins. Co.* v. *Lowry,* 61 Ark. 108, 32 S. W. 383; *German Amer. Ins. Co.* v. *Humphrey,* 62 Ark. 348, 35 S. W. 428; *Arkansas Mutual Fire Ins. Co.* v. *Witham,* 82 Ark. 226, 101 S. W. 721; *Queen of Ark. Ins. Co.* v. *Malone,* 111 Ark. 230, 163 S. W. 771. The court ruled correctly in submitting to the jury the issue as to whether or not the proof of loss had been waived by the conduct of the appellant through its agent, the adjuster. The conduct of this agent justified the jury in finding that the appellant had waived the provisions of the policy requiring the formal proof of loss therein stipulated. The jury might have found that the conduct of the adjuster was tantamount to saying to the appellee that he had done all that was necessary and all that he could do to prove his loss. The appellee furnished the adjuster, who had the authority to adjust losses for the appellant, an inventory of the goods which had been damaged and lost, and asked the adjuster if there were any other information that he could furnish him in order to enable the company to settle. The adjuster led the appellee to believe that there was nothing further he could do at that time, and that he (the adjuster) would return in ten days or two weeks, which he never did, although the appellee requested him to do so.

As was said in the case of *Minneapolis Fire, etc., Ins. Co.* v. *Fultz,* 72 Ark. 365, 80 S. W. 576:

"The evidence tended to prove that appellant, through its adjuster, accepted the statement or inventory of the personal property destroyed by fire that was furnished to the adjuster at Bearden, and waived all other proof of loss thereof, and that it is estopped from denying its sufficiency."

See also the recent case of *National Union Fire Ins. Co.* v. *Whitted,* 157 Ark. 515, 248 S. W. 560, where we said:

"In reference to the personal property, appellee had done what he intended and thought was a satisfactory compliance with the requirements of his policy in respect

to the proof of loss, and the adjuster should have notified him of any objection thereto. Silence on his part, under the circumstances, was calculated to mislead appellee to his disadvantage, and constituted a waiver of additional proof of loss."

In that case the assured had furnished a complete list of the personal property destroyed by fire, and no objection was made to the form and manner in which it was presented.

The record presents no error in the rulings of the trial court, and its judgment is therefore affirmed.

BOLEN v. FARMERS' BONDED WAREHOUSE.

Opinion delivered February 21, 1927.

1. WAREHOUSEMEN—PERIOD OF LIABILITY UNDER BOND.—Where the personal surety bond of a warehouse company, executed under Crawford & Moses' Dig., § 10411, specified no particular term, it will be conclusively presumed that it was limited to the year for which the certificate of qualification of its manager was issued, under § 10420, *Id.*, and the sureties were not liable for the value of cotton lost or misappropriated from the warehouse after such year had expired.
2. WAREHOUSEMEN—LIABILITY OF SURETIES.—Personal sureties of a warehouse corporation, under Crawford & Moses' Digest, § 10411, are liable for any loss covered by the bond during the period when the bond is in force, regardless of the time when the goods were placed in the warehouse, but are not liable beyond such period.
3. APPEAL AND ERROR—ISSUES NOT RAISED BELOW.—Issues not raised by the pleadings nor by requested instructions will not be considered on appeal.

Appeal from Polk Circuit Court; *B. E. Isbell,* Judge; affirmed.

Pipkin & Frederick, for appellant.

Norwood & Alley, for appellee.

SMITH, J. Pursuant to chapter 182, C. & M. Digest, (§ § 10404 *et seq.*) known as the Warehouse and Marketing Bureau Act, a bonded warehouse was organized at Mena under the corporate name of the "The Farmers' Bonded Warehouse of Mena." It is provided in the act

that when its provisions have been complied with by the applicants for a charter thereunder, a charter shall issue, but, before the charter is delivered to the corporation and before the certificate of authority which the incorporators must have is furnished, the corporation shall execute, by its proper officers, a bond payable to the State of Arkansas in such amount as the board of supervisors of warehouses may direct. Concerning this bond the statute provides that:

"The bond shall be that of a bonding and indemnity company authorized to do business in Arkansas, or may be a personal surety bond, and, in the event of a personal surety bond, shall be approved by the board of supervisors of warehouses, and shall be renewed each year."

Among other conditions of the bond is that the corporation will exercise ordinary care in the storing or sale, or both, of the commodities placed in the warehouse by the patrons thereof. Section 10411, C. & M. Digest. A bond conditioned as required by this act was executed and filed on the 4th day of December, 1920, by the warehouse company, which will hereinafter be referred to as the warehouse, and thereafter certain farmers stored cotton therein. Certain bales of this cotton were either lost or wrongfully disposed of by the warehouseman in charge, and the owners of the cotton brought suits, which were consolidated for trial, to recover the value thereof from the warehouse, and the sureties on its bond were made defendants and judgments against them were prayed. The undisputed testimony showed that the cotton was lost or misappropriated by the warehouseman more than a year after the execution of the bond by the warehouse. A verdict was directed against the warehouse, but in favor of its sureties, and judgment was rendered accordingly, from which is this appeal.

Before the institution of these suits the warehouse itself had brought suit against its warehouseman and the sureties on his bond for the loss of this cotton, and it recovered judgment for the value thereof against both the

warehouseman and the sureties on his bond. An appeal was duly prosecuted from that judgment to this court, where the judgment of the lower court was affirmed against the warehouseman, but was reversed and dismissed as to the sureties on his bond. *McMillan* v. *Farmers' Bonded Warehouse Co.*, 169 Ark. 7, 272 S. W. 867.

Section 10420, C. & M. Digest, provides that, before the corporation shall open for business, the officer or employee in active management of its warehouse must have a certificate from the board of supervisors of warehouses as a certified warehouseman, and that, in order to receive such certificate, such person must present satisfactory evidence to the board of his competency to discharge the duties of his position, and, "upon satisfactory evidence, the board shall issue a certificate showing that such applicant is a certified warehouseman. Provided, however, that the life of any such certificate shall be one year, at the expiration of which time the applicant must obtain a new certificate."

The cotton lost by the negligence or misconduct of the managing officer was lost more than a year after the execution of his bond, and we held that the sureties on his bond were not liable thereunder for this cotton. It was pointed out in the opinion in that case that the statute did not require the warehouseman to give a bond, but did require the corporation to do so, and that, as it was unlawful for the warehouse to do business without having a certified warehouseman in charge, it must be conclusively presumed that the bond was given to cover a valid period of service. It was there said:

"Of course, in the absence of a statute expressly providing for a bond and its terms and conditions, the parties could have made a common-law bond which would bind the sureties for any term or period or length of time specified therein with reasonable certainty. But here we have a bond which contains no specific provision with reference to time, and therefore it must be conclusively presumed that the parties intended to contract

for a valid period of service, which was merely during the lifetime of the certificate. Learned counsel for appellee invoke the doctrine that, ordinarily, sureties on a bond can make no defense which could not be made by their principal. 21 R. C. L. 991. This principle is sometimes applicable, but not so to a case where the question is as to the period covered by the terms of the bond. The surety is only bound by the conditions which apply while the bond is in effect."

The reasoning of that case is applicable here. There the warehouse sought to recover from the warehouseman and his sureties the value of cotton which had been lost through the negligence or misconduct of the warehouseman. Here the owners of the cotton are seeking to recover from the warehouse and its sureties the value of the same cotton. In this case, as in that, the bond contains no specific provision with reference to time, and it must therefore be presumed in this case, as it was in that, that the parties intended to contract for the period of time contemplated by the statute before a new bond would be required, which was one year. The statute, as we have seen, specifically requires an annual bond, when it is not executed by a bonding or indemnity company, and the bond was executed pursuant to the statute.

In the case of *Crawford* v. *Ozark Ins. Co.*, 97 Ark. 549, 134 S. W. 951, it was said that statutory bonds executed in the form provided by the statute must be construed as though the statute were written in them as respects the rights and liabilities of principal and surety. In the case last cited suit was brought on a bond obligating an assessment fire insurance company to pay "all claims arising and accruing to any person by virtue of any policy issued by said company during the term of the bond," and it was held that the bond was liable for all claims accruing during the term of the bond, whether the policies on which the liabilities arose were issued during such term or not.

So here, the sureties on the bond of the warehouse were liable for any loss covered by the bond during the

period when the bond was in force, regardless of the time when the cotton was placed in the warehouse, but the sureties were not liable beyond that time, and, as it is an undisputed fact that the loss of plaintiffs' cotton occurred more than a year after the execution of the bond, the court below was correct in holding that the sureties on the bond were not liable.

This view accords with the construction of a similar bond given by the Supreme Court of North Dakota in the case of *State* v. *Farmers' Cooperative Elevator Co.*, reported and annotated in L. R. A. 1918E, page 233.

It is insisted that, if the sureties on the bond are not liable as such, they are liable as directors for their failure to comply with the law by renewing the bond. A sufficient answer to this contention is that the pleadings raised no such issue, and there was no request to so amend the pleadings as to raise it, and the instructions requested by the plaintiff did not ask the submission of that question to the jury.

The judgment of the court below is correct, and it is therefore affirmed.

DUPREE v. WILLIAMS.

Opinion delivered February 21, 1927.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—VALIDITY OF ASSESSMENT.—Where an assessment for sewer benefits in a municipal improvement district and the proceeding to foreclose a lien therefor were against an undivided half interest in a certain tract of land, a sale thereunder was void, under Crawford & Moses' Dig., §§ 5657, 5667, since the benefits must be assessed against each tract of land, and not against an interest therein.
2. MUNICIPAL CORPORATIONS—IMPROVEMENT TAX SALES—REDEMPTION.—Crawford & Moses' Dig., § 5644, limiting the time for redemptions from sales for improvement taxes to five years, and § 6946, *Id.*, limiting the time for redemption from judicial sales to five years, do not apply to void sales.

Appeal from Miller Chancery Court; *C. E. Johnson*, Chancellor; reversed.

Frank S. Quinn, for appellant.

Shaver, Shaver & Williams, for appellee.

HUMPHREYS, J. Appellant instituted suit against appellees in the chancery court of Miller County to redeem the north half of the northwest quarter of the southeast quarter of the northeast quarter of section 19, township 15 south, range 28 west, in said county, from a sale for sewer district taxes, predicating her cause of action upon the allegations that she was a tenant in common with appellees in a 10-acre tract of land, of which the land described above was a part at the time they bought it in for sewer taxes, and that their purchase was for her benefit, and that they hold the tax title in trust for her; that, if not the owner as tenant in common, the sewer tax foreclosure and sale were void and of no effect.

Appellees filed an answer to appellant's complaint, denying the material allegations therein and interposing the defenses of limitations under redemption statutes, and laches.

The cause was submitted to the court upon the pleadings and testimony introduced by the respective parties, which resulted in a decree dismissing appellant's complaint for want of equity, from which is this appeal.

On the 24th day of January, 1913, appellant loaned the Southern States Realty Company, of Texarkana, Arkansas, the sum of $10,000, the said realty company being a subsidiary of the Texarkana Trust Company, a banking corporation, and, to secure the note given for the loan, such company executed its mortgage deed of trust to Frank S. Quinn, as trustee for appellant, on a large acreage, including the land described above. Subsequent to the execution of the mortgage, the Southern States Realty Company conveyed to the Texarkana Trust Company all the lands it was holding for said trust company, including the land mortgaged to appellant. On January 1, 1914, A. B. Little of Texarkana was appointed receiver for the Texarkana Trust Company, to succeed James D. Head, and continued as such receiver until the year 1921, when the receivership was closed. On November 15, 1915,

Sewer Improvement District No. 17 of the city of Texarkana foreclosed its lien against said real estate for delinquent improvement taxes, and sold same to satisfy said lien, at which sale appellees became the purchaser, and later procured a tax deed for same. The land was assessed in the sewer district as an undivided one-half interest in lot 10, section 19, township 15 south, range 28 west, and the same description was maintained throughout the proceedings to enforce the lien for delinquent sewer taxes. Appellant was not made a party to the proceeding. In the month of July, 1917, after the sale and purchase of an undivided one-half interest in said 10-acre tract by appellees at the sewer tax sale, the several owners thereof entered into a partition agreement whereby the Texarkana Trust Company was to have the north five acres and appellees and W. H. Arnold the south five acres. Subsequently the partition agreement was reported to the Miller Chancery Court, and approved. Deeds were never delivered to the respective parties in accordance with their several interests, but the partition agreement was acquiesced in and acted upon by said parties. On the 11th day of August, 1917, the Texarkana Trust Company agreed to convey the lands mortgaged to appellant to secure the $10,000 loan to the Southern States Realty Company to her in settlement of the note and mortgage. The agreement was approved by the chancery court on November 19, 1917, and the receiver was ordered to make a deed to her for the lands. He complied with the order, and, instead of conveying her the undivided one-half interest of the Texarkana Trust Company in said 10-acre tract, he conveyed her the north half of said 10-acre tract, in keeping with the partition agreement made between the parties, and approved by the chancery court on September 19, 1917. The 10-acre tract is unimproved. Neither appellant nor appellee have ever had actual possession thereof.

We deem it unnecessary to more fully state the facts revealed by the record in order to determine the ownership of the north five acres of said ten-acre tract. Accord-

ing to the statement above, it will be observed that appellees, W. H. Arnold and the Texarkana Trust Company, owned the 10-acre tract as tenants in common prior to the purchase at the sewer tax sale by appellees of the undivided one-half interest therein of the Texarkana Trust Company.

Appellees claim to have acquired the undivided one-half interest of the Texarkana Trust Company in said 10-acre tract under the tax sale, and not otherwise. They contend that the sale was valid. Appellant contends that the sale was void upon several grounds, the chief one being that the assessment of benefits was assessed against an undivided one-half interest in the 10-acre tract instead of being assessed against the entire tract, or some particular part of same. Our interpretation of § § 5657 and 5667 of Crawford & Moses' Digest is that benefits must be assessed against each lot, block or parcel of land in an improvement district, and cannot be assessed against an undivided interest therein. An undivided interest is neither a lot, block, or parcel of land. The sewer tax sale was absolutely void, and no rights were or could be acquired therein by appellees as against their tenants in common or its grantee, the appellant herein. Section 5644 of Crawford & Moses' Digest, relative to redemptions from improvement district tax sales within five years, and § 6946 of said Digest, relative to redemptions from judicial sales within five years, have no application to sales which are absolutely void. Appellant is therefore not barred by either statute.

There is nothing in the record which calls for the application of the doctrine of laches.

Appellant has offered to refund all taxes, with interest, which appellees have paid on said land, so the decree will be reversed, and the cause remanded with directions to cancel the alleged sewer tax title and the record thereof, and to quiet the title to the north five acres of said ten-acre tract in appellant as against appellees, upon the payment of taxes and interest paid on said land by appellees.

WACASTER v. STATE.

Opinion delivered February 21, 1927.

1. CRIMINAL LAW—ARGUMENTATIVE INSTRUCTION.—In a prosecution for murder, refusal to give requested instructions which were argumentative and on the weight of the testimony was not error.
2. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Refusal to give an instruction which was covered by another instruction given was not error.
3. CRIMINAL LAW—INSTRUCTION AS TO PRESUMPTION OF INNOCENCE.—In a prosecution for murder, where the court correctly charged on the law relating to weighing the testimony, the presumption of innocence, and reasonable doubt, a requested instruction that, if any testimony in the case is susceptible of two constructions, one of guilt and one of innocence, the jury must give the construction of innocence, was properly refused where there was no attempt to prove defendant's guilt by inferences to be drawn from facts and circumstances established by testimony.
4. CRIMINAL LAW—INSTRUCTING JURY AFTER RETIREMENT.—Crawford & Moses' Dig., § 3192, providing the manner in which the jury shall acquire information on any point of law or of evidence after it has retired, *held* mandatory.
5. CRIMINAL LAW—INSTRUCTING JURY AFTER RETIREMENT.—In a prosecution for murder it was error, in view of Crawford & Moses' Dig., § 3192, for the court to give an additional instruction to the foreman of the jury in absence of defendant and his attorney, and such error was not cured by testimony of jurors that they had already reached a verdict of guilty before the instruction was given, such testimony being incompetent.

Appeal from Garland Circuit Court; *Earl Witt*, Judge; reversed.

STATEMENT BY THE COURT.

Lee Wacaster, appellant, was indicted, tried and convicted in the Garland Circuit Court for the crime of murder in the first degree for killing Tillman Brown, and his punishment fixed at life imprisonment in the penitentiary, and from this judgment prosecutes an appeal.

It appears from the testimony that there had been some previous trouble and fighting between the deceased, Tillman Brown, and threats made by him against appel-

lant, whose wife was Brown's stepsister; that, on the day of the killing, Brown and his wife had driven up to the front of Wacaster's house, and had been talking to Mrs. Wacaster for about twenty minutes when Wacaster came up from the rear in his car, stopped, and then started and drove off around the block, came back, and stopped his car behind Brown's and asked, as one witness said, "Tillman, who told you to come around here?" to which Brown replied, "I am in the street, ain't I, Lee?" Lee replied, "It don't make a damn bit of difference if you are, get out from here." Brown said, "It's a free street, and I don't intend to leave until I get ready." Wacaster then went into the house and called Mr. Floyd, a deputy sheriff, on the 'phone, and was heard to say, "There is a fellow out here in front of my place, and I have ordered him to leave, and he won't do it. What about it?" Witness then heard him say, "Well, if he don't leave, I will fix it so he will have to be carried out." Wacaster came out of the house, and said "Tillman, I said for you to leave," to which Brown replied, "I don't intend to leave. I didn't come up here for any trouble, but to talk to Florence" (Wacaster's wife). Mrs. Brown then said, "Let's go on," and Mrs. Wacaster said, "No. Don't go; he is just trying to pull one of his old bluffs." Wacaster told him to leave again, and Brown said, "I am in the street, and there is no son-of-a-bitch can make me move."

Wacaster then asked Mrs. Brown to get out, and told Tillman to leave again. Told Mrs. Brown to get out, for he would move him, if he didn't get out, with the car. He moved around inside the fence to where he could shoot without hitting her, and fired, and that's about all, as Mrs. Brown stated. She said her husband had one hand on the wheel and the other in his lap; that Brown was in his shirt-sleeves.

The deputy sheriff stated that Wacaster called him just before the trouble, Sunday afternoon, saying, "There was a man in front of his gate who refused to move," and wanted to know what to do about it. The

deputy replied, "Well, bring him on down." He didn't think there was any trouble. Wacaster said, "No, I don't want to have any trouble with him. The man is right in front of my gate." I said, "Well, you have a right to move him if he is on your property, but don't have any trouble." He replied, "Well, if he don't move, you will have to come and get him or me, or both of us." After a little the phone rang again, and Wacaster asked if we wanted him to come on down.

Other witnesses testified that they arrived on the scene while Brown's car was still standing, and that there was a bottle lying on the front seat under the steering wheel, and that the front wheels of the car were about four and a-half feet from the fence, with the back wheels a little further out in the street.

There was other testimony that Brown had said to a witness to whom he was talking when Wacaster passed, "There went a son-of-a-bitch I am going to get sooner or later." He said that Wacaster had been mistreating his wife. This witness repeated the threat to Wacaster.

Another, Miles Conway, stated that he had heard Brown say, on coming out of Wacaster's place of business some months before the killing, to Wacaster, "You son-of-a-bitch, I will kill you sooner or later." He was getting into his car at the time.

Another witness testified that, two or three years before, when he was at work for Wacaster, who had cut his hand, that Brown came and went into the house while witness was cleaning hogs in the yard, and came out with a gun in his hand, and said, "Lee is not here, but that's all right, I will kill the son-of-a-bitch sooner or later."

Two or three other witnesses testified about threats made by Brown against Wacaster. Brown said that if Lee Wacaster mistreated his wife he was going to kill him. Wacaster and his wife had had trouble.

Another witness heard Brown talking to Mrs. Wacaster on the 'phone, and heard Mrs. Wacaster say to him, "It is the same old thing over all the time, just fussing and raising hell all the time."

Defendant stated that he was not related to Brown. After he married, Tillman Brown's mother married Mrs. Wacaster's father; that he had trouble with Brown recently before the fatal encounter; that Brown had knocked him in the head when he came back from Colorado, with a piece of pipe he had thrown at him at the slaughter-house, because of the dispute over a right to use a slaughter-pen; that he had had trouble with him over at his, defendant's, blacksmith shop, when he had tried to make Brown stop fighting another man, and he jumped on him, swore that he would kill him, and went home after a gun. "About ten months before the killing he came to my slaughter-pen, and said, 'I understand you have been mistreating Florence again.' I said, 'No, I guess not.' He said, 'You God damn son-of-a-bitch, I am going to kill you; you are going to stop it.' And I said, 'It looks like you would attend to your own business.' And he said, 'I will get you, you son-of-a-bitch,' and he drove off when Mr. Conway came." He was then standing in the door of the slaughter-pen, with his right hand in his coat pocket. He later saw Brown on his front porch, talking with his wife, and when he drove up and saw that it was Brown, he drove on away. This was about a month before the killing. He didn't stop at that time because he had heard the threats Brown had made against him, and he didn't want any trouble. He had been told of Brown's threats by two or three different people; on the day of the killing, about three o'clock, he went by his house to get his saw and some orders. "Stopped when I saw Brown was there, and drove away around a block and a half, and returned in about ten minutes, driving slowly, thinking Brown would be gone before I got back." Said further: "I stopped my car, taking my gun off the seat and went into the yard and said, 'Tillman, who sent for you?' And he said, 'I am here.' I said, 'Well, I don't want you out here now; you get up and go on away from my place.' He said, 'I don't go nowhere; no son-of-a-bitch can't move me.' I said, 'I will call a man and have him come and move you.'

He said: 'You or no other son-of-a-bitch can't move me.' I went in and called the sheriff's office. I said: 'Is this you, Floyd?' and he said it was. I said: 'Floyd, there is a man out here at my place and he won't go away, I have had trouble with him.' He said: 'Who is it?' I said, 'Tillman Brown.' He said: 'You go out there and tell him to move; you have a perfect right to move him.' I said, 'I don't want to; I don't want any trouble.' He said, 'You go out and tell him to move.' I went out and said, 'Now, Tillman, go on away; I don't want you here.' Brown said: 'I don't go nowhere; no son-of-a-bitch can move me.' Now I said: 'Go on, you and your wife move on away from my place; you are not wanted here.' He said: 'You God damn son-of-a-bitch,' and grabbed with his right hand down in the seat, and I fired. I do not know from what position I fired. I do not know where I hit him. I did not get out of my car and tell him to move, and then go back and get my gun. I took my gun to protect myself from any attempt he might make against me, on account of the threats he had made. I saw something between him and his wife, and I thought it was a gun. It was on the seat between him and his wife. I did not change my position, nor did I say, 'Move, woman.' I said for them to move. Mrs. Brown was never in the range of fire. It was never necessary for her to move. I shot him because I thought it was to shoot or be killed myself. I did not at that time intend to kill him. My wife and myself had been having trouble. My wife has had Tillman Brown to protect her. * * * I never at any time raised a difficulty with Tillman Brown. I have tried to stay out of trouble with him. I have avoided him, and have left my own home and have passed my own home when he would be there, and leave him there."

Denied on cross-examination that he had become violent in his own home within the last year, "but my wife and two of her sisters got a gun there, and she said if Brown didn't kill me she would." Stated that he had carried the shotgun for several years, ever since he had

been knocked in the head at the park. Denied that he had ever told any one that he was going to kill Brown, and said that he never went anywhere with the shotgun looking for it; that he had never attended a family reunion where Tillman Brown was, and had never had anything to do with him. After he talked with the deputy sheriff, he went out to tell him, Brown, to go, and "my intention was, if he didn't go, to go back and tell the sheriff, and when he made the break I thought that was my only chance. As the car was up next to my fence, I saw something in the seat, thought it was a gun, and when Brown said, 'You son-of-a-bitch,' and grabbed down, I fired."

Marion Cook stated he heard the gun fire, and ran over, and Wacaster got in his car and said to him he was being imposed on, or couldn't be imposed on any longer. "I asked him what he did it for, and he said he was tired of being imposed on by him, and he couldn't stand it any longer."

The court instructed the jury, refusing to give appellant's requested instructions numbered B and F, which refusal was made grounds of the motion for a new trial as well as complaint of error, because the court, after the jury had retired, permitted the jury to take the written instructions in the jury room, and especially because the instructions on reasonable doubt and presumption of innocence had not been written and were not included therein.

Complaint was made, further, of the court having instructed the foreman of the jury out in the hallway, in front of the room where they were considering the case, in the absence of appellant and his counsel. The bill of exceptions also recites:

"On the 6th day of November, 1926, the court made the following further statement: 'I will just make this statement then, that it was either at the time when the jury had requested the written instructions or I had gone to see as to whether or not they were making any progress toward a verdict; at any rate, I remember Mr. Kyle (the foreman of the jury) asked me something

about the likelihood of a parole in the case, and I told him that was a matter the jurors shouldn't consider at all in arriving at their verdict; that the likelihood of a parole was outside of their consideration of the case, and they shouldn't let that weigh with them at all, and I told him at that time to mention that fact to the jurors, that they shouldn't take into consideration the likelihood of pardon in the case at all, because it wasn't a matter for them to determine; just fix the punishment, whatever it was, or what they thought should be fixed." The court further said, "I don't think the defendant was there at the time, or his attorneys."

Cobb & Cobb and *Witt & Witt,* for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

KIRBY, J., (after stating the facts). No error was committed by the trial court in refusing appellant's prayer for instructions numbered B and F, 4 and 23. Instructions B and F were argumentative, and, in effect, amounted to instructions upon the weight of the testimony, telling the jury what importance should be attached to the evidence or lack of evidence, which this court has said should not be done. *Bullard* v. *State,* 159 Ark. 435. Moreover, these instructions were fully covered by instructions numbered 16, 17, 18, 22 and 23, given by the court.

Instruction No. 4, refused, was likewise fully covered by instruction No. 20, correctly given by the court upon its own motion, and it was unnecessary to give more than one instruction of the law applicable to the particular facts. *Housely* v. *State,* 143 Ark. 425, 252 S. W. 584.

Neither was error committed in refusing to give requested instruction numbered 23, telling the jury "if any of the testimony in the case is susceptible of two constructions, one of guilt and one of innocence, then it is your duty to give it the construction of innocence." The court correctly instructed the jury on the law relating to weighing the testimony, the presumption of innocence and the question of reasonable doubt, and there was

no attempt to prove the guilt of defendant by inferences to be drawn from facts and circumstances established by the testimony. *DeShazo* v. *State,* 120 Ark. 494, 179 S. W. 1012; *Cooper* v. *State,* 145 Ark. 403, 406, 224 S. W. 226; *Wawak and Vaught* v. *State,* 170 Ark. 329, 279 S. W. 997.

Relative to the assignment that error was committed by the trial court in permitting the instructions, two oral instructions not transcribed, not included, sent to the jury room without the consent of appellant or his counsel, it will suffice to say that, since the case is to be reversed on another point or assignment of error, and remanded for a new trial, at which no such ground for objection is likely to occur, we do not find it necessary to pass upon it now.

This court has concluded, however, that error that calls for reversal of the judgment was committed by the trial court in his conversation with, or instruction to, the foreman of the jury in the hall outside of the jury room, and away from the presence of defendant and his attorneys. The court, in explanation of this incident as set out in the statement, said:

"I told him, in answer to his inquiry, that the likelihood of a parole was outside of their consideration of the case, and they should not let that weigh with them at all, and I told him at that time to mention that fact to the jurors, that they shouldn't take into consideration the likelihood of pardon in the case at all, because it wasn't a matter for them to determine. Just fix the punishment, whatever it was, or what they thought should be fixed."

Section 3192, Crawford & Moses' Digest, provides how a jury, after it has retired for deliberation, shall acquire information on any point of law or about any part of the evidence, if there is disagreement, that they must require the officer to conduct them into court, where the information required must be given in the presence of, or after notice to, the counsel of the parties. Its provisions are mandatory. The jury might well have con-

cluded that this instruction was an expression of the court's opinion upon the weight of the testimony and the guilt or innocence of the defendant by his saying, "Just fix the punishment, whatever it was, or what they thought should be fixed."

In *Wawak and Vaught* v. *State,* 170 Ark. 329, the court said: "It is, of course, not only improper, but is error calling for the reversal of the judgment, for the court to communicate with the jury, in the absence of the defendant, any directions in regard to their verdict. *Hinson* v. *State,* 133 Ark. 149; *Pearson* v. *State,* 119 Ark. 152." Neither could its harmful effect be relieved against by the testimony of the jurors, after the verdict was rendered, that they had already reached a verdict of guilty before the communication or instruction was received, since the jury had the right to consider or reconsider the question of guilt until the delivery of the verdict, and the jurors are not permitted to testify about such matters, anyway." *Kindrix* v. *State,* 138 Ark. 594, 212 S. W. 84.

For the error designated the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

MUTUAL RELIEF ASSOCIATION. *v.* WEATHERLY.

Opinion delivered February 21, 1927.

1. INSURANCE—LIABILITY UNDER BENEFIT CERTIFICATE.—Provisions in mutual benefit certificates that the association will pay a certain amount upon the condition that one assessment on the members of the circle or group in which said member is placed shall produce such amount, less the cost of collection, are valid and binding.
2. INSURANCE—LIABILITY UNDER BENEFIT CERTIFICATE—BURDEN OF PROOF.—Where a mutual benefit association obligated itself to pay a certain amount on assured's death if an assessment on its members produced same, the burden is on the association to show the amount produced by such assessment.
3. EVIDENCE—WITHHOLDING EVIDENCE—PRESUMPTION.—Where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce

it, and, without satisfactory explanation, he fails to do so, the jury may draw an inference that it would be unfavorable to him.

4. INSURANCE—LIABILITY UNDER BENEFIT CERTIFICATE.—Under a benefit certificate limiting an association's liability to the amount produced by one assessment on the members of the assured's circle, less the cost of collecting it, it is immaterial whether the amount came in before or after the 30 days allowed for collecting it.

5. APPEAL AND ERROR—QUESTIONS NOT RAISED BELOW.—Attorney's fees and damages in an insurance case, for which no claim was made in the court below, will not be allowed on appeal.

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

John P. Roberts and *Carmichael & Hendricks*, for appellant.

Evans & Evans, for appellee.

MEHAFFY, J. The appellant is a mutual benefit association, organized in 1913, and issues policies or benefit certificates to its members, and they are divided into groups or circles. The appellees were members and certificate-holders, and the certificates entitled them to $500 each, but the promise to pay $500 was upon the condition that prompt and due payments be made by the certificate-holders of all assessments made under the rulings of the company.

There is no controversy as to the certificate-holders, parties to this suit, having paid their dues, and there is no controversy about liability. The appellant contends, however, that it is only liable in one case for approximately $208 and in the other something like $285, and contends that the policy or certificate entitles the member to collect $500 only in the event that one assessment on the members of the circle or group in which said member may be placed, less the cost of collecting said assessment, equals the $500. The contention is that the company is liable for the assessments collected in that particular group or circle, and, if that amounts to $500, after deducting the cost of collecting the assessments, then the beneficiary will be paid $500. If it amounts to less than $500,

then the beneficiary under the certificate is entitled to the amount collected less the cost of collecting.

This court has several times held that provisions like this in the policy or certificate are valid and binding, and, in a case not long since, the court said:

"The by-laws provide that the maximum amount of the benefit is to be the sum of one thousand dollars, and that the value of a benefit certificate shall be 'contingent on the full and prompt payment of all assessments by the members of the class to which the applicant belongs, and in no event shall said certificate have a greater intrinsic value than the amount paid in by the whole membership of said class on the last assessment, after deducting the actual cost of collecting said assessments.' * * * The undisputed testimony is that the amount of the last assessment preceding the death of Tate was $475, and this is the limit of the amount recoverable on this certificate." *Fayetteville Mutual Benefit Assn.* v. *Tate,* 164 Ark. 317, 261 S. W. 634.

Again this court has said, in deciding a case similar to this: "We are of the opinion, however, that the judgment is excessive, and that, according to the undisputed evidence, appellee is only entitled to recover $124.40, 'the amount paid in by the whole membership of said group on the last assessment preceding the death of the insured.'" *Home Mutual Benefit Assn.* v. *Rowland,* 155 Ark. 450, 244 S. W. 719, 28 A. L. R. 86.

Under the decisions of this court, the company in this case would have been liable to the beneficiaries under these certificates for the amounts collected from the assessments, less the cost of collection. The only person, however, who could show what had been collected on this assessment was the company itself, or its officers. It is contended that, in one group, there were only 499 members, if that many, and that the assessment therefore could not have produced as much as $500. Appellant's counsel, however, apparently overlooked the fact that the minimum assessment was $1, and the maximum assessment $1.40. It is conceivable that the assessment might have exceeded $500,

after deducting the cost of the collection, and the bookkeeper testified that, in this particular group, they had at least 499, unless some of them had lapsed, and that the record the witness testified from did not show any lapses. She also testified that the smallest assessment was $1, and from that graduated up 2 cents a month, and that this was true also of the other group. She testified also that the records show the total amount received from the assessment made on the death of Mr. Weatherly was $218.41, that the cost of collecting was $10, leaving a balance of $208.41, and this is the amount the company admits it owes under this particular certificate, and under the other certificate the assessment amounted to $303.91. The assessment was evidently properly made, at any rate there is no contention that this was not done, and the assessments were collected, and it appeared that the $208 and $285, approximately, were the amounts received within 30 days after the assessment was made, and that sometimes there would be quite a little money come in from the assessment after the 30 days expired. There is no attempt to show how much came in from the assessment after the 30 days had expired. Neither the secretary nor the officers of the company testified, and, when the court directed them to bring in their daily records, the witness stated they could not go through all that, they would have to go through each book, and the daily records were never brought in. The officers of the company had in their possession the records that would have shown the exact amount of the collections from each assessment. No one else was in possession of these facts; and, if the company did not want to be held liable for the $500, it was its duty to produce the evidence and thereby show the exact amount each beneficiary was entitled to.

This court has said: "As to the burden of proving the amount realized, or which could have been realized, by an assessment levied according to the terms of the contract sued on, the authorities are not agreed. We are of the opinion that, where the party suing on such contracts is entitled to recover, the society or association

which agrees to make the assessment upon its members, and to pay the amount realized, not exceeding a certain amount, to the beneficiaries named in the contract, is *prima facie* bound to pay the maximum amount of its liability, as specified in the contract, and the burden is on the society to prove that a less amount would have been realized by an assessment." It would be difficult, if not impossible, for the beneficiaries in such contracts, or their representatives, to show the number of the assessable members of the society and the amount that could be realized by an assessment upon them. These are facts within the peculiar knowledge of the society." *Masons' Fraternal Accident Assn.* v. *Riley*, 65 Ark. 261.

In the case at bar the bookkeeper alone was called to testify. The daily records, and in fact all the records that would have thrown light upon the question, were in the possession of the association, and not only was the burden of proof on them to show the amount realized on the assessment, but the duty is always upon a party having in his possession evidence or documents that will prove or disprove his claim, to produce the documents, or, if he can and does not produce them, the presumption is that they would not be favorable to his contention.

"And so it has become a well-established rule that, where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation, he fails to do so, the jury may draw an inference that it would be unfavorable to him." 10 R. C. L. 884.

The association had in its possession not only the records that would show the assessment made and collected after the death of the assured, but also had the records in its possession that would show the amount of the last assessment prior to the death of the assured. In this case it is unimportant to determine whether the beneficiary should receive the amount of the last assessment prior to the death of the assured, or the amount received from the assessment made subsequent to his death, because the association does not show the amount of

either, and, as the burden of proof was upon the association to show the amount realized from the assessment and did not do so, the beneficiary is entitled to recover the sum named in the certificate. While the testimony showed that $500 was not realized from the assessment within 30 days, it does not show how much money came in after the 30 days. Witness says that the money that comes in after the end of the month is put in a reserve fund to be paid out in cases where no assessment is made, but the benefit certificate provided for the payment of $500, provided that the liability of the association shall in no event exceed the amount produced by one assessment on the members of the circle in which said member may be placed, less the cost of collecting said assessment. That means the whole amount produced by one assessment, less the cost of collection, and it would be immaterial whether it came in before or after 30 days, and, since there no proof by the association showing the amount produced by the assessment, it is liable for the $500, the amount named in the certificate.

We think in this case the same principle, with reference to producing evidence, applies to the sureties on the bond. They could have produced evidence showing the amount of the assessment and the amount of the liability, but did not do so. No claim for attorney's fees or damages was made in the court below, and for that reason none will be allowed here. The evidence is ample to support the finding of the court, and the judgment is affirmed.

BROWNE-HINTON WHOLESALE GROCERY COMPANY v. GRUBBS.

Opinion delivered February 21, 1927.

DISMISSAL AND NONSUIT—REINSTATEMENT—PROCEDURE.—Crawford & Moses' Dig., § 6448, providing that a cause dismissed by a justice of the peace for want of prosecution may be reinstated by the justice under certain conditions, creates an exclusive remedy, and is applicable to the municipal court of Fort Smith, under Acts 1921, p. 259, § 7, and failure to observe such conditions will preclude plaintiff from prosecuting another suit based on the same cause of action.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; affirmed.

W. L. Curtis, for appellant.

Cravens & Cravens, for appellee.

McHANEY, J. The appellant sued appellee in the municipal court of Fort Smith, on June 4, 1925, for $173.95 on open account. Summons was issued and served on that date, and made returnable June 15, 1925. On the return day appellee appeared in person and by attorney, but appellant failed to appear either in person or by attorney, and the cause of action was dismissed by the court, on the motion of appellee, for failure to prosecute.

On the same day, June 15, appellant refiled its suit, based on the same cause of action on which summons was issued and served on said date, and made returnable June 25, 1925. On June 25 the case was continued to June 30, and tried on the latter date, resulting in a judgment for appellant in the sum of $168.43 with interest and costs.

Appellee appealed to the circuit court, and, on October 9, 1925, moved the court to dismiss appellant's cause of action, which motion was granted "for the reason that plaintiff (appellant) did not comply with § 6448 of Crawford & Moses' Digest of the statutes of the State of Arkansas before instituting in the municipal court of the city of Fort Smith, Arkansas, a second suit on the same cause of action, the first suit having been dismissed on motion of the defendant for failure to prosecute." From which comes this appeal.

The only question for decision by this court is whether a plaintiff who files a suit before a justice of the peace, or a municipal court with the jurisdiction of a justice of the peace, such as the municipal court of Fort Smith, and suffers a dismissal of such suit for failure to prosecute, may refile or institute and prosecute another suit on the same cause of action and ignore § 6448 of Crawford & Moses' Digest. We hold that he cannot.

Section 6448 reads as follows: "Judgment of dismissal for want of prosecution or judgment by default

may be set aside by the justice at any time within ten days after being rendered, if the party applying therefor can show a satisfactory excuse for his default, and a meritorious cause of action or a meritorious defense, whereupon a new day shall be fixed for trial, and notice given to the opposite party; and any execution which may in the meantime have been issued shall be recalled in the same manner as in cases of appeal, and the cause shall proceed to trial as though no such judgment had been taken."

The record in this case shows that appellant's cause of action was dismissed in the municipal court for failure to prosecute; that it had notice of such dismissal is conclusively shown from the fact that, on the same day, it reinstituted its cause of action in the same court, without making any attempt to have the judgment of dismissal set aside, nor did it attempt to comply in any way with the provisions of said § 6448. In order to have complied with said section, and to have been entitled to reinstatement of his cause of action, the appellant would have been required, (1) to make an application to the municipal court, within ten days after the dismissal, to have the same set aside; (2) to show a satisfactory excuse for his default; and (3) a meritorious cause of action.

The municipal court of Fort Smith was created by act 203 of the General Acts of 1921 (Acts 1921, page 259), and § 7 thereof makes all provisions of the general law applying to justices of the peace and not inconsistent with the act applicable to that court. Therefore § 6448 is applicable to the municipal court of Fort Smith.

In the case of *Carroll* v. *Texport Oil Company,* 148 Ark. 18, 228 S. W. 290, this court, in construing this section of the Digest, used the following language:

"This § 6448, under which appellee proceeded, is a special statutory proceeding. It was not intended to deprive one of his right to have a judgment set aside as having been obtained by fraud, nor was it intended to affect one's right of appeal. It was designed to afford relief to the litigant whose suit was dismissed for want of prosecution or against whom a judgment by default

had been taken where the litigant could show a satisfactory excuse for his delay and that he had a meritorious cause of action or defense. But this relief can be granted only where the litigant proceeds within the time limited by law, to-wit, ten days after the rendition of the judgment. This means that the party must file his motion and invoke the order of the court thereon within ten days."

The remedy provided by this section of the statute is therefore exclusive, and the appellant, by failure to follow the remedy provided by the statute, is precluded from prosecuting another suit based upon the same cause of action.

It follows that the judgment of the circuit court must be affirmed, and it is so ordered.

BANK OF COMMERCE *v.* HUDDLESTON.

Opinion delivered February 28, 1927.

1. MUNICIPAL CORPORATIONS—CREATION OF IMPROVEMENT DISTRICTS.—Improvement districts may be created in a city or town for the purpose of constructing waterworks and electric lights, and such districts may embrace the entire area of the city or town.
2. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—MUNICIPAL AID.—Where an improvement district embracing the entire area of a city is created for the purpose of constructing waterworks and an electric light system, such districts are not "private enterprises," within Const., art 12, § 5, prohibiting cities and towns from loaning their money or credit in aid of private enterprises.
3. MUNICIPAL CORPORATIONS—AIDING PUBLIC IMPROVEMENT.—Where an improvement district was created, under Sp. Laws 1911, p. 375, for construction of waterworks and electric lights, and the amount realized from bonds authorized by such act was insufficient, the issuance of warrants by the city to complete the construction *held* not to violate art. 12, §. 5, of the Constitution, prohibiting the use of public money for private enterprises.
4. MUNICIPAL CORPORATIONS.—Power to construct water and light systems for municipal and domestic purposes may be conferred by the Legislature on municipalities, as was done by Crawford & Moses' Dig., §§ 7564-5.

5. MUNICIPAL CORPORATIONS—CONDUCT OF WATER AND LIGHT BUSINESS.—As incident to the power to construct and maintain waterworks and a light system, a city or town may carry on the various businesses in which such public utilities are usually engaged, and may create a debt for that purpose.

6. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT.—The erection and maintenance of a system of waterworks and electric lights constitute a public improvement which may be constructed by local assessments on real property specially benefited.

7. MUNICIPAL CORPORATIONS—CONTRIBUTION TO PUBLIC IMPROVEMENT.—Where the general public shares to a greater or less extent in the benefits of a system of waterworks and electric lights, a city or town may contribute money to aid in the construction of such improvement, without violating the prohibition of Const., art. 16, § 1, against loaning its credit for any purpose whatever.

8. MUNICIPAL CORPORATION—ILLEGAL WARRANTS—ESTOPPEL.—Where a municipal corporation issued its warrants in aid of a public improvement and thereby received the benefit of the completion of such improvement, it will be estopped to assert that the warrants were illegally issued, because the yeas and nays were not called and recorded.

9. MUNICIPAL CORPORATIONS—INTEREST ON WARRANTS.—Where a city issued warrants to complete the construction of waterworks and an electric light system after the proceeds from the sale of bonds, authorized under Special Laws 1911, p. 395, § 39, were found to be insufficient, the holder of such warrants could not collect interest on same, in view of Const., art. 16, § 1, forbidding the issuance by cities and towns of interest-bearing evidences of indebtedness.

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

STATEMENT OF FACTS.

Ed Huddleston and others, owners of real property in the city of McGehee, brought this suit in equity against the city of McGehee and the officers thereof, the Bank of Commerce of the city of McGehee, and the McGehee Water and Light District, to enjoin the defendants from collecting any taxes from inhabitants of the city of McGehee to apply towards the payment of certain city warrants which were issued for the purpose of paying, in part, the cost of water and light plants which were constructed by the commissioners of an improvement district created for that purpose.

The suit was defended on the ground that the warrants were legally issued and that the Bank of Commerce is a *bona fide* owner thereof for value.

The facts, so far as they are necessary for a determination of the issues raised by the appeal, may be briefly stated as follows:

The Legislature of 1911 passed a special act to create an improvement district within the corporate limits of the town of McGehee for the purpose of providing, constructing and maintaining a system of waterworks and electric lights for the town of McGehee. Acts 1911, p. 375. Section 1 provides that all real property within the corporate limits of the town of McGehee, Desha County, Arkansas, be created into an improvement district to be known as the McGehee Water and Light District. Section 12 provides that the board of commissioners be authorized to maintain and operate the plant after completion. The section further provides, first, for the payment of the indebtedness of the district, and then that the surplus shall be paid to the treasurer of the town of McGehee to be used and expended by it as any other of its revenues. Section 18 provides for the payment of the assessment of benefits in annual installments, and contains a proviso that no improvement shall be undertaken under the act which shall exceed in cost twenty per cent. of the value of the real property in such district, as shown by the last county assessment. Section 33 provides for additional assessments, if necessary, and also contains a proviso that the sum of all assessments levied by the board from year to year shall not exceed twenty per cent. of the value of the real property of the district. Section 39 provides that, for the purpose of constructing and maintaining a system of waterworks and electric lights, the board of commissioners may issue bonds not exceeding the sum of $30,000.

The board of commissioners issued bonds to the amount of $30,000 for the purpose of constructing a system of waterworks and electric lights, as provided by the act. It was ascertained that this sum of money was not

sufficient to carry out the purpose of the act. The city council of the town of McGehee then issued city warrants in the sum of $16,520 for the purpose of paying the McGehee Valley Bank the money which it advanced for the purpose of completing the water and light system. This was on March 31, 1913. The yeas and nays were not called when the vote on the resolution adopted by the city council authorizing the issuance of these warrants was passed. Warrants were reissued from time to time for the face value of the original warrants and the accumulated interest. It is stipulated that the amount of warrants now held, principal and interest, is $28,700, and all the warrants are dated January 2, 1922. The McGehee Valley Bank became insolvent, and its assets were taken over by the Bank of Commerce of McGehee, which was organized for that purpose. At various times the city paid toward liquidation of these warrants the sum of $5,500, and there remains due and unpaid the sum of $11,020 as the principal of said warrants. The balance of the $28,700 is for the accumulated interest.

The chancellor was of the opinion that the act of the city of McGehee in issuing said warrants, under the circumstances above stated, was *ultra vires,* and therefore void. A permanent injunction was issued in favor of the plaintiffs against the defendants, under the terms of which the Bank of Commerce was directed to file the warrants with the clerk of the chancery court to be canceled, and said bank was permanently enjoined from collecting any part of the indebtedness evidenced by said warrants. It was also decreed that the city of McGehee and the board of commissioners of the McGehee Water and Light District be permanently enjoined from paying any portion of the indebtedness evidenced by said warrants. To reverse that decree the Bank of Commerce of McGehee has duly prosecuted an appeal to this court.

E. E. Hopson and *Robinson, House & Moses,* for appellant.

Williamson & Williamson, for appellee.

HART, C. J., (after stating the facts). As we have already seen, by special act of the Legislature, an improvement district comprising the whole of the territory of the town of McGehee was created by the Legislature of 1911, for the purpose of constructing and maintaining a system of waterworks and electric lights for said town. For the purpose of constructing the improvement the commissioners of the district were authorized to issue bonds not to exceed $30,000. It was found that the commissioners could not complete the improvement for that amount, and McGehee, which had become a city of the second class in 1913, issued city warrants in the sum of $16,520 for the purpose of completing the improvement. The McGehee Valley Bank advanced the money and the warrants were turned over to it. The Bank of Commerce succeeded to the assets of the McGehee Valley Bank and became the owner of the warrants.

It is sought to uphold the decree holding the warrants to be invalid, on the ground that their issuance was in violation of the provisions of art. 12, § 5, of our Constitution, which reads as follows: "No county, city, town or other municipal corporation shall become a stockholder in any company, association or corporation, or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual."

Under this section of our Constitution, public money or the public revenue cannot be used or pledged in aid of private enterprises. In no case originated by individuals, whether associated or not, or by private corporations with a view to gain, can municipal corporations participate in such manner as to incur pecuniary expense or liability. Municipal corporations may not become stockholders or furnish money or credit for the benefit of private enterprises. The object of the provision in the Constitution was to prevent municipal corporations from engaging in enterprises foreign to the purpose for which they were organized and assuming liabilities not within the compass of the usual and necessary powers of cities and towns. The question of the power of municipal cor-

porations to subscribe for or to loan its credit in the form of bonds in aid of railroad companies had been the subject of much litigation in other States, and the framers of the Constitution enacted the section in question for the purpose of settling the question. *Russell* v. *Tate,* 52 Ark. 541, 13 S. W. 130; *Newport* v. *Railway Co.,* 58 Ark. 270, 24 S. W. 427; and *Luxora* v. *J. L. C. & E. Rd. Co.,* 83 Ark. 275, 103 S. W. 605.

In this State, improvement districts may be created in a city or town for the purpose of constructing waterworks and electric lights, and such districts may embrace the entire area of the city or town. *Crane* v. *Siloam Springs,* 67 Ark 30, 55 S. W. 955; and *Wilson* v. *Blanks,* 95 Ark. 496, 130 S. W. 517. The cost of the improvement is obtained by means of special assessments levied upon the real property within the limit of the district, and the commissioners thereof are charged with a public duty; and such districts are in no sense private enterprises. In *McDonnell* v. *Imp. Dist. No. 145 Little Rock,* 97 Ark. 334, 133 S. W. 1126, under a statute providing that no single improvement shall be undertaken which alone will exceed in cost twenty per cent. of the value of the real property in such district, it was held that the regulation was intended only to apply to the amount which could be assessed against the real property in the district and was not intended to limit the total cost of the improvement, where contributions from the city and county reduce the cost of the improvement within the specified percentage of the valuation of the realty within the district. It is evident that this holding would not have been made by the court if it had considered that the contribution made by the city or county contravened the clause of our Constitution above referred to. If the contribution, under the circumstances, had been a violation of the Constitution, it would have been illegal, and it could not have had the effect of reducing the cost of the improvement within the limits provided by the statute. If such a contribution could be made directly by an appropriation of money, it could be made by the issuance

of warrants, which would be nothing more than a direction to the city treasurer to pay the amount of money specified in the warrants to the holder thereof. Therefore we are of the opinion that the issuance of the warrants in question was not in violation of art. 12, § 5, of our Constitution.

It is next contended that their issuance was in violation of art. 16, § 1, of our Constitution, which reads as follows: "Neither the State nor city, county, town or other municipality in this State shall ever loan its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the present existing indebtedness, and the State shall never issue any interest-bearing treasury warrants or scrip."

We do not agree with counsel in this contention. As we have already seen, cities and towns may be organized under our statute for the purpose of constructing a system of waterworks and electric lights, and the whole area of the city or town may be embraced within the boundaries of such district.

Again, it is well settled that a system of waterworks and electric lights may be constructed by cities and towns themselves and paid for by general taxes. The power of constructing waterworks and lighting the streets and other public places of cities and towns by electricity is conferred by statute. Crawford & Moses' Digest, §§ 7564-7565. Water and light are essential to the welfare of a city or compactly settled municipality. Therefore the power to construct and maintain a system of waterworks and electric lights for municipal and domestic purposes may be conferred by the Legislature upon such municipalities. 2 Dillon on Municipal Corporations, 5th ed., § 1296; and 4 McQuillin on Municipal Corporations, §§ 1781-85.

The general purpose of conferring upon municipal corporations power of the legislative and administrative

functions of the State was to enable them to provide for water, light and other conveniences necessary to the health and comfort of the inhabitants; and, as an incident to the power conferred, the municipalities themselves may carry on the various businesses in which such public utilities are usually engaged. When the city is authorized to construct waterworks and electric lights, it may necessarily create a debt for that purpose. Such a use of the corporate credit is for a public purpose, and is not the loan of the credit of the municipality.

There is nothing in the transaction in question which contravenes art. 16, § 1, of the Constitution. The city of McGehee, in effect, expended the amount of money evidenced by the warrants issued by it to help build a system of waterworks and electric lights, which were being constructed under an improvement district legally organized under the statute. The city did not thereby loan its credit or become security, directly or indirectly, for any person or corporation, or for any purpose. It simply stipulated that it would pay a certain part of the cost of construction of a system of waterworks and electric lights, which were being constructed by a public agency and not by a private corporation or association of individuals. The issuance of the warrants was for a public purpose, and not in aid of any private enterprise. The city did not loan its credit for any purpose, within the meaning of the Constitution. It merely contributed a part of its public revenue for a public purpose. It will be noted that the statute in question provides that the system of waterworks and electric lights may ultimately become the absolute property of the city. The statute directs that the revenues derived from supplying water and light to the inhabitants of the city shall first be appropriated to the payment of the cost of constructing and maintaining the system. A sinking fund is provided, and the unexpended revenue derived from the operation of the waterworks and electric lights is then placed in the city treasury, to be expended in the same manner as the general revenue of the city.

In *Town of Klamath Falls* v. *Sachs*, 35 Ore. 325, 57 Pac. 329, the Supreme Court of Oregon held that, under a statute authorizing a municipal corporation to furnish itself with a water system, it may enter into an executory contract looking to the acquirement of a water system, even though it does not become the present absolute owner.

The principle was also recognized in *Forrest City* v. *Bank of Forrest City,* 116 Ark. 377, 172 S. W. 1148, in which it was held that a municipal corporation has the right to borrow money to purchase necessary machinery for constructing and taking care of its water supply, and to pay the cost of moving its pumping station, and will be liable to the lender on notes given for the money so borrowed.

The erection and maintenance of a system of waterworks and electric lights constitute a public improvement which may be constructed by local assessments on the real property specially benefited. It may also happen that the general public shares to a greater or less extent in the benefits, and, when that happens, the city may contribute towards the construction of the improvement. *McDonnell* v. *Imp. Dist. No. 145, Little Rock,* 97 Ark. 334, 133 S. W. 1126; *Dean* v. *Moore,* 112 Ark. 254, 165 S. W. 639; and *Mullins* v. *City of Little Rock,* 131 Ark. 59, 198 S. W. 262. These cases hold that public funds of a city may be contributed by the city in order to complete a public improvement which has been constructed in part by the commissioners of an improvement district. This is practically what was done in the case at bar, and we are of the opinion that the transaction, when considered according to its substance, does not contravene art. 16, § 1, of our Constitution.

It is next insisted that the resolution authorizing the issuance of the warrants was not passed in the manner prescribed by the statute, because the yeas and nays were not called and recorded. As we have already seen, it was within the power of the municipality to issue the warrants and to receive the benefits of the transaction

in the completion of the public improvement. Under these circumstances it is estopped from asserting that the warrants were not legally issued. *Forrest City* v. *Orgill,* 87 Ark. 389; and *Natural Gas & Fuel Co.* v. *Norphlet Gas & Fuel Co.,* 173 Ark.——, and cases cited.

It is next contended that, in any event, the collection of interest on the warrants cannot be had. In this contention we think counsel are correct. Article 16, § 1, of the Constitution in plain language provides that no county, city or municipality shall ever issue any interest-bearing evidences of indebtedness except in certain cases, which do not affect the case at bar. In the consideration of this provision of the Constitution, in *Forrest City* v. *Bank of Forrest City,* 116 Ark. 377, 172 S. W. 1148, it was held that, where a municipal corporation borrowed money for a purpose authorized by statute, and gave an interest-bearing note therefor, the provision in the note calling for the payment of interest is in excess of the authority of the city council, and may be regarded as surplusage. See also *Gould* v. *Davis,* 133 Ark. 90, 202 S. W. 37, and cases cited.

The result of our views is that the holder of the city warrants in question is not entitled to collect interest on the warrants, but is entitled to the face value of the warrants themselves, which the evidence shows to be $11,020. It follows that the decree will be reversed, and the cause will be remanded with directions to the chancery court to enter a decree in accordance with this opinion, and for further proceedings in accordance with the principles of equity.

VANHOOSE v. YINGLING.

Opinion delivered February 28, 1927.

1. OFFICERS—ELIGIBILITY—PAYMENT OF POLL TAX.—Payment of a poll tax is essential to constitute one an "elector" so as to be eligible to hold office, under Const., art. 19, § 3, and Amdt. 6, unless he became of age after the time for assessing the poll tax.
2. MANDAMUS—CONTROL OF OFFICER'S DISCRETION.—The prosecuting attorney may be compelled by mandamus to institute ouster proceedings against one who usurps a county office, under Crawford & Moses' Dig., § 10327, only where honest judgment, intelligently exercised, can lead to one conclusion only—that the officer is ineligible—in which case there is no discretion.
3. MANDAMUS—OUSTER PROCEEDING—DISCRETION OF PROSECUTING ATTORNEY.—The prosecuting attorney cannot be compelled by mandamus to institute ouster proceedings against one holding the sheriff's office, under Crawford & Moses' Dig., § 10327, for failure to pay his poll tax, though such sheriff was not assessed by the assessor, and his name was placed on the tax-books after they were delivered to the collector, since, in absence of proof to the contrary, he may have paid his poll tax under an assessment pursuant to § 3738, *Id.*

Appeal from Woodruff Circuit Court, Central District; *E. D. Robertson*, Judge; affirmed.

Avery M. Blount, for appellant.

J. F. Summers and *Ross Mathis*, for appellee.

SMITH, J. This is a proceeding by certain citizens and taxpayers of Woodruff County to mandamus the prosecuting attorney of the district of which Woodruff County is a part to institute proceedings to oust A. C. McGregor, the sheriff of that county, from office, upon the ground that the incumbent was ineligible to hold it.

The complaint recites the evidences submitted to the prosecuting attorney tending to show that McGregor was ineligible to hold the sheriff's office. These included a certificate of the tax assessor to the effect that McGregor had not been assessed by him. Another instrument filed with the prosecuting attorney was a certificate showing a list of names of persons added to the taxbooks who had paid poll taxes. McGregor's name was included in the list, and attached to this list was the following certificate

of the clerk of the county court: "I, Bill Rives, clerk of the county and probate court and ex-officio recorder in and for the county and State aforesaid, do hereby certify that the above named parties shown to have been added to the personal taxbooks for the year 1923, after said taxbooks had been delivered to the sheriff of Woodruff County for the collection of taxes for the year 1923."

A demurrer to the complaint was sustained, and it was dismissed, and this appeal is prosecuted to review that judgment.

Payment of a poll tax is essential to constitute one an elector, unless he came of age after the time for assessing a poll tax. And one must be an elector to be eligible to hold a county office. Amendment No. 6 to the Constitution.

It is the duty of the prosecuting attorney to institute suit against one who usurps a county office. Section 10327, C. & M. Digest; *State* v. *Tyson,* 161 Ark. 42, 255 S. W. 289.

For the affirmance of the judgment of the court below it is insisted that the duty to institute an appropriate action against the usurper of a county office rests upon the prosecuting attorney, and that he has a discretion to determine when such an action shall be brought, and that this discretion will not be controlled by mandamus.

It is the law that, when a public officer has a discretion as to the circumstances under which he will exercise an official function, this discretion cannot be controlled by mandamus; but, if his duty is plain and certain, no discretion abides, and, if he refuses to discharge that duty, he may be compelled by mandamus to act. *Fraser* v. *Keck,* 146 Ark. 255, 225 S. W. 325, and cases there cited.

A general statement of the law as applied to the facts of this case is as follows: The prosecuting attorney has the discretion to determine for himself whether a county officer is usurping the office, and, if he concludes that there is no usurpation under the facts as he finds them to be, he is under no duty to act because some citizen, on the same state of the facts, has reached a different conclu-

sion as to the eligibility of the officer. But, where an honest judgment, intelligently exercised, can lead to only one conclusion, and that conclusion is that the officer is not eligible to hold the office, then there is no discretion, because the officer whose duty it is to act can then only determine whether he will obey the law and perform his duty, or will ignore the law and leave his duty unperformed. No such discretion as this is vested in any officer, and, under such circumstances, the prosecuting attorney may be compelled to act.

From the facts which we have stated it does not necessarily and certainly appear that McGregor was ineligible to hold the office. He may have paid his poll tax and thus qualified himself to hold office.

In the case of *Cain* v. *CarlLee,* 168 Ark. 64, 269 S. W. 57, it was held that a person who had not been assessed by the assessor might, by complying with § 3738, C. & M. Digest, have his name placed upon the taxbooks, and, by paying his poll tax, become a legal voter, but that this section must be complied with, this compliance being necessary, not only to protect the revenue, but to prevent fraud in elections.

McGregor may have complied with the requirements of this section, so far as the evidences submitted to the prosecuting attorney show to the contrary. These evidences show only that McGregor was not assessed by the assessor, and that his name was placed on the taxbooks after the books had been delivered to the collector. This may all be true, but, if McGregor appeared before the county clerk, as he was authorized to do by § 3738, C. & M. Digest, and was assessed, the poll tax paid by him on this assessment was valid and qualified him as an elector. It affirmatively appears that McGregor paid his taxes, and it does not affirmatively appear that he was not assessed pursuant to § 3738 of the Digest, as that statute was construed in the case of *Cain* v. *CarlLee, supra.* It only appears that his name was placed on the taxbooks after the books had been delivered to the collec-

tor, and, as we have seen, this does not show that the poll tax was not properly paid.

It was therefore within the discretion of the prosecuting attorney to decline to institute a proceeding against McGregor for usurpation of the office of sheriff, and the demurrer was therefore properly sustained, and the judgment is affirmed.

VANHOOSE v. MCGREGOR.

Opinion delivered February 28, 1927.

OFFICERS—USURPATION OF OFFICE—PARTIES.—Crawford & Moses' Dig., chap. 175, relating to usurpation of office, does not authorize private citizens to bring suit to oust a usurping county officer; the only persons authorized to bring such suits being the defeated candidate and the prosecuting attorney.

Appeal from Woodruff Circuit Court, Southern District; *E. D. Robertson,* Judge; affirmed.

Avery M. Blount, for appellant.

J. F. Summers and *Ross Mathis,* for appellee.

HUMPHREYS, J. Appellants, private citizens of Woodruff County, instituted this suit against appellee in the circuit court of the Southern District of said county to oust him from the office of sheriff and collector, upon the alleged ground that he was not qualified to hold the office by reason of the fact that he was not a qualified elector at the time he was a candidate for the office, or at the time he received his commission; that he had failed to assess his taxes, both poll and personal, for the year 1923, and that he had failed to be assessed as delinquent, but that his name was added to the poll-tax payers' list of Woodruff County by the tax collector. As an excuse for instituting the suit in their own names, they alleged that the prosecuting attorney of the district and the Attorney General of the State of Arkansas had refused to bring suit to test his right to hold the office, or to allow their names to be used for that purpose.

Appellee filed a demurrer to the complaint, alleging defect of parties plaintiff, and challenging the sufficiency of the complaint to state a cause of action, and also filed an answer denying the material allegations of the complaint. Appellants filed a motion, which was overruled by the court, to require appellee to elect whether he would stand upon his demurrer or upon his answer.

The cause was then submitted to the court upon the pleadings and the testimony adduced by the respective parties, with the result that the court found that appellee, at the time of his election and prior thereto, had legally assessed as required by law and was a qualified elector, and that the demurrer of appellee to the complaint was well taken, and should be sustained. A judgment was rendered in accordance with the findings, from which is this appeal.

This action was brought under chapter 178 of Crawford & Moses' Digest, which provides against the usurpation of office. The statute does not confer authority upon private citizens to bring the suit. The only proper parties to the suit to oust one who has usurped a county office are the defeated candidate and the prosecuting attorney. The demurrer was properly sustained to the complaint on account of a defect of parties.

The judgment is affirmed.

LAMMERS v. AMERICAN SOUTHERN TRUST COMPANY.

Opinion delivered February 28, 1927.

1. COVENANTS—BREACH OF WARRANTY OF TITLE—COMPLAINT.—In an action for breach of warranty of title, a complaint which alleges neither an eviction nor a total failure of title is demurrable.
2. FRAUD—MISREPRESENTATION—JURY QUESTION.—In an action for false representations, evidence *held* sufficient to make it a jury question whether false representations as to the rents to be received were made to plaintiffs for the purpose of inducing them to buy the property, and whether the representations had that effect.

3. FRAUD—WHEN ACTIONABLE.—For representations to be fraudulent in law, they must be material to the contract or transaction, and must be made by one who either knows them to be false, or, not knowing, asserts them to be true, and made with the intent to have the other party act upon them to his injury, and such must be their effect.

4. FRAUD—LIABILITY FOR MISREPRESENTATION—INSTRUCTION.—In an action for false representations, an instruction that plaintiffs, to recover, must show that defendants made false representations, or else, not knowing whether true, asserted them to be true, with the intention of deceiving plaintiffs, and on which they acted, *held* erroneous, since, under the instruction, one would be responsible for misrepresentations whether he intended to deceive the party to whom they were made or not, provided such party acted thereon and had a right to rely thereon.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; reversed.

J. E. Ray, for appellant.

Henry E. Spitzberg, for appellee.

HUMPHREYS, J. Appellants brought this suit against appellees in the circuit court of Pulaski County to recover $300 and interest upon the following grounds:

First. Upon the alleged breach of warranty of title to lots 10 and 11, block 1, Pulaski Heights Addition to Little Rock, Arkansas.

Second. Upon fraudulent misrepresentations concerning the terms of an existing lease upon a part of said property held by the Cox Stores, which they had procured from a former owner thereof.

A specific demurrer was filed by appellees to the first cause of action, and was properly sustained by the court, over appellants' objection and exception, upon the ground that neither an eviction nor a total failure of title was alleged.

Appellees filed an answer to the complaint denying the material allegations of fraud.

The cause was submitted upon the pleadings, testimony adduced by the respective parties, and instructions of the court, which resulted in a verdict for appellees, and a consequent judgment dismissing appellants' complaint, from which is this appeal.

Appellants' first contention for a reversal of the judgment is that the undisputed testimony showed that it was represented to them by appellees that Cox Stores held a lease upon part of the property by the terms of which they were to pay $60 per month for the use thereof for a period of five years from the date of the lease, which induced them to purchase the property; whereas, it contained a provision authorizing the Cox Stores to make two deductions of $150 each, with interest, from the rents, one October 21, 1924, and the other June 1, 1925, which they were required to pay. A. B. Lammers, one of the appellants, testified on direct examination that George F. Walz, who acted for appellees in selling him said property, represented to him as a fact that he would get $60 a month out of the Cox Stores lease if he bought the property; that witness relied on this statement in making the purchase, and would not have bought the property had he known of the rent deduction clause in the lease. Witness said, on cross-examination, that Walz' statement as to the rent was not the thing that induced him to buy the property; that, before the abstract had been completed, he went to see Mr. Cox about the lease, and was informed by him that he was to pay $60 a month for the property; that he did not ask Mr. Cox to see the lease, or for a copy of the same at that time.

G. F. Walz testified that he had received information from a former owner of the property and from Mr. Cox that Cox had leased the property and was to pay $60 a month for it; that he understood the amount of $60 would be paid for the remainder of the lease term; that he told appellants where he had received the information, and that he had no personal knowledge of the terms of the lease; that Cox was occupying the property at the time he sold it to Lammers; that he had no intention whatever of misrepresenting the terms of the lease, and was as much surprised as appellants when a copy of the lease was procured by them, showing the rent reduction clause therein; that he did not represent as a fact that appellants would get $60 a month if they bought the

property, but did say he had received such information from Cox and the former owners.

J. C. Brittain testified that he tried to get a copy of the lease for appellants, but was unable to do so before the sale was consummated.

The rule governing fraudulent representations was accurately laid down in the case of *Cotner* v. *Bangs*, 137 Ark. 397, 209 S. W. 81, in the following language:

"The law upon the subject has been frequently announced in numerous decisions of this court, and is as follows: 'In order for representations to be fraudulent in law, they must be material to the contract or transaction, and must be made by one who either knows them to be false, or else, not knowing, asserts them to be true, and made with the intent to have the other party act upon them to his injury, and such must be their effect.' "

We think the record presents a disputed question of fact, under this rule, as to whether Walz knowingly misrepresented the terms of the lease, or, not knowing, asserted as a fact that appellants would receive $60 a month under the terms thereof during the lease period, for the purpose of inducing appellants to buy the property, and that the misrepresentations had that effect. Appellants were not therefore entitled to a directed verdict for the amount for which they sued appellees.

Appellants also contend for a reversal of the judgment because the court instructed the jury that, before they could recover, it would be necessary for them to show that appellees made false representations, or else, not knowing whether true, asserted them to be true with the intention of deceiving them.

Appellants are correct in this contention, for, under the rule, one would be responsible for misrepresentations so made, whether he intended to deceive the party to whom made or not, provided the party acted upon and had a right to rely upon the representations. The cause should have been submitted to the jury under instructions drawn in accordance with the rule announced in the case

of *Cotner* v. *Bangs, supra,* and approved in the cases of *Wood* v. *Jones,* 151 Ark. 619, 237 S. W. 99, and *Bell* v. *Fritts,* 161 Ark. 371, 256 S. W. 53.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* GEORGE E. SHELTON PRODUCE COMPANY.

Opinion delivered February 28, 1927.

1. CARRIERS—CONNECTING ROADS—PRESUMPTION OF NEGLIGENCE.—In the absence of evidence locating the damage to goods in transit, a *prima facie* presumption arises that the last carrier is the negligent one.
2. CARRIERS—FAILURE TO RE-ICE CAR.—A delivering carrier's failure to re-ice a car of perishable freight received by it with knowledge that there was no messenger in charge, and that it had been iced two days previously, constituted negligence, making it liable for resulting damages, unless relieved of duty to re-ice by the terms of the bill of lading.
3. CARRIERS—DUTY TO RE-ICE CAR.—A delivering carrier is authorized by the perishable protective tariff of the Interstate Commerce Commission to re-ice a car of bananas in the usual way, where the messenger, without notice to the consignor or consignee, left the train without leaving directions for re-icing, and hence the carrier was not relieved from liability for damage from its failure to do so, without making any effort to procure instructions from the owner in accordance with ordinary procedure.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought this suit against appellant for damages alleged to have been caused by its negligence in failing to re-ice a carload of bananas shipped to it at Little Rock, Arkansas, from the Honduran Fruit & Transportation Company of Mobile, Alabama.

The appellant denied any negligence, carelessness or delay in handling the banana shipment, and that it negligently failed to keep the car properly iced, and

pleaded especially that shipment was made under a uniform bill of lading approved by the Interstate Commerce Commission, and under the provisions of perishable protective tariff No. 2, which it alleged was in effect, and set out rule No. 105 of said tariff, relating to the refrigeration and ventilation of cars containing perishable commodities, as follows:

"Bananas, cocoanuts, and pineapples in carloads must not be iced, re-iced, ventilated or given other protective service against heat or cold without specific instructions from shipper, owner or caretaker in charge of cars.

"All such protective service to be furnished to bananas, cocoanuts and pineapples in transit will be governed by the shipper's instructions on the billing, subject to contrary instructions from caretaker in charge, and the caretaker's instructions when he abandons the car shall be given by him in writing and attached securely to the waybill to accompany the car to ultimate destination. In the absence of a caretaker in charge of car, or if caretaker abandons car without giving necessary instructions, the shipment shall be subject to such changed instructions as may be given by the owner."

"That, under the provisions of said rule, the carrier was not permitted to supply ice to the shipment in the absence of specific instructions from the shipper or caretaker to do so. And that the damage resulted to the shipment of bananas from the shipper's failure to perform his duties relative thereto, for which defendant was not liable."

The bananas were shown to have been loaded in good condition and in the customary way. The car was shipped via the L. & N. Railway Company from Mobile, with memorandum notation on the bill of lading and the waybill, "Iced 3 tons, Mobile. Messenger to re-ice when necessary. Messenger in charge." It arrived in Little Rock over the line of appellant at 5:45 A. M. on the morning of the 17th of June, 1923, and was delivered by it on the morning of the 18th to appellee's unloading track.

It is undisputed that the car of bananas was damaged in the amount claimed by lack of ice in the bunkers, or a failure to re-ice the car when necessary. The car was re-iced at Birmingham, Alabama, on the 14th of June, the waybill showing notation, "For re-icing above car at Birmingham, Alabama, messenger instructions," and it was not re-iced thereafter, and the messenger left the car at Birmingham, Alabama, was not on the train carrying this car any more thereafter. There was no communication between the messenger and the railway company, and none between the owner or the shipper and the railway company, until after the arrival of the car in Little Rock, and the car was transported from Memphis to Little Rock without delay on the first available train after it was received by appellant company. Notice of the arrival of the car was mailed to appellee at 10:20 A. M. on the 18th.

George Shelton, president of appellee company, stated he was at his place of business as late as 6 o'clock on the evening of June 17, the day the shipment reached Little Rock, and that he got notice of its arrival Monday morning, June 18, about 10 o'clock, after he had noticed the car on his unloading track about 6:30 that morning. He also stated the cause of the damage was lack of ice, and that there is a regular icing station at Hulbert, which is just across the river from Memphis about four or five miles.

The conductor of the train testified about the waybills and the notations, and stated that he knew the messenger was not on the car after the train left Hulbert, which is one of the company's regular icing stations, where he got the car from the Frisco, and that he never saw the messenger at all. He was not on his train, and the car was not re-iced at Hulbert, so far as he knew.

Rule No. 105, as pleaded and set out in the complaint, was introduced in evidence, and also paragraphs (B), (C), (E), and (F), rule 225, § No. 2 of the tariff, which read as follows:

"Paragraph (B) under rule 225, § No. 2 of Tariff-Service at Destination—(Will not apply at destinations in Canada). After arrival of a car in the terminal train yard serving the destination, and up to the time the car is in process of unloading on team tracks, or until car has been placed on private or assigned siding, carriers will examine bunkers or tanks daily, and when such cars require additional ice during such period they will be re-iced to capacity. However, after the unloading on team tracks has been commenced, any additional re-icing will be furnished only on written instructions from shipper, owner or consignee.

"(C) of same Rule.—Non-acceptance of instructions to re-ice: No instructions whatever will be accepted from shippers, owners or consignees for the re-icing of cars at any intermediate stop, hold or reconsigning point, nor at final destination before shipment is in process of unloading on team track nor before it has been placed on private or assigned tracks. Written instructions will be accepted by the carrier reading 'Do not re-ice car' at destination after delivery has been accepted.

"(E) of same Rule.—Charge for icing at destinations: A charge as provided in § No. 4 of tariff as amended, for all ice supplied after arrival of cars in train yards serving the final destination, without allowance for free time, will be made and collected from consignee in addition to all other charges. (See Paragraph F).

"(F) of same Rule.—Bunkers three-fourths full upon arrival in train yards: Carriers will deliver cars in train yards serving intermediate stop points and destination with bunkers three-fourths (¾) or more full of ice. If and when to accomplish this result at intermediate stop points and destination such cars are re-iced, they will be re-iced to capacity. Bills for ice so supplied will be rendered against carrier to which the refrigeration revenue is credited."

Section No. 4 provides: "If shipper fails or neglects to give in shipping order and/or bill of lading one of the

notations provided in paragraph 'B' above, the carriers will re-ice car at all re-icing stations (if ice has previously been used), using salt if same has been previously used, and charges for such service will be on basis of the table of charges in this section. Exception: See Rule No. 105)."

A jury was waived, and the cause was tried by the court, which found that, under the rules of the tariff, the particular shipment would require icing at sufficient times, or in the necessary and established manner, a failure to do which would render the railway company liable for the damages; that, under the testimony, it was liable, and rendered judgment for the sum claimed, with interest, from which this appeal is prosecuted.

Thos. S. Buzbee, H. T. Harrison and *Geo. B. Pugh,* for appellant.

Mehaffy & Mehaffy, for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony shows that the shipment of bananas was properly loaded and in good condition when it left Mobile on the 13th of June; that it was re-iced afterwards only at Birmingham, Alabama, on the 14th of June. It was received by appellant from the connecting carrier at Hulbert, and left there on its train at 10 o'clock on the evening of the 16th; arrived in Little Rock on the morning of the 17th, and delivered to appellant's unloading track on the morning of the 18th, notice of delivery having been received by it at 10 o'clock of that day. The bananas were then in a heated and damaged condition because of lack of refrigeration, due to the carrier's failure to re-ice the car either at Hulbert or upon its arrival in Little Rock, the day before its delivery.

A *prima facie* presumption arises that the last carrier is the negligent one, in the absence of evidence locating the damage to goods in transit over several connecting lines. *St. L. I. M. & S. R. Co.* v. *Coolidge,* 73 Ark. 112; *H. Rouw Co.* v. *St. Louis-San Francisco Ry. Co., ante,* p. 881.

The evidence discloses here however that the court found that the damage resulted from failure to re-ice the car after it came into appellant's possession, with the knowledge that there was no messenger in charge, and the shipment was last iced at Birmingham, Alabama. Such failure constituted negligence making the carrier liable to the payment of any resulting damages, unless it was relieved of the duty to re-ice the car by the terms of the contract of shipment, the bill of lading.

It was known by the connecting carrier transporting the car from Birmingham that it had been re-iced there, according to the directions of messenger, who was not on the train thereafter, and it was not shown whether he left further directions as to re-icing the car. Neither was it shown that the consignor or the consignee had any notice or information that the messenger was no longer on the train in charge of the shipment; that instructions could be had from them as to re-icing if the necessity therefor arose, in the absence of instructions from the messenger relating thereto.

We think that the tariff provides for this contingency, and authorizes the carrier to re-ice the shipment in the usual and customary way under such condition, and make the proper charge therefor. Certainly the delivering carrier cannot relieve itself from liability to the payment of the damage arising from its failure to re-ice the car under the circumstances of this case.

It is equally as liable for damages resulting from its negligence for failure to do so as though no messenger had accompanied the car in the first instance, and especially since none of the carriers, after knowing that the messenger had abandoned the shipment, made any effort to procure instructions from the owner about re-icing it, notwithstanding that, in accordance with their ordinary procedure and the care required of them in transportation of freight, they would have been required to do so.

We find no error in the record, and the judgment is affirmed.

MEHAFFY, J., disqualified.

CITIZENS' BANK OF BOONEVILLE *v.* CLEMENTS.

Opinion delivered February 28, 1927.

1. BANKS AND BANKING—CONTRACT OF GUARANTY.—The guaranty by a bank, without benefit to itself, of the debt of another, in which it has no interest, is beyond its powers.
2. BANKS AND BANKING—CONTRACT OF GUARANTY.—If a contract of guaranty is for a bank's own protection or is incident to the transaction of its own business, or for its own benefit, it may give a guaranty.
3. BANKS AND BANKING—CONTRACT OF GUARANTY—JURY QUESTION.—Whether a bank had such an interest in the business of a customer as would authorize it to guarantee the customer's contract *held*, under the evidence, for the jury.
4. BANKS AND BANKING—AUTHORITY OF CASHIER—JURY QUESTION.—Whether a bank cashier had authority to make a contract guaranteeing the debt of a customer of the bank *held* a question for the jury.

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

Kincannon & Kincannon and *Evans & Evans,* for appellant.

I. J. Friedman and *John D. Arbuckle,* for appellee.

McHANEY, J. Appellee, Charles Clements, instituted this action against appellant to recover on a written contract between the parties whereby appellant undertook to guarantee the payment of a sum of money not to exceed $1,000, due by Booneville Marble & Granite Works of Booneville, Arkansas, to appellee. The contract is as follows:

"Booneville, Arkansas, May 31, 1922.

"To Chas. Clements,
258 Boyleston St.,
Boston, Mass.

"We, the Citizens' Bank, guarantee the payment of a sum not to exceed $1,000, one thousand dollars, payment for monument No. Clements 60772, purchased by the Booneville Marble & Granite Works of Booneville, Ark., on the following conditions: That the monument is to be cut strictly in accordance with the blue-prints

approved by the said Booneville Marble and Granite Works and submitted to the above named Charles Clements for the execution of same.

"Further, that this amount shall cover all expenses connected with the purchase of material of which the monument is to be cut, also the material for a marker ordered this date. All monument and marker to be loaded on board cars at Boston, Mass.

"The Citizens' Bank understands that the purchase price for this work is not due until a period of sixty days from date of invoice with bill of lading.

"Citizens' Bank,
"By Chas. X. Williams, Cashier."

Written at bottom with pencil: "4/27/23. New draft for $464.17.

"Made and passed to Inter. T. Co. to be collected and sent along with the $500 check.

"4/27/23.

"Check for $500 passed Inter. Trust Co. for collection."

Appellant is a banking corporation of Booneville, and is engaged in the business of operating an ordinary bank. Charles X. Williams was its cashier, and had authority from the board to perform the usual and customary duties of cashier, and to make loans and discount paper for the bank up to $1,000 at that time. Later his authority in this regard was reduced to $500. There was no meeting of the board to authorize the cashier to execute this contract, and no officer or director, except the cashier, had any knowledge that it had been executed, until about the time this suit was brought, and no specific authority was ever given by the board or any officer to the cashier to execute same.

Appellant defended on the ground that its cashier had no authority to make such a contract, and that his doing so failed to bind the bank.

At the conclusion of the testimony the court directed a verdict for appellee for the balance due in the sum of $464.17, with interest, and the bank has appealed.

The articles of incorporation of the Citizens' Bank of Booneville were not offered in evidence, and we cannot know just what the general nature of the business of the corporation is, as set forth therein. But we do know that the powers of a banking corporation and its officers have been very much limited and circumscribed by the Legislature during the past few years. As an example, § 695 of Crawford & Moses' Digest prohibits a bank from engaging in trade or commerce and from buying its own stock. Many other provisions of law are made for the protection of stockholders and depositors. Section 700 reads as follows: "The president, cashier or other officer or employee shall have no power to indorse, sell, pledge or hypothecate any notes, bonds or other obligations received by said corporation for any money loaned until such power and authority shall have been given such president, cashier or other officer or employee by the board of directors, a written record of which proceeding shall first have been made; and all acts of indorsing, selling, pledging and hypothecating done by said president, cashier or other officer or employee, without the authority from the board of directors, shall be null and void."

While this section was amended in 1923, it was the law when the contract in controversy was executed. It is difficult to perceive why the officers of a bank should be prohibited by law from transacting the business enumerated in this section without first getting authority from the board, a record of which must be made, and yet permit the cashier to bind the bank by guaranteeing the debt of another, which, apparently, is in no way connected with the bank's business, without authority of the board. When we consider the interest the depositors have in the success of the bank, and the interest of the stockholders, due to their hope of profit and the imposition of double liability, in the event of insolvency, we can readily see that the law should circumscribe, limit, and restrict the powers of the officers to involve the stockholders and depositors in hazardous undertakings.

It is the rule in this State, and is the general rule laid down by the authorities, that "the guaranty by a bank, without benefit to itself, of the debt of another, in which it has no interest, is beyond its powers."

Mr. Michie, in his work on Banks and Banking, vol. 1, p. 681, says: "The guaranty by a bank, without benefit to itself, of the debt of another in which it has no interest, is beyond its powers. For a bank has no power to make a guaranty except for the protection of its own rights, or as an incident to the transaction of its own business, unless specially authorized by law. But for its own protection or incidentally to transacting its own business, it may give a guaranty."

A long list of cases is cited by the author to support this declaration of law.

Again, the same author, on page 745, § 105, uses this language: "A bank has no authority to lend its credit; hence it is not within the power of the cashier to bind it upon a contract of guaranty or suretyship for the accommodation of third persons and with respect to matters in which it has no interest."

In vol. 3 R. C. L., § 53, page 425, it is said: "A banking corporation cannot lend its credit to another by becoming surety, indorser or guarantor for him. It cannot, for the accommodation of another, indorse his note or guarantee the performance of obligations in which it has no interest. Such an act is an adventure beyond the confines of the banking business, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction; and this applies to national banks."

But, if the contract of guaranty is for the bank's own protection, or is incidental to the transaction of its own business or for its own benefit, it may give a guaranty.

This court recently had this same question under consideration in the case of *Bank of Morrilton* v. *Skipper, Tucker Company,* 165 Ark. 49, 263 S. W. 54, and, in substance, held that the bank had authority to execute a con-

tract of guaranty if it was for its own benefit in the prosecution of its authorized business. The court, on page 57, used this language: "The court properly submitted to the jury the question of the authority of appellant, as a banking institution, to execute the contract of guaranty, on the ground that it was a contract for its own benefit in the prosecution of its authorized business. There was no error in that regard."

We think it is fairly deducible from the evidence that the members of the partnership known as the Booneville Marble & Granite Works were customers of the bank, and that perhaps the bank might have had some interest in making this contract of guaranty, although it is not definitely shown by the evidence in this case, and that this was a question for the jury to determine on proper instructions from the court, both as to the authority of the cashier to make the contract in the first instance, and as to whether the contract of guaranty was for its benefit in the prosecution of its authorized business.

The circuit court therefore erred in directing a verdict for the plaintiff, and the judgment will therefore be reversed, and the cause remanded for a new trial.

It is so ordered.

WILLIAMS v. BROADWAY-MAIN STREET BRIDGE DISTRICT.

Opinion delivered February 28, 1927.

1. BRIDGES—OPERATION OF STREET CARS AND MOTOR BUSSES.—Under Sp. Acts. 1919, p. 74, §§ 22, 23, and Sp. Acts 1923, p. 1648, §§ 1-3, amendatory thereof, the board of commissioners of Broadway-Main Street Bridge District had the power to provide for the operation of street cars over one of such bridges and motor busses over the other, and prohibiting either from interfering with the other by operating over the same bridge.
2. BRIDGES—AUTHORITY OF RAILROAD COMMISSION.—The Railroad Commission had no authority over the two bridges subject to regulation by the Broadway-Main Street Bridge District, under Sp. Acts 1919, p. 74, and Sp. Acts 1923, p. 1648, nor could it

grant a permit to operate a bus line over streets of either city connected by such bridges.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

Price Shofner, for appellant.

J. Merrick Moore and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

McHANEY, J. On the 27th day of January, 1925, the appellant filed a petition with the Arkansas Railroad Commission for permission to operate motor busses for the carriage of passengers for hire from Tie Plant, a settlement located about a mile east of the city of North Little Rock, through said city over a designated route to Main and Markham Streets in the city of Little Rock, and over the Main Street Bridge between the two cities. The Broadway-Main Street Bridge District, Ben D. Brickhouse as mayor of the city of Little Rock, and the Intercity Terminal Railway Company, intervened and filed a joint response to the petition, protesting against the granting of the permit, setting up four reasons for the protest, one of which in substance is as follows: (3). That petitioner had not obtained a license or franchise from the Broadway-Main Street Bridge District to operate busses over said Main Street bridge, which district, by virtue of the act creating it, had the exclusive authority to grant such a franchise, to regulate the traffic thereon, and to fix the rates and charges therefor; that it would be improper for the Railroad Commission to grant the permit to petitioner before she obtained such franchise from the bridge district.

The Railroad Commission, after hearing the evidence, entered an order denying the petition, and an appeal was taken to the circuit court of Pulaski County, where the case was heard on February 13, 1926, upon the record made before the Railroad Commission, and the court found that it had no jurisdiction of the Broadway-Main Street Bridge District for the purpose of reviewing the action of said district, and that the order of the Railroad Commission denying the petition of plaintiff should

be affirmed upon the whole record. From the judgment of the circuit court the petitioner has appealed to this court.

The act creating the Broadway-Main Street Bridge District was passed in 1919 (Sp. Acts 1919, page 74), and by § 22 it is provided: "The commissioners of said district, so long as they are in charge of said bridges, or the county court after the bridges shall have been turned over to it, may permit the use of said bridges by street-car lines, interurban lines, and other public utilities, exacting therefor a reasonable compensation."

Section 23 provides that: "When said bridges have been completely paid for, they shall be turned over to the county of Pulaski, and from thenceforth shall be the property of said county."

Said act was amended in 1923, page 1648, to read as follows: "Section 1. When said bridges have been completely paid for, including all bonds, or other evidences of indebtedness issued in payment or maintenance thereof, they shall be turned over to the county of Pulaski and from thenceforth shall be the property of said county. Until said bridges are turned over to the county, as herein provided for, the commissioners shall have the right to prescribe rates for the use of the bridges for private use by various public service corporations, and all fees and rentals received shall be used to pay off all outstanding bonds of the district and thereby reduce the tax of the property holders of the district."

Section 2 of that act provides: "The board of commissioners of the Broadway-Main Street Bridge District is hereby authorized, empowered and directed to charge reasonable fees for the use of said bridges by any and all persons, firms or corporations, where said bridges are used to further their private interests, such as to support gas or water lines, electric light and power lines, telephone lines and cables, telegraph lines and cables, or where the same is used by street cars or motor busses; where passengers are carried for fare, the commissioners may charge a flat annual fee, or any other fee that they may deem wise and expedient. In case of street cars

and motor busses for hire, the commission, if it deem best, may charge so much per passenger, and all funds derived from such charges shall be used in retiring the bonds of the district."

Section 3 of the act provides: "The charges as prescribed by the board of commissioners for the use of the bridges, as hereinabove set forth, shall not be subject to the jurisdiction of the Arkansas Railroad Commission, and the decision of the board of commissioners on all rates or charges shall be subject to review by the courts."

Under these provisions of the statute creating the district, and the act amendatory thereof, we hold that the board of commissioners of the Broadway-Main Street Bridge District had the power to regulate the operation of motor busses and street-car lines over and across said bridges, by providing for the operation of street-car lines over one of said bridges and motor busses over the other, and prohibiting either from interfering with the other by operating over the same bridge. Pursuant to such power, the board has granted a franchise over the Main Street bridge to the Intercity Terminal Railway Company, which company has built its double tracks over said bridge at a cost of $40,000 and is paying the bridge district for its franchise $60,000. The power to permit the operation of motor busses over the Broadway Bridge and to regulate their operation, and to fix a charge for same, is given by the acts above referred to.

The Arkansas Railroad Commission had no authority over said bridges, neither did it have the authority to grant a permit to said bus line to operate over the streets, either of North Little Rock or of Little Rock. It follows that the judgment of the Pulaski Circuit Court is right, and it is therefore affirmed.

KIRK v. PULASKI ROAD IMPROVEMENT DISTRICT NO. 10.

Opinion delivered December 20, 1926.

1. EMINENT DOMAIN—LIABILITY FOR GRADING PART OF STREET.—Where the street in front of plaintiffs' property was partly ungraded, an improvement district engaged in paving the street was not liable to plaintiffs for reducing to grade the ungraded portion of the street, there being no change in the grade of the street in front of plaintiffs' property.
2. EMINENT DOMAIN—DAMAGES FROM EXCAVATION.—Where a road improvement district, in widening a street and extending the grade, excavated part of a high bank in front of the property, the only element of damages recoverable by adjacent property owners was the actual injury to their property by loosening the soil in blasting off the face of the embankment.
3. EMINENT DOMAIN—DAMAGES IN WIDENING STREET.—In an action by property owners against an improvement district for damages by loosening the soil on his property caused by blasting in widening the street in front thereof, the measure of damages was the difference in market value of the property before and after the injury, if any, and not the cost of constructing a retaining wall or the depreciation in rental value.
4. EMINENT DOMAIN—INJURY TO PROPERTY—DAMAGES.—Every element that can fairly enter into the question of market value and which a prudent business man would consider before purchasing the property should be considered by the jury in determining the difference between the value of property before and after it was damaged in constructing a highway.
5. EMINENT DOMAIN—DAMAGES IN WIDENING STREET.—In an action by a property owner against an improvement district for damages by loosening the soil on plaintiffs' property by blasting in widening the street, evidence *held* to warrant recovery of substantial damages by property owners.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; reversed.

Horace Chamberlin, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

McCULLOCH, C. J. Appellants are the owners of two lots facing south on West Second Street, between Summit and Schiller avenues, in the city of Little Rock. They have owned these lots for many years, and there are three dwelling houses on them, built about the year 1900.

At that time the street in front of these lots had never been graded or otherwise improved. There was a downward slope from the south front of these lots to the opposite side of the street, and there was no sidewalk, but there was a pathway along in front of the houses, which was used by any one who had occasion to do so. The lots were situated in Plunkett's Addition to the city, and when this addition was laid out and platted there was a dedication of that portion of West Second Street to a width of sixty feet. In the year 1902 the city graded the street along there to a width of thirty-two feet, which was paved with brick, and a street-car track was laid thereon. There was a curb at the outer edge of the paving, which was ten or eleven feet south of the north line of the street as originally dedicated. In other words, in grading the street there was left ungraded a space of ten or eleven feet on the north side up to the property line. The north rail of the street-car track was within about three feet of the curb line, leaving an insufficient space for the passing of vehicles between the track and the curb. In grading the street there was left on the north side, in front of the property of appellants, a precipitous slate bank about ten feet high, and, in order to afford access to the dwelling houses, appellants provided steps set into the bank. Along the bank there was, as before stated, a pathway or trail used by pedestrians going along in front of the houses, but there was still no paved sidewalk.

In the creation of Pulaski Road Improvement District No. 10, authority was conferred upon the district to improve West Second Street, and this was done during the years 1923 and 1924. The city council passed an ordinance, just before the work of improving the street was begun, widening West Second Street in front of appellant's property to a width of forty feet. The ordinance provided that the road improvement district should do the work of widening the street and should make good any damages sustained by property owners. The work

was done by the district, and in doing so it was necessary to excavate the high bank in front of appellants' property. This was done to a width of eight feet, leaving about three feet of the dedicated street, but the top of the slope extended, in places, slightly beyond the property line. The widening of the street was all done on the north side, and there was a new curb line established within about three feet of the property line. As the bank sloped towards the south, the new excavation of eight feet left the slate bluff slightly higher. Appellants contended that the blasting away of the slate in excavating for the extension of the width of the street loosened the earth and rock to some extent back beyond the property line, thus invading their property, and that this caused the bank to cave or slough off from time to time, and that a retaining wall should be built in order to afford protection from that injury. They demanded that the district construct the retaining wall at its own expense, which was refused by the district, and they allege that the wall would cost about $3,500. They also allege that there was a loss of rental value of the property in the sum of $3,000, and this action was instituted by appellants against the district to recover the above sums, aggregating $6,500. There was a trial of the cause before a jury, which resulted in a verdict in favor of the district.

It is undisputed that the street in front of appellants' property was dedicated by the original owners to a width of sixty feet, and that the widening of the street by the district in making the new improvement did not extend to the line of appellants' property. No part of appellants' property was taken or used in the widening of the street, the only contention being that there was damage done to the property by loosening the bank and extending the top of the slope as a result of blasting away the face of the bluff. Nor was there any change in the grade of the street in front of appellants' property. That portion of the street which had been previously graded by the city

in the year 1902 was left unchanged, and the same grade was extended to a distance of eight feet in widening the street. That part of the street had not theretofore been graded, hence there could be no liability under the statute for changing the grade. *Red* v. *Little Rock Ry. & Elec. Co.,* 121 Ark. 71, 180 S. W. 220. Of course, there was no obligation on the part of the city or appellee district to build a sidewalk. The only element of recoverable damage, if any, was the actual injury done to the property of appellants in loosening the soil or slate when blasting off the face of the bluff. The issue as to this element of damage was properly submitted to the jury upon conflicting evidence, and the verdict of the jury against appellants is conclusive. The court's instructions were as follows:

"1. If you find for the plaintiff, you will find for them for the depreciation in the market value of their property caused by the invasion of their property line, and by the rendering of their properly line less accessible, if you find from the evidence it has been rendered less accessible by the invasion of their property line.

"2. If you find from the evidence in this case that, on account of the excavations made by directions of the defendant, the property of the plaintiff will in the future slide or crumble into the excavations, you would have a right to take that fact into consideration in determining the depreciation in the market value of the property of the plaintiffs.

"3. If you find from a preponderance of the evidence that the defendant, in widening Second Street, has invaded the plaintiffs' property line and has made a portion of said property useless to them by virtue thereof, and, if you find from such evidence that it has thereby deprived said properties of reasonably safe or convenient means of ingress and egress, then the court instructs you that such constitute injuries for which the plaintiffs should recover, and this is true, even though you may find

that the defendant did the work of widening the street in a skillful manner."

Error of the court is assigned in submitting as the measure of damages the difference in market value of the property, if any, instead of the cost of restoration by the construction of a retaining wall, and also in refusing to submit, as a measure of damages, the depreciation of the rental value. We think the court was correct in its instruction. The injury, if any, was a permanent one, for which all the damages could and must have been recovered in one action. The injury was not recurring so as to permit separate actions from time to time as each separate injury occurred, and the difference in market value was therefore the correct measure of damages. *Davis* v. *Dunn*, 157 Ark. 125, 247 S. W. 793.

We conclude upon the whole that there was no error in the proceeding—that the issues were correctly submitted to the jury, and that the evidence was sufficient to support the verdict in favor of appellee.

Affirmed.

Opinion on rehearing, delivered February 21, 1927.

HART, C. J. Upon further consideration of this case, the majority of the court is of the opinion that the motion for a rehearing should be granted.

This is an action for the assessment of damages for injury to plaintiff's property in improving a street next to her property, which is also a State highway. It is true, as stated in our former opinion, that the cost of the retaining wall is not the plaintiff's measure of damages. The record shows that the highway commissioners, in a praiseworthy effort to satisfy the plaintiff, expended about $325 in erecting a retaining wall to protect a shade tree in her yard. The record also shows that it would cost more than $2,000 to erect a retaining wall which would prevent the embankment of the plaintiff's property, abutting the improved street, from further caving in. While this proof was competent to show the damage to the plaintiff's property, it was not the measure of

her damages. In cases of this sort, the owner is entitled to recover the difference between the market value of her property before the taking or damage to it and the market value afterwards. *St. L. Ark. & Tex. Ry. Co.* v. *Allen,* 41 Ark. 431, and *St. L. I. M. & S. Ry. Co.* v. *Theo. Maxfield Co.*, 94 Ark. 135.

Every element that can fairly enter into the question of market value and which a business man of ordinary prudence would consider before purchasing the property should also be considered by the jury in arriving at the difference between the value of the property before and after the taking or damage to it. *L. R. Junction Ry.* v. *Woodruff,* 49 Ark. 381.

Tested by this rule, we think the plaintiff, under the undisputed evidence, was entitled to recover some substantial amount of damages.

Glenn D. Douglas, a civil engineer, was a witness for the plaintiff. He made a plat of her property showing the line of the embankment as it existed at the time of the survey. We quote from the abstract of the plaintiff his testimony as follows: "The upper line of the embankment is over the property line and encroaches thereon. The under line is irregular and is practically outside the line—that is, south of the property line—at least this is practically so. The embankment has caved some more since I made my survey. This soil is slate or shale with an inclination to the north of approximately forty-five degrees. The encroachment on the plaintiffs' lots by virtue of this excavation presents an irregular line and it extends onto the property from nothing to approximately two feet.

"The surface of lot 7 is from ten to twelve feet above the street level. Lot 7 is higher above the surface of the street than lot 6. The street opposite lot 7 between curbs is 40 3/10 feet. The curb is six inches on each side. The north curb of the street is from three to three and a half feet to the embankment. The north curb line which the district established is about two and

a-half feet from the plaintiff's property line. The plaintiffs' property can be restored to them by building a retaining wall, and there is no other way whereby they can enjoy the use and benefit of their property which has been cut away. From the nature of this soil, and due to the weather, the embankment 'will gradually slough or slide away.' ''

His testimony was corroborated by that of Mrs. Maude M. Kirk. In addition, she stated that the embankment had caved up to the very edge of the terrace. She testified that there is always some sloughing away, which was much more when there was a hard rain.

D. A. McCrea, one of the engineers for the road improvement district, which damaged the property, testified that the caving of the embankment was the result of blasting. According to his testimony, it is almost impossible in digging out rock excavations to control the effect of the powder. The reason is that the powder will follow the seams. The average encroaching upon the plaintiff's property occasioned by the excavations is about six inches. It might be in some places as much as a foot and six inches back of the retaining wall, which was afterwards filled in. The retaining wall was the one which the commissioners placed around the shade tree next to the edge of the embankment abutting the street in order to protect it.

Other evidence shows that the embankment would still cave after hard rains. Thus, it will be seen that, according to the undisputed evidence, the plaintiff suffered some substantial amount of damages, and the jury failed to award her any amount.

It is probable that the jury was misled by the instructions of the court which singled out her element of damages. In any event, the testimony above abstracted is not contradicted at all. It is true that the witnesses for the defendant testified that there was no difference between the market value of the property before and after the taking and damage. But, as we

have already seen, the testimony, which we have copied above, establishes a state of physical facts which show that the plaintiffs suffered some substantial amount of damages. It follows that the verdict of the jury was contrary to the evidence, and the judgment must be reversed, and the cause remanded for a new trial.

Justices WOOD and SMITH dissent.

SIMS v. FISHER.

Opinion delivered January 24, 1927.

1. QUIETING TITLE—BURDEN OF PROOF.—Where plaintiff, in a suit to quiet title, claimed as heir of his father, who had received a deed from the owner to the land in question, plaintiff must prove both his heirship and that the alleged deed had been executed and delivered to his father.
2. QUIETING TITLE—SUFFICIENCY OF PROOF OF HEIRSHIP.—In a suit to quiet title, where plaintiff claimed through one to whom the land had been conveyed by the original owner, the preponderance of the evidence *held* to show that plaintiff was the son of such grantee.
3. QUIETING TITLE—PROOF OF LOST DEED.—Evidence *held* not sufficiently clear and decisive to establish the execution and delivery of a deed alleged to have been lost.

Appeal from Union Chancery Court, First Division; *J. Y. Stevens,* Chancellor; affirmed.

Betts & Betts, for appellant.

Jordan Sellers and *Patterson & Rector,* for appellee.

SMITH, J. Appellant brought this suit to quiet and confirm his title to a forty-acre tract of land in Union County. He alleged that his grandfather, Wade Sims, bought the land in 1902, and in 1910 conveyed it to his son Julius, who was appellant's father. The defendants in the case are Eliza Sims, the widow of Wade Sims, who was also known as Wade Fisher, and Martha Arnold, who was the only child of Wade, except Julius. Wade Sims died in 1917, and Julius died in 1914. In their answer defendants denied that appellant was the son of Julius,

and also denied that Wade Sims had ever executed a deed to Julius. After hearing the testimony of a number of witnesses, the court dismissed the complaint as being without equity, and this appeal is from that decree.

It does not appear whether the case was dismissed because the heirship of appellant was not proved, or because the execution and delivery of a deed to Julius Sims was not established. It was, of course, essential for appellant to prove both facts, and the failure to prove either would defeat his action.

Appellant was required to show only by a preponderance of the evidence that he was the son of Julius, and we think the testimony met that burden. Nancy Sims was appellant's mother, and she was also the mother of several other children when appellant was born, and it is claimed that these children were also illegitimate. Nancy Sims testified, however, that they were children by a former marriage. She also testified that appellant was born August 12, 1912, and that she and Julius were married September 12, 1912, and the date of her marriage was clearly established by the date of her marriage license, which was offered in evidence.

The testimony is conflicting as to appellant's age at the time his mother and Julius were married, and he may have been born earlier than August 12, 1912, but it appears that Nancy had lived with Julius as his cook and housekeeper for about two years before appellant was born, and it also appears that Julius recognized appellant as his son. This being true, appellant was legitimatized.

Section 3474, C. & M. Digest, reads as follows: "If a man have by a woman a child or children, and afterward shall intermarry with her, and shall recognize such children to be his, they shall be deemed and considered as legitimate."

We are of the opinion, however, that the relief prayed was properly denied, for the reason that the execution of the deed was not established.

Nancy Sims testified that Wade Sims agreed to execute a deed to Julius as an inducement for Julius to live on the farm and to take care of it and his father, and that, pursuant to this agreement, Julius built a log cabin on the farm, and moved into it in 1910, and that the deed was executed and delivered to Julius the same year; that she did not have the deed recorded, but placed it in her dresser drawer, where it remained until the night Julius died, when some one took it, and that she had not seen it since. She further testified that Eliza Sims admitted having taken the deed out of the drawer, and that Eliza told her the rats destroyed the deed.

The taxes were paid by Julius in his own name for the years 1910, 1911 and 1912, but the land continued to be assessed in the name of Wade Sims, and this assessment was never changed on the taxbooks. Julius died in March, 1914, which was before the close of the tax-paying time for the year 1913, and the taxes for that year were paid by Wade Sims in his own name.

Wade Sims became insane, and was carried to the State Hospital, where he remained until his death in 1917, but his widow, Eliza Sims, continued to reside on the land, and now occupies it as her homestead.

Nancy Sims left the land in 1914, and has not at any time since resided on it, and does not appear to have claimed at any time that the land belonged to her son (appellant) until shortly prior to the institution of this suit.

A number of witnesses testified in appellant's behalf, and several of them gave testimony strongly corroborative of the testimony of Nancy Sims. Among these was W. D. Webb, a white man, who brought this suit as next friend for appellant, who is a colored boy. Webb testified that he went with Nancy to the home of Eliza to inquire about the deed, and Eliza admitted its execution, but stated that the rats had eaten it.

B. Green, who was also a white man, testified that he conducted a small general store, and that Julius had given him a mortgage, which was never recorded, on the

land to secure witness in making advances of supplies, and that, before taking this mortgage, Julius had shown him a deed, which witness did not read, which Julius stated was a deed from his father to him, and that the description of the land in the mortgage was taken from a tax receipt which Julius produced.

C. S. Cranston, who is also a white man, testified that he lived on an adjoining tract of land, and that Julius once showed him a deed, and asked the loan of $18 to pay the taxes on the land, but witness did not make the loan.

R. B. Ripley, another white witness, testified that he lived on adjoining land, and that Wade Sims had told him he had deeded the land to his son Julius.

Harb Burton, a colored man, testified that he was at the home of Julius about a week before Julius died, and that Julius told Nancy to look in the dresser drawer and hand him his deed. Nancy obeyed, and Julius looked over the deed, and, after doing so, said: "Well, I am going to die, but I have forty acres of land. I have paid for it, and it is yours."

It was very clearly shown that Julius never owned any other land.

There was other testimony more or less corroborative of the testimony recited.

Nancy Sims also testified that the deed was signed by Wade Sims and Eliza Sims and a Mr. Brown, who was a justice of the peace. Mr. Brown was dead at the time of the trial.

On behalf of defendants, Bob Nelson, a colored man, testified that he had known Wade Sims for many years; that they were neighbors and close friends, and that Wade consulted him about his business affairs. He testified that Julius worked on the railroad, and was taken sick and came home to die, and that Wade Sims built the little log house in which Julius resided and later died. That witness helped Wade Sims to get out the boards to cover the house, and bought the nails and the lumber for the floor, but never heard Wade Sims at any time refer to a deed. Julius had nothing to do with

building the house. Julius did not make a crop in the year he died, but worked on the railroad when he worked at all.

The only witness who claimed to have read any part of the deed was Nancy Sims, and she admitted that she had not read all the deed, and did not know what land it described, nor what consideration was recited, but she testified that the deed was signed by Wade and Eliza Sims and by Mr. Brown.

Eliza Sims testified that she had never heard of this deed until a short time before this suit was commenced, and denied that she had ever signed a deed.

Without further recitation of the testimony, we announce our conclusion to be that it does not measure up to the standard required by the law to establish a lost deed. Concerning testimony of this character it was said in the case of *Wasson* v. *Walker,* 158 Ark. 4, 249 S. W. 29:

"The alleged contract relates to and affects the title to land, it constitutes one of the muniments of title in the chain, and a mere preponderance of the testimony is not sufficient to establish it. Its execution and contents must be established by evidence that is clear and decisive (citing cases)."

In the more recent case of *Erwin* v. *Kerrin,* 169 Ark. 183, 274 S. W. 2, it is said:

"The rule is well established in this State, as well as by the authorities generally, that the burden is upon one who claims title under the alleged lost instrument to establish the execution, contents, and loss of such instrument by the clearest, most conclusive, and satisfactory proof (citing cases)."

As the testimony fails to measure up to this standard, the relief prayed was properly denied, and the decree will therefore be affirmed.

AMERICAN INSURANCE UNION *v.* BENSON.

Opinion delivered February 7, 1927.

1. INSURANCE—CONSTITUTION AND BY-LAWS AS PART OF CONTRACT.—In an action by a beneficiary on a certificate of insurance, defendant benefit society having taken over certificates of members of another society to which assured belonged, the constitution and by-laws of defendant were admissible as part of the contract of insurance, and that the members have notice of, and are bound by, the provisions of same.
2. INSURANCE—NOTICE OF CONSTITUTION AND BY-LAWS—ESTOPPEL.—The beneficiary in a benefit certificate, suing thereon, is estopped to deny that assured had notice of the provisions of the Constitution and by-laws of defendant where assured agreed to and signed an instrument witnessing the merger between the original insurer and defendant society, and acknowledged her contract of insurance with defendant by paying premiums to it, and where plaintiff bases his action on such merger agreement.
3. INSURANCE—WAIVER OF FORFEITURE.—In an action by the beneficiary on an insurance certificate, where the defense was that the certificate was forfeited for nonpayment of premiums, evidence *held* sufficient to warrant finding by the jury that the policy was not forfeited.
4. INSURANCE—WAIVER OF FORFEITURE.—Any conduct or declaration by the insurer which leads the insured to believe that forfeiture of the policy will not be incurred estops the company from insisting on a forfeiture.

Appeal from Calhoun Circuit Court; *W. A. Speer,* Judge; affirmed.

T. E. Helm, for appellant.

J. S. McKnight, for appellee.

WOOD, J. Margaret Ritchie became a member of the Mutual Relief Union of Fort Smith, Arkansas, in September, 1916. As such member she received a certificate insuring her life in the maximum sum of $1,000, in favor of G. B. Benson. The Relief Union was afterward merged with the Home Protective Association, and the latter association was merged with the American Insurance Union under a contract which required the holders of certificates to pay all premiums and chapter dues on or before the 20th day of each month, without notice. The payments were to be made to the cashier of

the Union. The failure to pay caused the policy to lapse, and no cashier or other officer could waive the obligation to pay. The member whose certificate or policy had lapsed could be reinstated at any time within six months by making application on a printed form, attested by the cashier and forwarded to the home office, and by depositing with the cashier the unpaid premium and dues and reinstatement fee of ten cents. The reinstatement had to be approved by the medical director. There was a provision that the receipt by the cashier of the premiums or chapter dues or reinstatement fee would not have the effect of reinstating a lapsed member until his application was approved by a medical director. No provision of the contract could be waived by any of the officers. There was a provision in the contract to the effect that the Union would not be liable to a beneficiary for more than the proceeds of one assessment of the roll to which said deceased member belonged, unless, at the expiration of the maximum period allowed to the members of said roll, said member elected to pay to the Union the regular rate for carrying said member for the full amount of the certificate. Mrs. Ritchie paid her dues until September, 1923, which was the maximum period for increase in her payments, and, under the contract, she had the right at that time to elect to pay an increased premium of $4.70 per month, which would entitle her beneficiary, at her death, to the full amount of her certificate. Mrs. Ritchie died April 2, 1924. This action was instituted by G. B. Benson, beneficiary in the certificate, against the American Insurance Union. He alleged that the defendant was liable for the full amount of the certificate, under the contract of merger by which it took over the certificate of Mrs. Ritchie. In its answer the Insurance Union denied that it was liable under the contract for any amount, but, under no circumstances, for more than the proceeds of one assessment of the members of the roll to which Mrs. Ritchie belonged.

Benson testified, and introduced the certificate issued to Mrs. Ritchie. Mrs. Ritchie died April 2, 1924. The

policy was in force at the time of her death. The secretary of the defendant notified witness when the assessments were due, and they were always paid. The assessment for October, 1923, was paid. $1.43 was the amount to be paid on the policy every month. The witness introduced cards from the defendant which showed that $1.43 was received for September, 1923, and $1.43 over, which was held as a credit to her account "pending choice of options upon reaching the maximum rate in September, 1923."

On April 24, 1923, the defendant wrote Mrs. Ritchie that her next premium would not be due until October 1, 1923, and that it was returning money order for $1.43. On January 11, 1924, the defendant wrote her that she had several options, designating them, under her contract with the defendant, one of which was a whole life level rate policy, on which the premium at her age would be $4.70, payable monthly, and the first would be due October 1. The letter concluded by stating: "When you make choice of a policy on which you wish to continue your insurance and pay the stipulated premium thereon and chapter dues, your protection will be worth every dollar agreed upon, and your membership and insurance will be on an equality with all other members of the American Insurance Union." When witness received this letter, he sent them, on January 16, 1924, $4.80. They held this check from that date until April 18, 1924. On March 31, 1924, the defendant wrote Mrs. Ritchie, in which letter she was notified that it would require $30.90 to cover her premiums through the month of April on the standard step rate, and $7.06 to cover her premiums on the maximum rate. In this letter the defendant asked her to advise regarding the option, and send remittance at the earliest possible moment. Two days thereafter witness sent defendant a check for $30.90, the amount defendant asked the assured to send.

On cross-examination the witness identified a letter written to the assured on February 18, 1924, stating "if it is your desire to have this policy placed in good stand-

ing on our records, it will be necessary to give this matter your prompt attention." The witness further stated, in answer to questions, that he had $1.43 in the hands of the defendant; that he sent them $4.80 on January, and $30.90 the day after Mrs. Ritchie was buried. On redirect examination witness stated that the defendant kept his money ninety days before returning it; that the assured did not receive the option for the new policy until in January, and later she received a letter stating she owed $30.90, and witness sent that; that he always sent what they requested. The defendant never wrote anything about reinstatement; after the defendant wrote that the assured was paid up to October 1, and said at the proper time it would give the option to take the policy and would send the papers on October 1, and did not do it, witness wrote defendant two letters about it. On April 18, 1924, the defendant wrote the assured the following letter: "As your application for reinstatement has been rejected by our medical director, we are returning herewith two checks, one under date of January 17 for $4.80, the other dated April 4, for $30.90. These remittances have been held in our pending file awaiting the consideration of the application for reinstatement." Witness further testified that he notified defendant by letter of the death of Mrs. Ritchie the next day after she was buried, and requested it to send him blanks on which to make proof. Witness' letter was properly stamped and mailed; witness did not receive any response.

The court refused to permit the defendant to introduce its constitution and by-laws in evidence, to which ruling the defendant duly excepted. The secretary of the defendant testified, among other things, that no proofs of death were made out and filed by the beneficiary. He stated that checks aggregating $35.70 were mailed to the defendant April 4, 1924, two days after the member's death, which were returned with the statement that the application for reinstatement had been rejected by the medical director. The witness testified in September, 1923, Margaret Ritchie reached the maximum

assessment, and the level premium basis being $1.43 would purchase $200.84 had she been in good standing when she died. She had failed to make a choice of options in September, 1923, and automatically went upon the level premium basis.

The cashier of the defendant testified to the same effect. She failed to pay anything after September, 1923, was suspended for nonpayment October 20, 1923, was never reinstated, and was not a member at the time of her death. Attached to the deposition of the secretary of the defendant and made exhibits thereto were the contracts of merger between the defendant and the Protective Association of Springdale, Arkansas, and also the rider and contract between defendant and Mrs. Ritchie. Under this rider and contract the certificate holders agreed to make their payments, comply with the constitution and by-laws of the defendant, and the defendant agreed to assume the liability under the certificate. Among the exhibits is an application for reinstatement showing that Mrs. Ritchie's certificate lapsed in the month of October, 1923, and answering all the questions therein in favor of reinstatement, showing that she was in good health, etc., at the time of the application. The application for reinstatement is dated January 17, 1924, signed by Margaret Ritchie, and gives her address as Hampton, Arkansas. At the close of the application for reinstatement is the following certificate: "This is to certify that the above signature was written by the applicant in my presence and that he has deposited with me unpaid premiums and dues, including a reinstatement fee of ten cents, amounting in all to $37.75. I do recommend this applicant for reinstatement." Signed C. L. Jordan, cashier.

The court instructed the jury, in effect, that, if they believed from the testimony that the policy of Mrs. Ritchie lapsed for the nonpayment of dues October 20, 1923, nevertheless if the defendant, by the acts and conduct of its officers, led Mrs. Ritchie to believe that the policy had not lapsed or forfeited, and that she, acting

upon such belief, incurred expenses or trouble on account of the nonpayment of premiums or assessments, then the defendant waived its right to claim a forfeiture in this action; and if the jury so found, their verdict should be in favor of the plaintiff in the sum of $1,000. The defendant asked the court, in its prayer for instruction No. 1, to instruct the jury to direct a verdict in its favor, and its prayer for instruction No. 2 told the jury that, if they found that Mrs. Ritchie was suspended for nonpayment of dues on October 20, 1923, and failed to comply with the laws and requirements of the defendant before her death on April 3, 1924, their verdict should be for the defendant. The court modified the defendant's prayer for instruction No. 2 by adding thereto the following: "provided you further find that the said forfeiture was not waived by the defendant," and granted the prayer as modified. The court refused appellant's prayer for a directed verdict. The appellant duly excepted to the rulings of the court in the giving and refusing prayers for instruction. The jury returned a verdict in favor of the plaintiff in the sum of $1,000, with interest at the rate of six per cent. from June 2, 1924. Judgment was entered in favor of the plaintiff for that sum, from which judgment the defendant duly prosecutes this appeal.

1. Learned counsel for the appellant contends that the court erred in excluding the constitution and by-laws of the appellant from the jury. Counsel are correct in this contention. In the merger contract between the appellant and the Home Protective Association, entered into on November 1, 1918, by which the appellant assumed liability to the certificate holders of the Home Protective Association, among whom was Mrs. Ritchie, was the following provision: "It is hereby understood and agreed that the members hereby consolidated shall be subject to the constitution and laws of the American Insurance Union now in force, or that may hereafter be in force, except as herein otherwise provided."

It is alleged in the answer of the appellant that "a rider and contract of consolidation between the Home Protective Association and the appellant was sent to Mrs. Ritchie and duly signed by her, and afterwards sent to the appellant; that, in this receipt, Mrs. Ritchie agrees that the rider and contract shall be attached to and form a part of her certificate and contract of insurance of the appellant "under the terms and conditions set forth in said rider and contract." While the appellant does not prove the above allegation of its answer, the appellee is not in an attitude to deny that Mrs. Ritchie received and signed the receipt containing the rider and contract of consolidation between the appellant and the Home Protective Association and that such contract was a part of her certificate and contract of insurance with the appellant.

The testimony of the appellee proves conclusively that the rider and contract were received by Mrs. Ritchie and agreed to by her, because she continued, after the merger agreement, as the appellee asserts and as the testimony and correspondence between Mrs. Ritchie and appellant shows, to pay her premiums to the appellant and to thus acknowledge that her contract of insurance was with the appellant. The appellee bottoms his action against the appellant on the ground that, under the merger contract, the appellant had assumed the liability on her policy of insurance. The cause, in this particular, is ruled by the recent case of *Knight* v. *American Insurance Union, ante,* p. 303, where we said: "The conclusion is irresistible that the assured member did receive the rider, for he continued, after the merger contract until his death, to pay the assessments to the appellee. The undisputed testimony therefore justified the trial court in finding that Horace Knight, the assured member, received a copy of the consolidation contract and accepted its provisions. The appellant predicated his cause of action upon such contract, and, having accepted the same, he is bound by its terms."

This court is committed to the doctrine that the constitution and laws of a fraternal benefit society are a part of the contract of insurance and that the members or certificate holders of such society have notice of and are bound by the provisions of the same. See § 6076, C. & M. Digest; *Sov. Camp W. O. W.* v. *Barnes,* 154 Ark. 486, 246 S. W. 55; *Sov. Camp. W. O. W.* v. *Newman,* 142 Ark. 132, 219 S. W. 759, 14 A. L. R. 903, and other cases cited in appellant's brief. To eliminate the error we have stated the contract of insurance upon which the appellee based his right of action as though it were a contract of insurance with the appellant, embracing the provisions of the latter's constitution and by-laws, and, in our consideration of the case, have given the appellant the benefit of these provisions. The question then is, was appellee entitled to recover when the contract is so treated?

2. This brings us to a consideration of appellant's second contention, "that the certificate had lapsed and all rights thereunder forfeited." The issue as to whether or not the policy was forfeited because of nonpayment of premiums or dues was submitted to the jury under correct instructions. The material testimony bearing on this issue is set out above. Giving this testimony its strongest probative force in favor of the appellee, it was certainly sufficient to warrant the court in refusing to declare as a matter of law that the policy was forfeited, and was sufficient to warrant the finding by the jury that the policy was not forfeited, and to sustain the verdict in favor of the appellee. The testimony of appellant's secretary and also of its cashier was to the effect that Mrs. Ritchie defaulted in the payment of her installment dues for the month of October, 1923, in the sum of $1.43, and she was suspended because of such failure on October 20, 1923; that she was never reinstated under the constitution and by-laws of the company and that, if she had been in good standing at the time of her death, the value of her certificate would have been $200.84, under the constitution and laws of the appellant and the rider and merger contract by which she was bound. The jury

might have found that all these contentions were effectually refuted, not only by the testimony of the appellee but likewise by the certificate of appellant's cashier, C. L. Jordan, which was made an exhibit to appellant's depositions, introduced in evidence, referred to in appellant's abstract and found in the record at pages 103 and 104. This document was designated "Application for Reinstatement" of a policy which, it states, lapsed in the month of October, 1923. It is dated January 17, 1924, and is signed by Margaret Ritchie and certified to by appellant's cashier as follows: "This is to certify that the above signature was written by the applicant in my presence, and that she has deposited with me unpaid premiums and dues, including a reinstatement fee of ten cents, amounting in all to $37.75. I do recommend this applicant for reinstatement." There is no testimony in the record to the effect that this amount of money was ever returned to Mrs. Ritchie. If the above certificate stated the truth, then Mrs. Ritchie, at the time of her death, had in the hands of the appellant more than enough money to pay the premiums due on a whole life level-rate policy from October to April, inclusive. Having this money in its hands from January 17, 1924, until after April 2, 1924, when Mrs. Ritchie died, a period of nearly three months, without returning the money and notifying Mrs. Ritchie that the appellant would not reinstate her policy, but would insist on a forfeiture thereof, appellant, by such conduct, must be held to have waived the forfeiture, and is estopped from claiming non-liability on the policy.

There were conflicts in the testimony, which it was the province of the jury alone to reconcile. The undisputed testimony shows that, when the appellant declared the forfeiture of the policy, October 20, 1923, it had in its hands sufficient money to pay the premiums due at that time, and its own correspondence tends strongly to prove that it did not intend to insist upon a forfeiture of the policy, but, on the contrary, was urging Mrs. Ritchie to exercise her option as to which form of insurance she

would finally accept. This was the situation at the time of her death. Appellee's testimony tends to prove that he complied with every request of the appellant to remit premiums, sending in the entire amount that appellant advised him was due, and that Mrs. Ritchie had paid, and was willing to pay at any time, a sufficient amount to prevent a forfeiture of the policy, if appellant had indicated that such was its intention. Appellant delayed making known its purpose to insist upon a forfeiture of the policy until after the death of the assured. Under the facts as the jury might have found them from the testimony in this record, the appellant must be held to have waived the forfeiture. The facts bring the case within the general doctrine announced in many of our cases as follows: "Forfeitures are not favored in law, and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conformity thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop, and ought to estop, the company from insisting on a forfeiture, though it might be claimed under the express letter of the contract. * * * As is said in 14 R. C. L. 1181, § 357, 'waiver of a forfeiture, though in the nature of an estoppel, may be created by acts, conduct, or declarations insufficient to create a technical estoppel, and the courts, not favoring forfeitures, are inclined to grasp any circumstances which indicate an election to waive a forfeiture'." *American Life Assn.* v. *Vaden,* 164 Ark. 75, at page 88, and cases there cited.

There is no reversible error in the record, and the judgment must therefore be affirmed.

NELSON v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered February 14, 1927.

1. APPEAL AND ERROR—TEST OF SUFFICIENCY OF EVIDENCE.—In testing the legal sufficiency of evidence to support a verdict, the Supreme Court gives to the testimony which tends to support it its highest probative value.
2. EVIDENCE—WEIGHT OF PARTY'S TESTIMONY.—The positive testimony of an interested party will not be treated as undisputed.
3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The verdict of a jury upon conflicting testimony is conclusive.
4. RAILROADS—KILLING OF DOG—INSTRUCTION.—In an action for damages for killing a dog by a railroad train, refusal of an instruction that, if the dog was killed by the train, it is immaterial what part of the train killed it, was proper where it was an issue of fact whether the dog was struck by a train or had run under the train.
5. RAILROADS—KILLING OF DOG—INSTRUCTION.—In an action for damages for killing of a dog by a railroad train, an instruction that, if the dog ran under the train after the engine had passed, the railroad company would not liable, *held* proper.

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

E. F. Duncan, for appellant.

Thos. B. Pryor and *H. L. Ponder*, for appellee.

SMITH, J. This is an action to recover damages on account of the alleged negligent killing of a dog, the property of appellant, plaintiff below. There was a verdict and judgment in favor of the defendant railroad company, and this appeal is prosecuted to reverse that judgment. This is the second appearance of the case in this court, the opinion on the former appeal being found in 160 Ark. at page 568, 255 S. W. 10.

At the trial from which the first appeal came the court had given, over the plaintiff's objection, the following instruction: "The burden of proof is upon the plaintiff to show that the employees of the defendant, in charge of the engine pulling the train which killed a dog, carelessly, negligently or willfully ran over the dog, before you would be authorized to find for the plaintiff." The court had refused to give, at plaintiff's request, an

instruction to the effect that proof that the dog was killed by the running of the train made a *prima facie* case of negligence and imposed upon the railroad company the burden of showing that it had not negligently killed the dog. It was held on the former appeal that the refused instruction should have been given, and that the instruction given was erroneous.

Upon the remand of the cause, instructions were given which conformed to the opinion on the first appeal, and the only question presented on the appeal now before us is whether the testimony on the part of the defendant was sufficient to overcome the statutory presumption of negligence.

Charles Nelson, a witness for the plaintiff, testified that he was picking cotton on the railroad right-of-way about ten yards from the track. That the train whistled for the crossing, but did not whistle for the dog. Witness saw the dog going towards the track, and in some weeds near the track, just before the train passed, but did not see the train strike the dog. Witness looked for the dog after the train passed, and, not seeing it, went down the track, and found that the dog had been decapitated, and that its body was on one side of a rail and its head on the other.

Plaintiff, testifying in his own behalf, stated that the dog was in front of the train, and, when he saw that the dog was about to be struck, he turned his head to avoid seeing it killed. The train which killed the dog was identified by plaintiff as a long through freight train, known as the "Red Ball," and the engineer and fireman in charge of this train on the day the dog was killed both testified that they did not strike a dog on that trip. It is true, they admitted they had no independent recollection of what happened that day, except as their recollection was refreshed by the trip report which they were required to make and had made. They had examined their reports and found that they had not reported the killing of a dog, but they testified that they would have

reported the killing of a dog had they been aware of that fact.

The engineer was positive that the engine had not struck a dog, as he had kept a constant lookout, although he could not say whether some other part of the train had done so. The Red Ball train carried forty-five to fifty cars, and one of the rear cars could have struck the dog without witness knowing it. The fireman was equally as positive that the engine had not struck a dog.

In testing the legal sufficiency of the evidence to support the verdict, we give the testimony which tends to support it its highest probative value, and, when this is done, we are unable to say that the jury was not warranted in finding that the railroad company was not guilty of negligence. It is true, plaintiff himself testified that he saw the dog in front of the train, but the jury evidently did not credit this testimony. As this witness was party plaintiff, it cannot be said that his evidence must be treated as undisputed. *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. 52, 12 Ann. Cas. 243. Moreover, plaintiff's testimony is contradicted by that of the engineer, who stated that he was keeping a lookout, and did not see the dog. The jury has passed upon this conflict, and the verdict is decisive of the question.

Plaintiff requested the court to give an instruction reading as follows:

"You are further instructed that, if you find from a preponderance of the evidence in this case that the plaintiff's dog was killed by the defendant company's train, it is immaterial as to what part of the train killed the dog."

This instruction was refused, and the court charged the jury, on the contrary, that, if the dog ran under the train after the engine had passed it, the railroad company would not be liable.

No error was committed in giving one and refusing the other of these instructions. They must be read in the light of the facts to which they were applied. The

issue of fact was whether the dog was struck by the engine or had run under the train. If the engineer told the truth, he was keeping a lookout, and did not see the dog, possibly because it was in the weeds where the witness Charles Nelson last saw it alive when the engine passed it, and there was no liability. Under these circumstances it would not do to say that it was immaterial that cars following the engine killed it, for no lookout, however constant or effective, could have prevented the dog from running under the train. To hold otherwise would render a railroad company liable for any animal killed, regardless of the circumstances under which it was killed, and the law has never been so declared.

As no error appears, the judgment must be affirmed, and it is so ordered.

CONNELL v. PIONEER COOPERAGE COMPANY.

Opinion delivered February 7, 1927.

TAXATION—LANDOWNER PAYING TAXES ON TIMBER SEPARATELY OWNED.—Where, at the time of assessments of taxes, the owner of land also owned the standing timber, the land and timber were properly assessed jointly, and a subsequent purchaser of the land, apart from the timber, who voluntarily paid the taxes on both land and timber, cannot recover the proportionate amount of the taxes on the timber from the purchaser thereof, either under or independently of Crawford & Moses' Dig., §§ 9940-1, which authorize separate assessments of land and timber only where timber rights are held by another than the landowner.

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

Strait & Strait, for appellant.

Edward Gordon, for appellee.

McCULLOCH, C. J. Appellant is the owner of certain lands situated in Conway County (exclusive of the standing timber thereon), and appellee, Pioneer Cooperage Company, is the owner of the timber, both having purchased from the same grantor, who was the owner of the unseparated land and timber. Each of the parties

purchased from Morgan, the owner, after the taxes for 1924 had been duly assessed and extended on the taxbooks for payment of State and county taxes and road improvement taxes, but before same became payable, on the first Monday of January, 1925. There was no separate assessment of the timber for that year, and the taxes on the land, including the timber, were paid as assessed by appellant, who instituted this action in the chancery court of Conway County against said appellee, alleging that the timber is far more valuable than the land, and praying for an accounting of the proportionate amount of taxes on the timber, and that decree be rendered against appellee in favor of appellant for recovery of the amount of such proportionate part of the taxes. The court sustained a demurrer to the complaint, and, upon dismissal of the complaint, appellant has duly prosecuted this appeal.

This action is predicated upon the statute which provides for separate assessment of land and timber when owned by different persons. The statute reads as follows:

"Section 9940. When the timber rights in any land shall, by conveyance or otherwise, be held by one or more persons, firm or corporation, and the fee simple in the land by one or more persons, firm or corporation, it shall be the duty of the assessor, when advised of the fact, either by personal notice or by recording of the deeds in the office of the recorder of the county, to assess the timber rights in said lands separate from the soil and to the owner of said timber right, and said soil shall be assessed to the owner thereof. And in such case a sale of the timber rights for nonpayment of taxes shall not affect the title to the soil itself, nor shall a sale of the latter for nonpayment of taxes affect the title to the timber rights.

"Section 9941. It shall be the duty of the assessor to assess said timber rights with a description of the land on the real estate taxbooks; and said assessment shall be marked 'timber,' and, upon the nonpayment of taxes so assessed against said timber, the same shall be

advertised with a description of the land as 'timber,' giving the character or kind of such timber, in some newspaper, as now provided by law for nonpayment of taxes on land, and said timber shall be sold as now provided by law for the sale of delinquent lands.'' Crawford & Moses' Digest.

We are of the opinion that the court was correct in sustaining the demurrer, for the remedy sought by appellant is one purely of statutory creation, if it exists at all, and we do not find that the statutes referred to provide for recovery under circumstances set forth in the complaint. In other words, the statute does not authorize separate assessment of standing timber and collection of taxes thereon except in cases where ''the timber rights in any land shall, by conveyance or otherwise, be held by one or more persons, firm or corporation and the fee simple in the land by one or more persons, firm or corporation * * *.''

According to the allegations of the complaint, the joint assessment against the land and timber was correct, for there had not been a separation of the timber rights from the ownership of the soil. The situation did not come within the operation of the statute, and appellant is without remedy to recover taxes which he voluntarily paid on the land and timber. The appellant would have no remedy independent of the statute, and, since we find his case does not fall within the statute, he is without remedy.

Affirmed.

CHICAGO MILL & LUMBER COMPANY v. DRAINAGE DISTRICT NO. 17.

Opinion delivered February 14, 1927.

1. DRAINS—COST OF IMPROVEMENT—INTEREST.—The Legislature may provide that interest shall not be taken into account in determining whether the cost of a proposed improvement will exceed the betterments.
2. DRAINS—INCREASE OF LEVY RATE.—Under Acts Extra Sess. 1920, No. 305, amending Acts 1917, p. 485, organizing Drainage District No. 17 of Mississippi County, and authorizing the commissioners to levy such rate as is deemed necessary to construct and pay for the improvement, the commissioners had power to increase the percentum of betterments to be collected in any one year.
3. MANDAMUS—COMPELLING COURT TO MAKE LEVY.—Under act No. 305 of Extra Sess. of 1920, amending Acts 1917, p. 485, making the commissioners of the drainage district fiscal agents of such district, it is their duty to ascertain the requirements of the district in the way of taxation, in order to meet the obligations of the district, and to call on the county court to make the necessary levy, and such court may, by mandamus, be compelled to make the levy.
4. DRAINS—EXCESSIVE LEVY.—An anticipated surplus of $3,115 from a tax levy in a drainage district *held* not excessive, in view of the magnitude of the district and the large requirements to meet its obligations.
5. DRAINS—LEVY BASED ON ESTIMATED DELINQUENCIES.—An estimated requirement based on anticipated delinquencies was not speculative or unreasonable where the estimate was based on actual delinquencies for the previous year.
6. DRAINS—REASONABLENESS OF LEVY.—The levy of a proposed increased rate against a drainage district, based on anticipated delinquencies, *held* not to result in imposing a greater burden on landowners who pay such rate than on the delinquent lands, since the revenues eventually to be obtained from the delinquent lands will be available for payment of the district's obligations.

Appeal from Mississippi Circuit Court, Chickasawba District; *G. E. Keck,* Judge; affirmed.

W. R. Satterfield and *Little, Buck & Lasley,* for appellant.

Chas. D. Frierson, for appellee.

SMITH, J. Drainage District No. 17 of Mississippi County was organized by special statute (Acts 1917, volume 1, page 485), and embraced a large part of both the Chickasawba and Osceola districts of that county. Pursuant to the authority conferred by this act, serial bonds running from the year 1919 to 1942, inclusive, were issued by the district, aggregating $1,682,500. The betterments to the real property in the district were assessed at $4,190,868.41, and taxes thereon were levied in twenty-four installments for the years 1919 to 1942, inclusive. The first four installments were fixed at 2.3 per cent. of the assessed betterments, and for the remaining nineteen years the annual installments were fixed at 3.6 per cent. of the benefits. These annual installments aggregated 81.2 per cent. of the benefits. The levy of the taxes against the benefits was sufficient to take care of the principal and interest of the bond issue, the interest amounting to $1,394,649.20.

This special act was amended at the extra session of the General Assembly of 1920 by act No. 305, approved February 23, 1920. The amendatory act enlarged the district and cured all defects in the proceedings leading up to the organization of the district, confirmed all judgments, assessments and contracts, and removed the limitation on the cost of the improvement, and made all betterments bear interest at the rate of six per cent., and provided that interest on the bonds should not be considered as a part of the cost of the improvement, and should be collected in addition to the benefits.

Pursuant to the authority conferred by the amendatory act, plans were prepared to afford drainage to what is known as the Big Lake area, and certain other changes in the plans were made and benefits were reassessed. Bonds dated August 2, 1920, aggregating $2,300,000, were issued in addition to those previously issued. Taxes were levied on the changed and corrected benefits to take care of the principal and interest on both issues of bonds maturing after that date.

The taxes were then levied in twenty-two annual installments for the years 1921 to 1942, both inclusive. The installments for the years 1921 and 1922 were fixed at 5 per cent.; for the years 1923 and 1924 at 6 per cent.; for the year 1925 at 6.6 per cent.; and for the years 1926 to 1942, both inclusive, at 7½ per cent. The tax rate for 1921 was reduced from 5 to 4 per cent., and for the years 1923 and 1924 it was increased from 6 to 7 per cent.

The district filed a petition in the county court, praying an increase in the rate for the year 1925 to 7.7 per cent., and alleged that it was necessary to increase the tax rate because of a large delinquency of the lands in the district. At the time this petition was filed no default had occurred in the payment of principal or interest on either bond issue.

The appellant, Chicago Mill & Lumber Company, which owns a large body of land in the district, intervened, and was made a party defendant, and filed an answer denying the authority of the court to make an order increasing the tax rate previously fixed. At the hearing in the county court the order prayed was granted, and the intervener duly prosecuted an appeal to the circuit court. Upon the hearing of this appeal the order of the county court was affirmed, and this appeal is from that judgment.

Proof was offered showing that the annual increase in delinquencies had in 1924 reached $71,738.69, the principal part of which was in the Big Lake area. It was shown that a total of 14,000 acres of land had been returned as delinquent, of which 8,000 acres had been sold to the district in proceedings to enforce payment of the drainage tax. The showing was made that the taxes for the year 1924 were on a 7 per cent. basis and produced revenues of $339,724.04, and it was further shown that, if the rate were increased to 7.7 per cent., as prayed, a total revenue of $363,990 would be produced if all taxes were paid, but it was estimated by the commissioners of the district that a delinquency total of 20 per cent. would likely occur. It was also shown that during the year

1925 bonds and interest thereon totaling $310,875 would mature, and, if the anticipated delinquencies occurred, there would be an excess of revenues over requirements of only $3,115.

The court made no finding of fact, for the reason stated that the facts were undisputed, but did make the following declaration of law: "Under the facts in this case, the drainage district is entitled to increase the tax rate as petitioned for herein. The county court had authority to order said increase under the acts of the General Assembly under which said district was created, and the order of the county court is affirmed."

The appellant lumber company requested the following declarations of law, all of which were refused, to which ruling of the court exceptions were duly saved:

"No. 1. The drainage district has not shown that the original levy of taxes is insufficient to meet the costs of the improvement, and, until it does do so, the county court has no authority to increase the tax rate.

"No. 2. Under the law creating the district, each tract of land must bear its just proportion of the costs of making the improvements in said district; that the order of the county court made herein in which this appeal is taken is based upon an anticipated insufficiency of the revenue arising from the levying of taxes to meet the maturity of principal and interest of bonds, and that, if said order stood, it would result in the lands which have been paid upon each year bearing a greater burden than other lands in the district permitted to go delinquent.

"No. 3. Drainage district has not shown, under the proof herein, that it was entitled to the relief prayed for, and that the county court was without authority to make an order increasing the tax rate."

We think the declarations of law requested by counsel for appellant are all answered adversely to its contention in the cases of *Oliver* v. *Whitaker,* 122 Ark. 291, 183 S. W. 201; *Pfeiffer* v. *Bertig,* 141 Ark. 531, 217 S. W. 791; *Skillern* v. *White River Levee District,* 139 Ark. 4, 212 S. W. 90; *Massey* v. *Ark. & Mo. Highway District,*

163 Ark. 63, 259 S. W. 387; *Griffin* v. *Little Red River Levee District,* 157 Ark. 590, 249 S. W. 16; and *Faulkner Lake Drainage District* v. *Williams,* 169 Ark. 592, 276 S. W. 604.

The effect of these cases, as applied to the facts of the instant case, is that the Legislature may provide that interest shall not be taken into account in determining whether the cost of a proposed improvement will exceed the betterments, and if it be true, as contended by counsel for appellant, that the original act did not so provide, the amendatory act very clearly did, and, as has been frequently decided, this is a matter wholly within the control of the General Assembly.

Upon the question of the power of the board of commissioners to increase the rate per centum of the betterments to be collected in any one year, it may be said that both acts confer power and impose the duty upon the commissioners to levy such rate as is deemed necessary to construct the improvement and pay for it, the only limitation in this respect being that not more than ten per cent. of the betterments shall be collected in any one year if any landowner objects thereto.

Under the act creating appellee district, as under the act construed in the case of *North Arkansas Highway Improvement District No. 2* v. *Rowland,* 170 Ark. 1168, 282 S. W. 990, the commissioners are made the fiscal agents of the district. It is their duty to ascertain what the requirements of the district in the way of taxation are to meet the obligations of the district, and to call upon the county court to make the necessary levy, and the court might, by mandamus, have been compelled to make the levy. The case last cited so expressly decided.

It was said in that case that:

"We do not mean to hold that, if it were shown in a proper proceeding that the commissioners of the district were levying taxes unnecessarily, the taxpayers would be without remedy to prevent this from being done."

But we think no abuse of discretion was shown here. It was a proper matter for the exercise of the discretion

vested in the commissioners to ascertain and declare the probable requirements of the district to meet its obligations as they matured. In view of the magnitude of this district and the large requirements to meet its obligations, the anticipated surplus of $3,115 cannot be regarded as excessive or unnecessary. It is true this estimated requirement is based upon anticipated delinquencies, but that estimate is based upon the actual delinquency for the previous year, and cannot therefore be said to be either speculative or unreasonable.

We conclude therefore that the court below was wholly warranted in refusing appellant's declaration of law that the district had not shown that the original levy of taxes was insufficient to meet the cost of the improvement.

The contention of appellant, expressed in its second request, that the levy of the proposed rate would result in requiring it and other landowners who had paid and who continued to pay their taxes to bear a greater proportionate burden than that imposed upon the lands which were allowed to go delinquent, is answered in the Rowland case, *supra,* and in that of *Arkansas-Louisiana Highway Imp. Dist.* v. *Pickens,* 169 Ark. 603, 276 S. W. 355. It was pointed out in those cases that the lien of the district continued until the taxes were paid or until the lands themselves were acquired by the district through sales for the nonpayment of the taxes, and that, when the delinquent taxes were paid, they became available and should be used in paying the obligations of the district, and further, that, if the lands were sold to the district and not redeemed, then the entire value of the lands to be realized by a sale thereof would be available for this purpose. So that, while a delay would be entailed in obtaining and applying revenues from the delinquent lands, these revenues would finally be obtained and applied, and thus no unequal burden would be imposed. Upon this feature of the question the case of *Turley* v. *St. Francis Rd. Imp. Dist. No. 4,* 171 Ark. 939, may be cited.

We think it sufficiently appears, from what has been said, that the district was entitled to the relief prayed, and that the county court had the authority to make the order increasing the tax rate, and the judgment of the circuit court to that effect is accordingly affirmed.

REHEARING OPINION.

SMITH, J. In the brief filed by counsel for appellant in support of its petition for rehearing certain questions are discussed which we think are concluded by the original opinion in the case.

It is insisted that we did not discuss the question of the priority of the first bond issue over the second issue of bonds, and that a condition may arise through delinquency of payment of taxes when this question will be of paramount importance.

We purposely refrained from discussing this question, as we do not think it properly arises on this appeal. The bondholders are not before the court, and appellant is being required to pay only a per cent. of the betterments against its lands which is authorized by law. The limitation of taxation to the amount of its betterments is its protection, as this cannot be exceeded in any event. The principle of uniformity is fully preserved, as is shown in the original opinion.

The petition for rehearing is therefore overruled.

FARMERS' & MERCHANTS' BANK v. HAMMOND.

Opinion delivered February 21, 1927.

1. WILLS—ESTATE IN FEE.—Where a will expressed a desire to divide the real estate of the testatrix equally between her son and her granddaughter and provided that the latter should take the land devised to her "to her sole and separate use, benefit and enjoyment, free from all debts, contracts and liabilities of any husband that she may have," *held* that the granddaughter took a fee simple.
2. WILLS—CONSTRUCTION—VESTING OF ESTATES.—In construing wills, courts favor the early vesting of estates and carrying out the

intention of testators, if not at variance with recognized rules of law.

3. WILLS—DEFEASIBLE FEE SIMPLE.—Where a will devised a fee simple to the granddaughter of the testatrix, but provided that, if she should die leaving no child surviving, the property should go to certain remaindermen, *held* that the granddaughter took a defeasible fee simple.*

4. ESTOPPEL—BY DEED.—Where a will devised land in fee to a granddaughter, but provided that, if she should die, leaving no child surviving, the land should go to certain remaindermen, the latter, by executing deeds to the granddaughter, are estopped from defeating the title upon the remote contingency of the death of such granddaughter leaving no children, where improvements were made upon the faith of such deeds.

Appeal from Lee Chancery Court; *A. L. Hutchins,* Chancellor; reversed.

E. L. Westbrooke, Jr., E. L. Westbrooke, Mann & McCulloch, for appellant.

Daggett & Daggett, for appellee.

HUMPHREYS, J. This is a suit by appellants, owners of separate notes evidencing the balance of the purchase money for the Battle Ax Plantation in Lee County, Arkansas, to foreclose a mortgage lien given to secure said notes by B. F. Hammond, Sr., C. T. Chandler and R. D. Jarrett to C. E. Daggett, trustee for Logan, Ward & Company, a Kentucky corporation, which had conveyed the plantation to Hammond, Chandler and Jarrett in September, 1919.

Appellees, C. T. Chandler and R. D. Jarrett, filed an answer and cross-complaint, alleging that Logan, Ward & Company had only a life estate in said plantation, it holding through mesne conveyances dating back to June 19, 1878, on which date Grizelle T. McKinney, by will, a copy of which they filed, gave to her granddaughter, Courtney McKinney Mitchell (now DeSaussure) a life estate in the plantation, with remainder over to others; that the covenant of warranty in the deed from Logan, Ward & Company to Hammond, Chandler and Jarrett had been broken, resulting in

*Compare *Combs* v. *Combs, post,* p. 1073 (Reporter).

damage to them in the sum they had paid on the purchase price.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a finding that Courtney McKinney Mitchell (now DeSaussure) acquired a life interest only under the will of her grandmother, Grizelle T. McKinney, and that, by reason of this fact, there had been a failure or breach of the covenant of warranty in the deed of Logan, Ward & Company to appellees, Hammond, Chandler and Jarrett, and that Chandler and Jarrett, the cross-complainants, were entitled to a judgment against J. W. Ward, a stockholder in the corporation of Logan, Ward & Company, for a breach of covenant of warranty by said corporation; that appellants, J. T. Robertson and P. B. Benham, who were intervening plaintiffs below, had not purchased their notes in due course for value without knowledge of the defense interposed by Chandler and Jarrett; that all of the appellants, except the interveners, were entitled to a decree against the life estate of Hammond, Chandler and Jarrett in the plantation for the amount of their respective purchase money notes. A decree was rendered in accordance with the findings of the trial court, from which all the parties have prosecuted an appeal to this court.

We have confined ourselves to a very brief as well as general statement of the case, because learned counsel for appellees have agreed, in order to simplify the issues, that, if said appellees acquired, through mesne conveyances dating back to and including the will of Grizelle T. McKinney, a fee simple title to the plantation, then the decree of the chancery court is erroneous, and appellants are entitled to a judgment for the full amount claimed and to a decree foreclosing the entire estate in the plantation to pay same. The sole question presented therefore for determination on this appeal is whether, under Mrs. McKinney's will, Mrs. DeSaussure acquired a life estate or a fee simple title to the plantation. Omitting formal parts, and provisions for the burial of her

body and the payment of her debts, and some special bequests, the will is as follows:

"4. It is my will and desire that all the rest and residue of my estate, both real and personal, shall be equally divided between my beloved son, Alexander Finley McKinney, and my little granddaughter, Courtney McKinney Mitchell, daughter of W. Z. Mitchell, of Memphis, Tennessee, to be held and enjoyed by them as hereafter provided, and to this end I hereby devise to my said son, Alexander Finley McKinney, the homestead and plantation near Germantown, Shelby County, Tennessee, upon which he and I reside, containing about 1,480 acres of land, together with all the improvements and appurtenances thereto belonging, to have and to hold the same to him and his heirs in fee simple.

"In order to avoid the trouble and expense of partitions between devisees, as far as practicable, I value the tract of land at the sum of $22,000, and charge my son with that amount for it in the division.

"5. For the purpose mentioned in the last item I further give and devise to my said granddaughter, Courtney McKinney Mitchell, my plantation in Lee County, Arkansas, known as the McKinney Place, cultivated this year by Messrs. Wormley and Goodman, containing about 1,720 acres of land, together with improvements and appurtenances thereto belonging. This plantation I value at the sum of $17,000, and with this amount I charge my said granddaughter for it in the division. This and all other real estate devised under this will to the said Courtney McKinney Mitchell to be taken and held by her upon the conditions and limitations following, viz: To her sole and separate use, benefit and enjoyment, free from all debts, contracts and liabilities of any husband that she may have, and in the event that she shall die leaving no child or children surviving her before the death of my said son, Alexander Finley McKinley, then all of said property and estate shall go to and become the absolute property and estate of my said son, and in the event she shall die without child or

children surviving her after the death of my said son, then all of said property shall become the property of Alexander McKinney Rafter, J. M. Carter and C. M. Carter, to whom in that contingency, or to such of them as may be then living, I devise said property.

"6. I hereby constitute and appoint my beloved son, Alexander Finley McKinney, the testamentary guardian of the property and estate bequeathed and devised under the will to my said granddaughter, Courtney McKinney Mitchell, to be held and cultivated by him as such guardian during the minority of said granddaughter for her support, maintenance and education, etc.

"7. My Memphis real estate and such other as I may die seized and possessed of shall be equally divided between my said son and granddaughter by commissioners appointed by the court having jurisdiction of the person and subject-matter, but in the partition of such real estate my said son shall be charged with the sum of $5,000, the excess of the value that I placed upon the Shelby County plantation over the value of the Arkansas plantation, as heretofore provided. If, by reason of the depreciation in value of property or by any other contingency, the property to be then partitioned shall not be sufficient value to equalize the shares of my two devisees, then in that event the said Alexander Finley McKinney shall be debtor to my said granddaughter in the amount of any such deficit, and the property herein devised to him is charged with said deficit and the same shall be a lien thereon."

The testatrix, Grizelle T. McKinney, died December 30, 1888. Alexander Finley McKinney and Courtney McKinney Mitchell (now DeSaussure), the devisees in the will, acquired deeds to all interest under the aforesaid will of Alexander Finley Rafter, J. M. Carter and C. M. Carter to said plantation in 1894, and on March 14, 1900, conveyed it by warranty deed to William L. Bailey, under whom, through mesne conveyances, it was acquired by Hammond, Chandler and Jarrett, who have since remained in the undisturbed possession thereof. Alex-

ander Finley McKinney died September 17, 1918, without issue. Courtney McKinney Mitchell (now DeSaussure) is the only living heir of her grandmother, the testatrix. She is living with her husband, Louis M. DeSaussure, at Collierville, Shelby County, Tennessee. She was born August 3, 1871, was fifty-one years of age when the suit was brought, and has four children, whose names and ages are as follows: Louis M. DeSaussure, Jr., 29 years; Margaret DeSaussure, 27 years; Charles Albert DeSaussure, 24 years, and Ellen Chessnutt DeSaussure, 18 years.

Appellants' contention is that Courtney McKinney Mitchell (now DeSaussure) took a qualified fee in the plantation under the will of her grandmother; that, having survived her uncle and testamentary guardian, the first condition imposed in the fifth paragraph of the will was eliminated, and, on the birth of her first child, the second condition therein expressed was eliminated, and her title to the plantation became a title in fee simple, thereby defeating the remaindermen who were to take under said paragraph.

Appellees' contention is that, under the common law, the language used in the will created an estate tail by construction, and this, by operation of § 1499 of Crawford & Moses' Digest, vested the life estate only to the plantation in Courtney McKinney Mitchell (now DeSaussure), with the remainder to her children.

It will be observed that the first and last declarations of the testatrix relative to a division of her estate, both real and personal, between her son and only granddaughter, are that they shall share it equally. In the first part of paragraph 4 she said: "It is my will and desire that all the rest and residue of my estate, both real and personal, shall be equally divided between by beloved son, Alexander Finley McKinney, and my little granddaughter, Courtney McKinney Mitchell * * *." In the first part of paragraph 7 she said: "My Memphis real estate and such other as I may die seized and possessed of shall be equally divided between my said son

and granddaughter * * *." In order to prevent trouble and expense of partitioning her estate equally, she valued the 1,480-acre plantation in Tennessee, which she devised to her son in fee simple, at $22,000, and the one in Arkansas she devised to her granddaughter at the sum of $17,000. In paragraph 7 of the will she reiterated the inequality in value between the plantations she had already devised to her son and granddaughter, and in the division of the Memphis real estate and such other as she might own when she died, her son's share therein was specifically charged with the sum of $5,000, the excess of the value that she had placed upon the Shelby County plantation over the value of the Arkansas plantation. In a last effort to effect an equal division of her entire estate between her son and granddaughter she said, in the latter part of paragraph 7: "If, by reason in the depreciation in value of property or by any other contingency, the property to be then partitioned shall not be sufficient value to equalize the shares of my two devisees, then in that event the said Alexander Finley McKinney shall be debtor to my said granddaughter in the amount of any such deficit, and the property herein devised to him is charged with said deficit, and the same shall be a lien thereon." In valuing the plantations she placed a value upon the lands themselves according to her idea of what each was worth, and charged each devisee for the amount fixed for the land which each received in the division. It is evident she did not value a fee simple title in one plantation and a life estate in another. It would have been next to impossible to have equalized a division of the estate on the basis of a fee simple title in one plantation and a life estate only in another. It would seem that a declared intention of a testator, in both the opening and closing paragraphs of his will, to divide his estate equally between the beneficiaries, when connected with an effort to accomplish that purpose by fixing the values of the properties devised to each and charging each with the value of the property devised to him, should not be thwarted by intervening language of doubtful meaning.

By reference to the intervening language it will be observed there are no words in the will indicating that a limitation over to the heirs of the body of Courtney McKinney Mitchell (now DeSaussure) was intended by the testatrix. No reference was made in the will either to a life estate or to a remainder estate. The language does not restrict the use of the property by the devisee nor limit a remainder to her issue or the heirs of her body. On the contrary, we find language to the effect that it was devised to her for "her sole and separate use, benefit and enjoyment, free from all debts, contracts and liabilities of any husband she may have." The absence of such restrictions and limitations and the use of the language just quoted indicate that the testatrix intended to devise a fee simple estate in the plantation in question to her granddaughter. In construing wills, courts favor the early vesting of estates, and in carrying out the intention of testators, if not at variance with recognized rules of law. A majority of the court has concluded that the instant case is ruled by *Wiggins* v. *Hill,* 145 Ark. 152, 223 S. W. 394. It was decided in that case that the devisee took a defeasible fee simple title to the property devised. By so holding in the instant case, effect and meaning will be given to every clause of the will. We cannot concur with learned counsel for appellees that this construction of the will will necessarily affirm the case because of the remote possibility that all of Mrs. DeSaussure's children may predecease her.

The first contingency upon which her defeasible fee simple title might be defeated was eliminated upon the death of her uncle, Alexander Finley McKinney. The other contingent remaindermen executed deeds for all their interest in said plantation to Alexander Finley McKinney and Courtney McKinney Mitchell (now DeSaussure) in 1894, and they in turn conveyed the land to William L. Bailey in fee simple, through whom Hammond, Chandler and Jarrett acquired title through mesne conveyances purporting to convey the fee simple title. The taxes have been paid and improvements made on the

faith of deeds executed by these contingent remaindermen, and certainly they have estopped themselves from defeating the title upon the remote contingency of Mrs. DeSaussure surviving all of her children.

On account of the error indicated the decree is reversed, and the cause is remanded with directions to enter judgments in favor of appellants for their respective claims and to decree a foreclosure and sale of said plantation to satisfy the judgments.

Chief Justice HART and Judge WOOD dissent.

COMBS v. COMBS.

Opinion delivered March 7, 1927.

1. WILLS—CONSTRUCTION BY DECREE.—A decree finding that the widow of testator's son was, as sole legatee under the son's will, owner in fee of all the son's property, including property received under his father's will, *held* to construe such will as devising a fee simple to the son, and not a defeasible fee.
2. WILLS—REMAINDER IN FEE.—A devise to the testator's wife and son during their natural lives with remainder in fee to the son if he should survive the wife, gave to the son a fee-simple title after the wife's death, with power to convey by grant or devise.
3. WILLS—FEE-SIMPLE ESTATE—REPUGNANT LIMITATION.—Where a will conveyed a fee-simple estate to testator's son, an attempted limitation directing the disposition of the property in case of the son's death seized and possessed of the property without leaving children, is void as repugnant to the fee already given.*
4. WILLS—ACCEPTANCE UNDER WILL.—In a suit by the sons of a nephew of a testator for partition claiming under a limitation in testator's will in favor of the sons of two nephews which was void as repugnant to a fee-simple remainder in testator's son, the son's devisee and the sons of the other nephew of the testator *held* not estopped to claim that the limitation in the will was invalid by the fact that, at such devisee's request, the court vested the property in the sons of one of the testator's nephews to the exclusion of the plaintiffs.
5. WILLS—ESTOPPEL OPERATING AS GRANT.—Where a widow, who became entitled to land as her husband's sole devisee, surrendered

*See *Farmers' & Merchants' Bank* v. *Hammond, ante* p. 1065 (Reporter).

rights thereto and asked the court to decree the title to be in certain of her husband's cousins, which order was made, the effect of her action was to grant the property to such cousins.

6. WILLS—DESCRIPTION OF DEVISEES.—An attempted limitation over in a will to the sons of the testator's three brothers, naming them, cannot be construed as applicable to the sons of two nephews so named, when the testator had only one brother, who was correctly named.

7. WILLS—DESIGNATION OF DEVISEES.—Parol evidence is admissible to identify a beneficiary under a will where the designation of the beneficiary is uncertain or ambiguous.

8. WILLS—DESIGNATION OF BENEFICIARIES.—A limitation in a will in favor of sons of "my three brothers, Alfred, Sewell and Isaac," *held* not uncertain or ambiguous in designation so as to admit parol evidence to identify the beneficiaries, though the testator had one brother and two nephews bearing the names designated.*

Appeal from Washington Chancery Court; *Lee Seamster,* Chancellor; affirmed.

Action by C. F. and H. C. Combs, sons of Sewell Combs, and others, against A. T. and J. W. Combs, sons of Isaac G. Combs and others. Complaint dismissed, and plaintiffs have appealed.

STATEMENT BY THE COURT.

On the 25th day of January, 1926, appellants commenced this action in the chancery court of Washington County, charging that, on the 25th of April, 1899, Nathan Combs, late a resident of Washington County, died testate, leaving surviving his widow, Elizabeth Combs, and his son, Isaac Combs; that said will was admitted to probate in Washington County, and by the terms of which he made certain specific bequests, and then disposed of the remainder of his estate in the following language:

"And I give and bequeath the residue of my estate, after my funeral expenses and just debts have all been paid, to my beloved wife, Elizabeth Combs, and to my son, Isaac Combs, for and during their natural lives, with the remainder in fee to Isaac G. Combs if he should survive my said wife, and in the event that my said son,

*Compare *Boone* v. *Boone,* 114 Ark. 69, 4th headnote. (Reporter).

Isaac G. Combs, should fail to have a child or children born to him, and should die seized and possessed of any of said property, I desire and will that the same be divided equally between the sons of my three brothers, Alfred, Sewell and Isaac Combs."

It is further alleged that said Isaac G. Combs, son of the testator, survived his mother, and died testate without issue on the 26th of March, 1925, and that his will was admitted to probate in said county; that, at the time of his death, the said Isaac G. Combs was seized and possessed of a large amount of real property which had come to him through the estate of his father; that, at the August, 1925, term of the Washington Chancery Court, in an action between Martha Combs *et al.* against the unknown heirs of Henderson Combs *et al.* the court entered a decree finding that, under the will of Isaac G. Combs, his wife, Martha Combs, was the sole beneficiary and legatee, and, as such, was the owner in fee of all the real and personal property of which the said Isaac G. Combs died seized and possessed. The court then finds that he died without having born to him any child or children, and that he died seized and possessed of a large amount of real property which came to him under the will of his father, Nathan Combs, which is set out and described at length. The court further found in its decree, after quoting the paragraph of the will above set out, that Elizabeth Combs, the wife of Nathan Combs, died prior to the death of Isaac G. Combs, and that Alfred Combs, brother of Nathan Combs, mentioned in his said will, as above, had six sons, all of whom died prior to the death of Isaac G. Combs; that Isaac Combs, brother of Nathan, mentioned in his will, had three sons, J. W., A. T. and R. L. Combs, and that said R. L. Combs died about the year 1900 and left surviving him the plaintiffs, L. R. Combs and W. O. Hicks, and that therefore the only sons of the brothers mentioned in the will of Nathan Combs who were living at the time of the death of Isaac G. Combs were the plaintiffs, A. T. and J. W. Combs.

The court further found in said decree that, under said paragraph of the will of the said Nathan Combs, above set forth, any right, interest or property bequeathed to the sons of said brothers was contingent and would not vest under said will until the death of the said Isaac G. Combs, and that therefore none of the children nor heirs at law of the sons of the brothers of Nathan Combs, who died prior to the death of the said Isaac G. Combs, acquired any interest under the will of said Nathan Combs, and that A. T. and J. W. Combs acquired all the interest or right conveyed by the above provision of said will.

The court further found that the plaintiff, Martha Combs, his widow and sole legatee under the will of her husband, Isaac G. Combs, "announced in open court, by her counsel, that she desires that the property hereinbefore set out and described be vested and conveyed under and by virtue of the provisions of the will of the said Nathan Combs, deceased, as above set forth, and construed by this court as to the validity of said provisions of said will as against the said plaintiff, Martha Combs."

The court further found that Martha Combs was entitled in fee to all other property of which her husband, Isaac G. Combs, died possessed, and that she was entitled to the rents collected on the city property up to October 1, 1925, and the rents and profits from the farm lands for the year 1925, being the lands which the court found that the plaintiffs, A. T. and J. W. Combs, were entitled to.

It further found that A. T. and J. W. Combs were each the owners in fee of an undivided one-half interest in said lands, and the court entered a decree based upon said findings; that thereafter the court entered a partition decree dividing the lands between the plaintiffs, A. T. and J. W. Combs, based on the report of the commissioners theretofore appointed.

The complaint continued by alleging that C. F. and H. H. Combs were the only sons of Sewell Combs,

referred to as a residuary legatee in the will of Nathan Combs, and that other of the plaintiffs are the daughters and widow of Sewell Combs; that T. A., W. M., I. N., S. S., Jr., and James H. Combs are the only sons of Alfred Combs, referred to as residuary legatee in the will of Nathan Combs, and, in November, 1904, they conveyed all their interest in the estate of Nathan Combs to Sewell Combs; that Alfred Combs and Sewell Combs, named in the will of Nathan Combs, were not his brothers, but were nephews, and that the will erroneously designated them as brothers of the testator, when, as a matter of fact, they were nephews, and that Nathan Combs did not have a brother named Sewell Combs, and that it was the intent of the testator, Nathan Combs, that the sons of his nephew, Alfred Combs, should receive an undivided one-third interest in the residue of his estate remaining in the hands of his son, Isaac Combs, at the time of his death; that it was the intent of said testator that the sons of his nephew, Sewell Combs, should receive a like undivided one-third share, and that the sons of his brother, Isaac, should receive a like undivided one-third share therein.

It is further alleged that the plaintiffs, C. F. and H. H. Combs, as sole and only sons of the nephew, Sewell Combs, are the owners of an undivided one-third of the real property as a residuary legatee under the will of Nathan Combs; that the plaintiffs, C. F., H. H. and Annie Belle Combs and Alice Pieratt, are the owners of an undivided one-third interest therein, subject to the dower right of the plaintiff, Kate Combs, by virtue of inheritance from the nephew, Sewell Combs, of the share purchased by him from the said T. A., W. M., I. N., S. S. and James Combs; that these plaintiffs were not made parties to the action of Martha Combs and others against the unknown heirs of Henderson Combs and others, prosecuted in the chancery court at the August, 1925, term, and had no notice or knowledge of said action whatever; that the decree rendered in said action is erroneous in giving to J. W. and A. T. Combs an equal share of all

said property, when they were in fact entitled to only an undivided one-third share jointly in said estate.

The complaint then sets up the decree of partition heretofore mentioned, and recites certain conveyances that A. T. and J. W. Combs and wife have made since said partition decree, and pray that both decrees be modified, canceled and annulled in so far as they attempt to decree the entire estate to A. T. and J. W. Combs, and that the share and interest of each of the plaintiffs in this action be decreed to them, for partition, and that the sales and incumbrances theretofore made under said decrees be set aside, and for other relief.

To this complaint the appellees filed a general demurrer, which the court sustained, and entered a decree dismissing same for want of equity, from which comes this appeal.

C. D. Atkinson, for appellant.

Johnson & Combs, W. N. Ivie, H. L. Pearson and *E. B. Wall,* for appellee.

McHANEY, J., (after stating the facts). The question for decision on this appeal is whether the complaint states facts sufficient to constitute a cause of action. Counsel for appellants first insist that the decree of the chancery court of October 2, 1925, construed the will of Nathan Combs "as devising a defeasible fee in said real property to Isaac G. Combs, and, upon his death without issue, the remainder to the sons of Alfred, Sewell and Isaac Combs." In this contention we believe counsel is in error, for this is not the effect of the finding of the chancery court. It found "that Isaac G. Combs died testate in Washington County, Arkansas, March 6, 1925, and that his last will and testament has been duly probated in the manner required by law, and that said last will and testament provided 'that, after the payment of all my just debts and funeral expenses, I will, devise and bequeath all my property, both real and personal, to my beloved wife, Martha Combs, to her sole use and benefit,' and that, under this provision of said will, plaintiff, Martha Combs, was the sole beneficiary and legatee

under said will, and, as such sole legatee, was the owner in fee of all the real and personal property of which the said Isaac G. Combs died seized and possessed, and that the said Isaac G. Combs died without having born to him any child or children, and that he died seized and possessed of the real estate situated in Washington County, Arkansas, which he derived from and under the last will and testament of his father." Therefore it is manifest that, instead of the court decreeing that Isaac G. Combs was devised a defeasible estate under the will of his father, the court did find and decree that Isaac G. Combs, by the will of his father, Nathan, became the owner in fee simple of said lands, and that Martha Combs became the owner thereof in fee as sole beneficiary and legatee under the will of her husband. If Isaac G. Combs got only a defeasible fee, how could his wife get the absolute fee under his will? Certainly she could acquire by virtue of his will no greater interest in the lands than he had. This being true, appellants' whole argument, based on this assumption, must fall, as it is without foundation to support it.

Under that paragraph of the will of Nathan Combs hereinbefore quoted, the residue of the testator's estate was given to his wife, Elizabeth, and his son, Isaac, for and during their natural lives, "with remainder in fee to Isaac G. Combs, if he should survive my said wife." The lower court found that this clause gave to Isaac G. Combs the fee simple in said lands, and that his will gave to his wife, Martha, the same estate, the fee, and we think the court was right in so holding. The clause following, after vesting the fee in the remainder in Isaac G. Combs, is: "And in the event my said son, Isaac G. Combs, should fail to have a child or children born to him, and should die seized and possessed of any of said property, I desire and will that the same be divided equally between the sons of my three brothers," naming them.

Under the decisions of this and other courts generally, this clause of the will must be held to be mere sur-

plusage, and void, for the reason that it is a subsequent clause attempting to limit a clear fee already given by the testator.

The general rule is laid down in 40 Cyc, pages 1585, as follows: "A limitation over, after a clear fee is given, on the death of the first taker, at a certain age, or without issue, children, or heirs, or intestate, or on his or her marriage, is usually void, and leaves a fee in the first taker. So a fee may be created notwithstanding other restrictions. Where property is given in clear language sufficient to convey an absolute fee, the interest thus given should not be taken away or diminished by any subsequent, vague, or general expressions in the will. Where fee is clearly given, a limitation over of the remainder is void as inconsistent with the fee granted, whether the gift over is expressed to be of what remains, or may be left, or the residue, or is on death of the first taker without having disposed of the property."

Many authorities are cited in the footnotes to sustain the above declaration of law.

In the case of *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682, the following clause in a will was under consideration: "All the rest, residue and remainder of my estate, real as well as personal, and wheresoever situated, I hereby give, devise and bequeath to my beloved wife, Minna Elle, to have and to hold the same in fee simple forever. But, in the case of the death of my beloved wife, it is my will that all the estate then remaining and not disposed of by her by a last will or other writing shall pass to my said brother, Moritz Elle, and my sister, Henrietta Bernstein, or their heirs in equal parts." This is a very similar paragraph to the one in question, and, in construing same, this court said: "The property in controversy was devised to Minna Elle in fee simple 'with an absolute power of disposition either by will or devise clearly and unmistakably implied,' according to the authorities cited, the limitation over to Moritz Elle and Henrietta Bernstein is void."

The cases on this question were exhaustively reviewed by Judge BATTLE, who wrote the opinion in the Bernstein case, and, among others, he quoted from Page on Wills, § 684, which, as said in *Davis* v. *Sparks,* 135 Ark. 417, 205 S. W. 804, "is peculiarly applicable to the case in hand."

It follows: "It not infrequently happens that a testator disposes of property in fee, and then attempts to provide for the disposition of the property after the death of the devisee in fee simple. A provision of this sort is to be carefully distinguished from the cases where a fee simple is cut down to a life estate by a devise over after the death of the first taker. The distinction between the two classes of cases, though not strongly marked, is well recognized by the courts. If the devise over upon the death of A is intended to pass entire property, it is evident that the testator contemplated that A should take only a life estate, without any power of disposing of his property for a longer term than his own life. But where the devise over upon the death of A shows that A was vested with a fee simple estate, and that testator wishes him to have such an estate, but to direct the course of its descent upon his death, the limitation over after the fee is repugnant to the nature of the estate, and void. * * * A condition that, if devisee does not dispose of his property in any way during his lifetime, it shall pass to certain named persons, is held to be void." *CarlLee* v. *Ellsberry,* 82 Ark. 209, 101 S. W. 407; *Davis* v. *Sparks,* 135 Ark. 417, 205 S. W. 803; *Archer* v. *Palmer,* 112 Ark. 527, 167 S. W. 99; *Fies* v. *Fiest,* 145 Ark. 351, 224 S. W. 623.

Clearly Isaac G. Combs took the fee, and had the power to convey, either by deed or by will, and this is further evidenced by the clause, "and should die seized and possessed of any of said property." Evidently this contemplated that he might sell and dispose of the property during his lifetime, conveying the fee thereto, and, if so, he could dispose of it by will at his death. Having done so, the fee vested in his wife, Martha Combs.

Counsel for appellants next contend that, even though this may be the correct rule, and although Martha Combs may have taken the fee, yet he says she renounced the will of her husband, and that she and J. W. and A. T. Combs are estopped to raise the question of the invalidity of the subsequent clause in the will of Nathan Combs, aforesaid; that a devisee or legatee who has accepted benefits under a will is estopped to deny its validity. No doubt this is a correct declaration of law, but we do not think the facts, as reflected solely by the decrees of the chancery court as set out in appellant's complaint, which is the only evidence in the record now before us, justify the conclusion that appellees assumed or took any position in that cause contradictory to the one they now take in this case. The pleadings in the chancery court in the Martha Combs case are not before us. Judging from the decrees in the record we are of the opinion that appellees were seeking the construction of the two wills, that Martha Combs desired a construction of the will of Nathan, in which the two appellees joined, to ascertain who was entitled to the property under said clause of said will, if same was legal, and the court decreed that appellees, J. W. and A. T. Combs, being the survivors of the class mentioned in said will, would take the whole of said property. She then asked that said property be decreed to them, or, in other words, that her title to said property under the will of her husband be divested out of her and vested in them. We do not think this amounted to a renunciation or a refusal to accept the legacy under the will of her husband. At least it cannot be said that either she or the other appellees accepted any benefits under the will by her action, but, on the contrary, she surrendered certain rights under the will, and the other appellees accepted her grant or gift. The effect of her action was to grant or give to J. W. and A. T. Combs, as the only survivors of the class mentioned in the will of Nathan Combs, the property in controversy, and the decree of the court passed the title as per her request.

Appellants' next contention is that, the complaint having alleged that C. F. Combs and H. H. Combs are the sons of Sewell Combs, named in the will of Nathan Combs, and that Nathan Combs never had a brother named Sewell, but that said Sewell Combs, of which said appellants were sons, was in fact a nephew of Nathan Combs, and that it was the intention of Nathan Combs to designate the sons of his nephew, Sewell Combs, instead of his brother, Sewell Combs, states a cause of action. But the language of the will of Nathan Combs was: "To the sons of my three brothers, Alfred, Sewell and Isaac Combs." The contention of appellants is that Nathan Combs intended only to mention the sons of one brother, Isaac Combs, and intended to mention his two nephews, Alfred and Sewell Combs, instead of his two brothers, Alfred and Sewell Combs. To do so, we would have to change the language of the will to read: "To the sons of one brother, Isaac Combs, and to the sons of two nephews, Alfred and Sewell Combs." We cannot do this, and we cannot hold that the testator intended to name the sons of two nephews instead of the sons of the two brothers named. This clause of the will, upon this allegation of the complaint, would be void for uncertainty. 40 Cyc., 1445, announces the rule of the law on this point as follows: "In order that a beneficiary may take under a will, he must be designated therein, either by name or by description, with such certainty that he can be readily identified and distinguished from every other person, otherwise the devise or bequest is void for uncertainty."

But counsel contends that parol evidence is admissible for identifying the beneficiary. This is always true where there is uncertainty or ambiguity in the designation of the beneficiary. In the case of *McDonald* v. *Shaw*, 81 Ark. 240, 98 S. W. 953, cited by appellant, this court said: "It is an elementary rule of construction that a bequest or devise will not fail because of a mere inaccuracy in the designation of the beneficiary, where the meaning of the testator can be gathered with reasonable

certainty from the instrument itself, or where the identity of the object of his bounty can be shown by extrinsic evidence; and such evidence is always admissible for the purpose of identifying the beneficiary, where there is uncertainty or ambiguity in the designation."

A complete answer to this contention is that, in the case at bar, there is no uncertainty or ambiguity in the designation, "to the sons of my three brothers, Alfred, Sewell and Isaac Combs." It does not read to the sons of one brother and two nephews, but to the sons of three brothers. Therefore parol evidence would not have been admissible in proof of the allegation in the complaint. 40 Cyc., 1440.

The decree of the chancery court dismissing appellants' complaint for want of equity is therefore affirmed.

BERRY v. GROSS.

Opinion delivered February 21, 1927.

APPEAL AND ERROR—EFFECT OF REVERSAL OF DECREE.—Where the Supreme Court in a former case concluded its opinion with the words, "the decree is therefore reversed," it referred to the decree as a whole, including the part not expressly discussed, since, if it was the purpose to reverse in part only, the court would expressly so declare and indicate the part affirmed.

Appeal from Woodruff Chancery Court, Southern District; *A. L. Hutchins,* Chancellor; affirmed.

J. F. Summers, for appellant.

Roy D. Campbell, for appellee.

WOOD, J. Gross and Shields instituted an action in the chancery court of Woodruff County to recover of Berry *et al.* damages for the value of timber on 4,300 acres of land in Woodruff County, Arkansas, which they alleged was due them by the defendants. Berry *et al.* instituted an action against the Standard Shingle Company *et al.* to enjoin it from cutting and removing cypress timber from these lands. Berry claimed title to

the timber under mesne conveyances from Gross and Shields. He alleged that Gross and Shields had released their vendor's lien on the standing timber and that the Standard Shingle Company, which had a prior timber deed to the cypress timber, had forfeited its right by failure to pay taxes on the land in accordance with the terms of its timber deed. The shingle company answered Berry's complaint, and denied that it had forfeited the right to remove the timber by failure to pay taxes on the land, and it made its answer a cross-complaint, alleging that it owned the cypress timber, and prayed judgment against Berry for the value of the timber which it alleged he had cut and removed from the land.

The cause was submitted to the court upon the pleadings and the testimony, which consisted of the deeds in the chain of title of the respective parties back to the common source of title, Gross and Shields, and the testimony responsive to the issues as to the amount and value of the timber cut and removed by the respective parties from said lands. The trial court found that Berry was the owner of the cypress timber claimed by the shingle company, and entered a decree for the value of such timber and restraining the shingle company from further cutting and removing such timber from the lands. The trial court also found that the complaint of Gross and Shields should be dismissed for want of equity, and rendered a decree in accordance with its findings. The causes had been consolidated for trial. Those causes as consolidated were appealed to this court, and the case is reported under the style of *Standard Shingle Co.* v. *Berry,* 168 Ark. 923, 271 S. W. 969. In the opinion we took up specifically the issue between the appellant and the appellee and disposed of the cause as to the shingle company, holding that that company had not forfeited its right to the cypress timber by failure to pay the taxes according to the provisions of one of the timber deeds under which that company claimed title. We there said: "We are unable to determine from the record the amount

and value of the timber removed from the land by Berry. This feature of the case was not fully developed. The Standard Shingle Company was entitled to the dismissal of Berry's bill and to a judgment against him for $917.50, the value of the timber which he cut on the premises, and an order restraining Berry from cutting and removing any timber from the lands. The decree is therefore reversed, and the cause remanded with directions to determine the amount and value of the cypress timber removed from the land by Berry, and to render a decree in accordance with this opinion."

After the mandate of this court was filed in the lower court, a decree was entered by consent in favor of the Standard Shingle Company against Berry. Gross and Shields filed a motion in which they set up that, under the mandate, they were also entitled to a decree in their favor. Berry responded to that motion, and alleged that, under the mandate, Gross and Shields were not entitled to a decree in their favor foreclosing their alleged vendor's lien on the timber on the lands mentioned. The court sustained the motion of Gross and Shields, and entered a decree in their favor in the sum of $29,045, purchase price of the timber, and directed that a lien be declared on all timber except the cypress timber, and that the same be sold to satisfy the decree if the same were not paid within ten days, from which decree Berry *et al.* duly prosecute this appeal.

The opinion of this court in the case of *Standard Shingle Co.* v. *Berry,* 168 Ark. 923, 271 S. W. 969, *supra,* it must be conceded, did not expressly discuss and distinctly determine the issue between Berry *et al.* and Gross and Shields. But, when the opinion of the court in that case is considered as a whole, we are convinced that it was the purpose of the court to dispose of all the issues presented by the appeal and to reverse the finding and decree of the lower court which was adverse to Gross and Shields as well as the finding and decree adverse to the Standard Shingle Company. The decree of the trial court in the case of *Standard Shingle Co.* v. *Berry,* 168

Ark. *supra,* was treated by us as one decree, and was found erroneous in its entirety. While we discussed specifically and separately the issue between the shingle company and Berry, we did not mean by so doing and by a failure to separately discuss the issue between Gross and Shields and Berry, to hold that the decree of the trial court adverse to them was not likewise erroneous. We considered all the testimony presented by the record in that case, and we were firmly convinced that the decree of the trial court was erroneous, not only as it affected the interests of the shingle company but as it affected the interests of Gross and Shields as well.

In *Standard Shingle Co.* v. *Berry, supra,* the opinion concludes as follows: "The decree is therefore reversed, and the cause remanded with directions to determine the amount and value of the cypress timber removed from the land by Berry and to render a decree in accordance with this opinion." This language means what it says, that is, that the decree of the trial court is reversed. We were speaking of the decree of the trial court as a whole and not that part only which referred to the finding of the trial court with reference to the Standard Shingle Company. The trial court found that the complaint of Gross and Shields should be dismissed for want of equity. That part of the decree was reversed as well as that part relating to the shingle company. For, as we have stated, the decree was reversed as a whole, and not in part. If it had been the purpose of this court to reverse the decree in part and affirm in part, we would have expressly so declared, and indicated that part which was affirmed and that part reversed, and given directions accordingly. By declaring that "the decree is therefore reversed" and directing the trial court "to render a decree in accordance with this opinion," we intended, and the language necessarily means, that the trial court should understand that its entire decree was erroneous, and that a decree should be entered by it accordingly, in effect changing and reversing its former decree *in toto.*

There was therefore no error in the ruling of the court in granting the motion of appellees praying a decree in their favor and in rendering a decree as therein prayed.

The decree is affirmed.

J. C. ENGLEMAN, INCORPORATED, v. BRISCOE.

Opinion delivered February 21, 1927.

1. PROCESS—WAIVER OF DEFECT.—When a party applies for or agrees to a continuance of the case, this makes him a party to the record, and any defect that might exist as to the service of process upon him is waived.
2. CONTRACTS—ORAL MODIFICATION OF WRITTEN CONTRACT.—Parties to a written contract may, subsequent to its execution, modify it and substitute a valid oral agreement therefor, and the change in the terms of the contract is a sufficient consideration for the execution of the new contract.
3. CONTRACTS—BURDEN OF PROOF.—Where a subsequent oral agreement was substituted for a written contract, the burden is upon the party relying upon the new contract to prove its terms.
4. BROKERS—CONTRACT OF EMPLOYMENT.—A contract employing an agent to find a purchaser for land is not within the statute of frauds, and need not be in writing.
5. TRIAL—APPLICABILITY OF INSTRUCTIONS.—The court, by its instructions, should concretely apply to the facts the principles of law applicable thereto, as shown by the issues raised in the pleadings.
6. TRIAL—SUFFICIENCY OF INSTRUCTIONS.—When the instructions given sufficiently set forth the claims of the respective parties in such concrete form as to give the jury a proper understanding of the issues raised by the pleadings, a repetition of the instructions is not necessary, and may serve to confuse and mislead the jury, as an indirect expression of the court upon the weight to be given to the evidence.
7. APPEARANCE—EFFECT OF GRANTING CONTINUANCE.—Where, in a joint suit against a corporation and its president, a continuance was asked on account of sickness by the president, who represented the corporation and was a necessary witness on its behalf as well as for himself, the granting of the continuance was for the benefit of both parties and resulted in the entry of appearance of both of them.
8. ATTACHMENT—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to take to the jury the question whether land attached

belonged to a nonresident corporation or to its president where lands of the corporation were exchanged for the land attached, but title to the latter was taken in the name of such president.

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

STATEMENT OF FACTS.

S. M. Briscoe instituted this action in the circuit court against J. C. Engleman, Inc., and J. C. Engleman, Jr., to recover damages for an alleged breach of contract of employment of the plaintiff to sell real estate for the defendants.

According to the allegations of the complaint, the defendants were engaged, during the year 1923, in the business of selling land in the Rio Grande Valley, in the State of Texas, and, in the course of business, employed agents in order to induce people to go to Texas to look at said lands with a view to purchasing them. On the 3d day of August, 1923, the defendant, J. C. Engleman, Inc., entered into a written contract with the plaintiff and J. C. Engleman, Jr., to procure purchasers for their Texas lands, at a commission of fifteen per cent. of the sale price of the lands sold to purchasers procured by the agents. The instrument contained other terms relating to the contract between the parties which it is not necessary to state in order to review the issues raised by the appeal.

After the execution of the written contract referred to, the plaintiff and the defendants entered into a verbal contract whereby the defendants contracted with the plaintiff to be their agents to procure purchasers for their Texas lands. The plaintiff was given the power to employ subagents to assist him. The plaintiff earned commissions under the contract in the sum of $3,000, and sought judgment against the defendants for that amount.

The defendants denied liability under the written contract, and denied entering into an oral contract. The defendants are nonresidents of the State of Arkansas, and a writ of attachment was sued out by the plaintiff

and levied upon lands claimed to be owned by them in Logan County, Arkansas, where the suit was commenced.

S. M. Briscoe was a witness for himself. According to his testimony, the verbal contract sued on was entered into between him and J. C. Engleman, Jr., for himself and the defendant, J. C. Engleman, Inc., while they were coming back from Texas in August, 1923. J. C. Engleman, Jr., was the president and manager of J. C. Engleman, Inc., which is a foreign corporation organized under the laws of the State of Delaware. It was understood that the oral contract should be substituted for the written contract, which had been executed a few days prior thereto. The written contract was executed on the 3d day of August, 1923, and the verbal contract was made on the 17th day of August, 1923. The purpose of the verbal contract was to employ the plaintiff to procure purchasers for lands owned by the defendant in the Rio Grande Valley, in the State of Texas. The plaintiff was given the power to appoint subagents to work under him. The plaintiff was to receive as compensation for his services seven and a-half per cent. commission on the purchase price of the lands sold or procured to be sold for the defendants. According to his own testimony and the testimony of other witnesses, sales were procured by the plaintiff amounting to something over $30,000, and he was entitled to a commission of seven and a half per cent. on all these sales.

On December 30, 1923, J. C. Engleman, Inc., in a letter written to S. M. Briscoe, recognized that Briscoe was in the employment of the defendant to sell its lands, and gave him directions about carrying out a certain designated contract. Again, in 1924, the defendants wrote to the plaintiff, urging him to procure people to go down into Texas and examine their lands.

J. C. Engleman, Jr., was the principal witness for defendants. According to his testimony, the written contract executed between the plaintiff and the defendants was canceled in the fall of 1923. At the time of its cancellation they did not owe the plaintiff anything. On

the other hand, the plaintiff owed the defendants at that time. Engleman denied that the defendants owed the plaintiff anything at all, and denied making the oral contract testified to by the plaintiff.

The jury returned a verdict in favor of the plaintiff in the sum of $2,000. From the judgment rendered the defendants have duly prosecuted an appeal to this court.

Warner, Hardin & Warner, for appellant.

U. C. May and *Evans & Evans,* for appellee.

HART, C. J., (after stating facts). The defendant, J. C. Engleman, Inc., is a corporation organized under the laws of the State of Delaware, and the defendant, J. C. Engleman, Jr., is a nonresident of the State of Arkansas. They filed a motion to quash the service of summons against them and to dismiss the attachment levied on their property, and saved their exceptions to the action of the court in overruling their motion. Subsequently J. C. Engleman, Jr., president and manager of J. C. Engleman, Inc., filed a motion to continue the case for the term on the ground that he was physically disabled to attend court and was confined in a hospital in Temple, Texas, and would necessarily be confined in the hospital for an indefinite period, and that it was necessary for him to be present at the trial of the case, both for the purpose of advising his attorneys and testifying as a witness in the case. The case was continued for the term on his motion. When the case was tried, he was the principal witness for both defendants.

The object of the service of summons upon a party to a lawsuit is to apprise him of the nature of the proceedings against him. When a party applies for or agrees to a continuance of the case, this makes him a party to the record, and any defect that might exist as to service of process upon him is waived. *Rogers* v. *Conway,* 4 Ark. 70; *St. L. I. M. & S. Ry. Co.* v. *Barnes,* 35 Ark. 95; and *Sager* v. *Jung & Sons Co.,* 143 Ark. 503, 220 S. W. 801. Therefore we hold that the assignment of error of the defendants, that the judgment should be

reversed because there was a personal judgment against them in favor of the plaintiff, is not well taken.

It is next contended by counsel for the defendants that there was no consideration for the oral contract sued on. This court has held that parties to a written contract may, subsequent to its execution, modify it and substitute a valid oral agreement therefor. The change in the terms of the contract is a sufficient consideration for the execution of the new contract. Of course, the burden of proof is upon the party relying upon the new contract to prove its terms. *Cook* v. *Cave,* 163 Ark. 407, 260 S. W. 49.

In *Moore* v. *Exelby,* 170 Ark. 908, 281 S. W. 671, it was held that it is not necessary that authority to sell and make a binding contract for the sale of lands be in writing, for a contract employing an agent to find a purchaser is not within the statute of frauds; and several earlier cases are cited in support of the ruling.

In the application of these principles of law to the facts at issue in the present case, it will be seen that the plaintiff was entitled to recover, if the jury believed his testimony. According to his evidence, the oral contract was made in substitution of a previous written contract. The parties agreed to be bound by the terms of the oral contract. The plaintiff was to receive seven and one-half per cent. commission on the amount of all sales of land made by him or by his subagents for the defendants. According to the evidence adduced in his favor, sales to the amount of over $30,000 were made by the plaintiff and his subagents. At seven and a half per cent. commission, this would be more than $2,000, the amount for which the jury returned a verdict in his favor and for which judgment was rendered in his favor against the defendants.

Numerous assignments of error in the refusal of the court to give instructions asked by the defendants are urged for a reversal of the judgment. We do not deem it necessary to set out these instructions or to review them. The object of instructing the jury by trial courts is to

state and apply the law to the facts of a particular case. The court, by its instructions, should concretely apply to the facts the principles of law applicable thereto as shown by the issues raised in the pleadings. When the instructions sufficiently set forth the claims of the respective parties in such concrete form as to give the jury a proper understanding of the issues raised by the pleadings, a repetition of the instructions is not necessary, and may serve to confuse and mislead the jury. It is proper to refuse instructions embodying principles of law substantially covered by other instructions given, which fully and fairly submit to the jury in a concrete form the respective theories of the parties to the lawsuit. The reason is that, if the court should repeat in varying form the principles of law applying to a particular state of facts, the instructions might be considered by the jury as an argument by the court and as an indirect expression of the court upon the weight to be given to the evidence, which is prohibited under our Constitution. *Redman* v. *Hudson,* 124 Ark. 26, 186 S. W. 312, and *North American Union* v. *Oliphint,* 141 Ark. 346, 217 S. W. 1.

In the case at bar the issues were plain and simple. The court told the jury that the burden of proof was upon the plaintiff to show by a preponderance of the evidence that he furnished buyers that actually bought and paid for the lands of J. C. Engleman, Inc., and that he had not received his commissions for such sales. The court further stated that, if he did not establish these facts by a preponderance of the evidence, he was not entitled to recover. In other instructions the respective theories of the parties were fairly and fully submitted to the jury; and, as we have already seen, the court was not required to repeat the instructions in varying form.

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

HART, C. J., (on rehearing). Counsel for J. E. Engleman, Inc., earnestly insist that a rehearing should be granted because the opinion of the court is contrary to

the well-known rule that the officers of a corporation are distinct and separate from the corporation itself, and that the appearance of an officer of a corporation is not an appearance by the corporation.

We are of the opinion that the peculiar facts of the case at bar make it an exception to this well-settled rule. The record shows that J. C. Engleman, Inc., is a Delaware corporation, and that the wife of J. C. Engleman, Jr., owns practically all the stock in it. The corporation was engaged in selling lands in Texas to persons in Arkansas, and J. C. Engleman, Jr., alone had charge of its affairs and conducted its business in the State of Texas. He had the authority to employ attorneys for it and to conduct its litigation. Constructive service was had upon the corporation and upon Engleman as an individual. The presumption is that both the corporation and Engleman individually were sued in order to prevent a shifting of responsibility in the premises. J. C. Engleman, Jr., was just as necessary as a witness for the corporation as he was for himself. He alone conducted the business of the corporation, and he alone could advise the attorneys of the corporation about this particular lawsuit. The continuance was had at his request, because he was sick and unable to attend court. In his motion for a continuance he stated that his presence was necessary to advise the lawyers about the conduct of the case and to be a witness in it. The interest of the corporation and of Engleman as an individual was so commingled that the same testimony would be introduced in each case, and the presence of Engleman was just as necessary for the corporation as it was for himself. Under these circumstances it is inferable that the continuance was had for the benefit of both parties and resulted in the entry of the appearance of both of them.

It is also insisted that the court erred in submitting to the jury whether the land attached in Logan County belonged to the corporation or to Engleman. It is earnestly insisted that there is no testimony in the record upon which to predicate such an instruction. We do not

agree with counsel in this contention. As we have already seen, the corporation was organized under the laws of the State of Delaware, and was engaged in selling land in the State of Texas. Practically the whole of the stock of the corporation belonged to the wife of J. C. Engleman, Jr., who alone had charge of its affairs in this part of the country. It is true that he testified that he never took any Arkansas lands for the corporation in exchange for its Texas lands. He states that he took the lands for himself. Under the circumstances, the jury was warranted in finding that the taking of the title in himself was colorable merely, and that the corporation owned the beneficial interest in the lands. It is inferable from the evidence in the record that the Texas lands of the corporation were often exchanged for lands in Arkansas. Agents were especially employed by J. C. Engleman, Jr., to sell lands to persons in Arkansas. Frequently the owners of lands in the State of Arkansas were induced to exchange their lands for lands belonging to the corporation in the State of Texas. The owners of the Arkansas lands would not convey their lands directly to the corporation, but would convey them to J. C. Engleman, Jr. It is not shown that he had any interest in the matter except as an agent of the corporation, and it is fairly inferable from all the attendant circumstances that the beneficial interest or equitable title was in the corporation. Therefore we hold there was no error in sustaining the attachment on the ground that the lands attached belonged to a nonresident corporation.

The motion for a rehearing will be denied.

CLARK v. DENNIS.

Opinion delivered February 21, 1927.

1. MINES AND MINERALS—OIL AND GAS LEASE.—An oil and gas lease conveys, not merely a license, but an interest and easement in the land itself.
2. VENUE—LIEN ON OIL AND GAS LEASE.—A suit to impose a lien on an oil and gas lease is not a transitory, but a local, cause of action and is properly brought in the county where the land is located, under Crawford & Moses' Dig., § 1164.
3. MINES AND MINERALS—LEASE AGREEMENT.—In an action on a draft and to enforce a lien on an oil and gas lease, it was immaterial whether the agreement contemplated that the lessee should have a reasonable time for examination of the abstract of title, where there was no evidence that a marketable title was not shown by the abstract nor any claim that the draft would have been paid if the abstract showed a good title.

Appeal from Columbia Chancery Court; *J. Y. Stevens,* Chancellor; affirmed.

W. B. Sorrels, for appellant.

Paul Crumpler, for appellee.

SMITH, J. The complaint in this cause alleged that appellee, the plaintiff below, owned a forty-acre tract of land in Columbia County, on which he sold appellant an oil and gas lease for the sum of $1,000, it being agreed that the purchase price therefor should be paid by the draft of appellant for that amount on the Cotton Belt Savings & Trust Company of Pine Bluff; that the draft was drawn and delivered and duly presented, but was dishonored. Wherefore plaintiff prayed judgment for the amount of said draft, and that a lien be declared in his favor on the lease and the same ordered sold in satisfaction of the judgment, if it were not otherwise paid.

Appellant, defendant below, is a resident of Jefferson County, and was served with process in that county to appear and answer in the Columbia Chancery Court, where the cause was pending. He filed a motion to quash the service and to dismiss the cause for the reason that it was a transitory action, and he had not been served with process in the county where the suit was

brought. This objection to the jurisdiction of the Columbia Chancery Court was duly preserved by appellant in the answer which he filed, after his motion to quash was overruled, and throughout the trial.

The lease made an exhibit to the complaint appears to be an ordinary oil and gas lease, wherein the lessor granted to the lessee the right to explore for oil and gas for a period of five years, in consideration of one-eighth of the oil or gas produced. The land there described is in Columbia County.

The answer filed alleged that plaintiff agreed, within a given time, to furnish an abstract showing a marketable title, and that the lease and draft were placed in escrow; that the abstract was never furnished, and that the draft was prematurely and improperly delivered by the escrow agent.

There was a general finding in favor of the plaintiff for the amount of the draft, and the amount thereof was adjudged to be a lien on the land, which was ordered sold if the judgment was not paid, and this appeal is from that decree.

The motion to quash the service was properly overruled. An oil and gas lease conveys, not merely a license, but an interest and easement in the land itself. *Standard Oil Co.* v. *Oil Well Salvage Co.*, 170 Ark. 729, 281 S. W. 360. The suit to impose a lien upon the lease was a local, and not a transitory, cause of action, and was properly brought in the county where the land was located. Section 1164, C. & M. Digest.

The cashier of the bank which acted as escrow agent testified that the lease and the draft were placed in escrow in the bank, and when the abstract was completed it was attached to the draft, which was sent for collection to the bank upon which it was drawn. The witness did not understand that there was any stipulation as to the time within which the abstract was to be finished, and it is not shown that there was any unreasonable delay in the preparation of the abstract.

If it be said that the escrow agreement contemplated, not only the delivery of the abstract, but a reasonable time for the examination to determine whether a marketable title was shown, it may be answered that no attempt was made to prove that a marketable title was not shown by the abstract. No claim is made that the draft would have been paid had the abstract shown a good title, nor, as we have said, was there any proof that plaintiff's title was not a marketable one.

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

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE v. FORD.

Opinion delivered February 21, 1927.

1. INSURANCE—CONSTRUCTION OF POLICY.—An insurance policy must be liberally construed in favor of the insured or beneficiary, and the limitations or restrictions upon the liability contracted for should be construed strictly and most strongly against the insurer.
2. INSURANCE—CONSTRUCTION OF POLICY.—Ambiguities in limitations or restrictions in insurance policies should be resolved against the insurer.
3. INSURANCE—CONSTRUCTION OF POLICY.—A provision in an accident policy that no indemnity will be paid "where the death or loss of members or eyesight does not occur within 30 days from the date of the accident," *held* to relate to the loss of two members, and not to the loss of one member only; the recovery for loss of one member being less than for the loss of two members.
4. PLEADING—EFFECT OF DEMURRER.—A demurrer to a complaint admits the truth of allegations and all reasonable inferences which can be drawn therefrom.
5. INSURANCE—CONSTRUCTION OF COMPLAINT.—Under an accident policy, in which plaintiff is named beneficiary, providing that "indemnity for the loss of life of the insured is payable to the beneficiary if surviving the insured," and that "all other indemnities of this policy are payable to the insured," a complaint alleging the loss of a limb of plaintiff's insured, a child six years old and bearing the same surname, from which loss the child subsequently died, *held* to justify a presumption, on general demurrer, that plaintiff was related to the child and entitled to his estate.

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

Wilson & Martin and *Compere & Compere,* for appellant.

DuVal L. Purkins, for appellee.

HUMPHREYS, J. Appellee instituted this suit against appellant in the circuit court of Bradley County on an accident insurance policy to recover, as beneficiary therein, $500 for the loss of the left limb of appellant's insured, Eugene Layton Ford, through external, violent and accidental means. The policy was made a part of the complaint, and contains two paragraphs which, appellant contends, exempts it from liability under the facts alleged in the complaint. The paragraphs referred to are as follows:

"No indemnity will be paid as the result of, or for injuries caused by, other means or under other conditions than those set forth above, nor where death or the loss of the members or eyesight does not occur within thirty days from the date of the accident."

"Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured."

The indemnities provided for in the policy are as follows:

For loss of:

Life	$1,000
Both hands	1,000
Both feet	1,000
Sight of both eyes	1,000
One hand and one foot	1,000
One hand and sight of one eye	1,000
One foot and sight of one eye	1,000
Either hand	500
Either foot	500
Sight of either eye	500

It was alleged in the complaint that, on or about October 20, 1924, appellant's insured, a boy six years old,

was standing on a little bridge, or culvert, which extends over the west curb just north of the Y. M. C. A. building in the city of Warren, Arkansas, when an automobile came down the street and turned upon said bridge or culvert, and, in some manner, struck and knocked the insured into a ditch and injured his left limb; that medical treatment was rendered him promptly, and that, on the 28th day of October, 1924, he was removed to a hospital, where an operation was performed on his left limb with a view to saving same without severance; that, no relief having been afforded, a second operation on said limb was performed on November 20, 1924, to determine finally if amputation was necessary, which operation determined the necessity of the removal of the limb, and, on the 29th day of November, 1924, the injured limb was removed above the knee joint; that, despite the removal of the limb and the best medical treatment, the insured showed no improvement, and, after lingering from the date of the injury, he died on the 19th day of February, 1925, from the result of the injury.

The first paragraph quoted herein is one of several liability limitations following the schedule of payments for losses set out above.

Appellant filed a general demurrer to the complaint, alleging that it failed to state sufficient facts to constitute a cause of action under the law, which was overruled by the court; and, declining to plead further, a judgment was rendered against it in the total sum of $660; the judgment includes the amount of the indemnity sued for, $100 attorney's fee, and a penalty of $60.

Appellant has duly prosecuted an appeal to this court from the judgment.

We understand that appellant does not question the amount of the judgment if any liability exists under the terms of the policy and the facts alleged in the complaint.

Its first contention for a reversal of the judgment is that, because the leg of the insured was not amputated within thirty days after the injury, it is exempt from liability by reason of the provision in the policy to the effect

"that no indemnity will be paid * * * where the death, or the loss of members or eyesight does not occur within thirty days from the date of the accident." Appellant is the author of the policy, so its provisions must be liberally construed in favor of the insured or beneficiary. Another way of stating the rule is that the limitations or restrictions upon the liability contracted for should be construed strictly and most strongly against the insurer. Another well-settled rule of construction is that, if the limitations or restrictions against liability contain ambiguities, they should be resolved against the insurer rather than the insured or beneficiary. Applying these rules to the paragraph referred to, we think it necessarily relates to the loss of two members or the entire eyesight for which the insured agreed to pay $1,000 in the schedule of indemnities. There are two classes of indemnities in the schedule, one of $1,000 for the loss of two members of the body, and the other of $500 for the loss of one member. It will be observed that the language of the limitation is that "the loss of members or eyesight" must occur within thirty days from the date of the accident. It does not say that the loss of one member or one eye, or the loss of any member or either eye, must occur within thirty days from the date of the accident before the insurer shall be liable. Since two classes of indemnities are provided for in the schedule, and the restrictive clause mentions the "loss of the members or eyesight," it should be construed as relating to the class providing for payment in the event of loss of two members of the body and not to the class providing for the payment in the event of the loss of one member. Certainly it cannot be said that the limitation phrase is unambiguous, when read in connection with the schedule of indemnities. The construction put upon the limitation paragraph by us finds support, by parity of reasoning, in the well considered case of *Marshall* v. *Commercial Travelers' Mutual Accident Assn.*, 170 N. Y. 434, 63 N. E. 446.

Appellant's next and last contention for a reversal of the judgment is that, under the terms of the policy,

appellee, the beneficiary therein, is entitled to recover indemnity for the death of the insured only. The paragraph relied upon by appellant in support of this contention is set out in the statement of the case, so it is unnecessary to quote it again. A general demurrer was filed to the complaint, which raised the question below of the right of appellee to sue at all. The question is therefore before us for consideration on appeal. In determining the question, all inferences fairly deducible from the express allegations of the complaint must be considered. The demurrer admits the allegations and all reasonable inferences which can be drawn therefrom. The basis of the suit is the policy. It reflects that the insured, Eugene Layton Ford, was a child six years old, and that the beneficiary is Vol C. Ford. It is clearly inferable that Vol C. Ford has some family relationship with the insured, Eugene Layton Ford, else he would not have had an insurable interest in him; and it is reasonably conceivable from the latter fact, and the further fact that they both bore the same surname, that the beneficiary was related in such a way to the insured as to entitle him to some part of the estate left by the deceased at his death. Appellee did not sue for the death indemnity but for the indemnity covering the loss of the child's limb, indicating that he was suing as the sole heir for the estate of the deceased. We think it reasonable to indulge the presumption, on general demurrer, that he was related to and entitled to the estate of the child.

No error appearing, the judgment is affirmed.

Justices SMITH and KIRBY dissent.

PATRICK v. ARKANSAS NATIONAL BANK.

Opinion delivered February 21, 1927.

1. APPEAL AND ERROR—TRANSCRIPT OF EVIDENCE.—In a suit in chancery where the parties agreed that oral testimony might be taken in shorthand by a stenographer named and transcribed and filed, and, when so filed, should be treated as depositions of the witnesses and become part of the record, *held* that typewritten testimony, presented to the clerk and by him filed and certified as a complete transcript of the depositions of the witnesses, was sufficient showing of the evidence, though such testimony was not certified by the stenographer; there being no contention that any material part of the testimony was not in the transcript.
2. BILLS AND NOTES—LIABILITY OF ACCOMMODATION PARTIES.—Persons interested in a corporation who, to avoid Rev. Stat. §§ 5200, 5239, limiting the amount a national bank may loan to a corporation, executed and indorsed to such bank their personal note for money turned over by them to the corporation for its use, *held* liable as accommodation parties, though the bank may have known that they were only accommodation parties.
3. CORPORATIONS—CONTRACT FOR LIQUIDATION.—In a national bank's action on a note, proceeds of which were paid to a corporation to which a direct loan by a national bank would have been excessive, under Rev. Stat. U. S. §§ 5200, 5239, a cross-complaint of the maker and indorsers of the note, praying specific performance of a contract with a third person for sale and liquidation of the corporation's assets, was properly dismissed, where such defendants had first broken the contract.
4. BANKS AND BANKING—LIABILITY OF PRESIDENT.—Where one interested in a corporation executed a note to a national bank, which was indorsed by other persons interested, and the proceeds were paid to the corporation, to which a direct loan would have been excessive under Rev. Stat. §§ 5200, 5239, *held* that the estate of the president of the bank, who was interested in such corporation and who knew of such arrangement, was not liable to the bank for the amount of the note, which was accepted by the cashier and approved by the board of directors in absence of the president.

Appeal from Washington Chancery Court; *Sam Williams,* Chancellor on exchange; reversed in part.

STATEMENT BY THE COURT.

The Arkansas National Bank brought suit in the Washington Circuit Court against F. M. Patrick, M. L. Price and R. M. Clark upon a promissory note for $10,000 executed to it by F. M. Patrick as maker, and indorsed

by M. L. Price and R. M. Clark. The defendants answered, denying the execution of the note; that the copy attached was a copy thereof; that they had ever paid interest thereon as alleged; and, as a further defense, alleged that the note sued on was executed for a loan made to the Ozark Poultry & Egg Company by the said bank; that said loan was an excess loan; that the $10,000 proceeds was paid over to the corporation, Ozark Poultry & Egg Company, the bank and its officials knowing at the time that the loan was an excess loan under the Federal statutes; and, by way of cross-complaint, in which M. L. Price and R. M. Clark joined, set up a contract between themselves and Mrs. Roberta Fulbright, to which the bank was not a party, entered into on about the 11th day of August, 1923, almost a year after the execution of the note sued on.

In the cross-complaint they prayed for a specific performance of the contract between Patrick, Price and Clark on one hand, Mrs. Roberta Fulbright on the other, for the sale of the holdings of the Ozark Poultry & Egg Company and it liquidation, and, in the alternative, if specific performance could not be had, for damages against Mrs. Fulbright for the alleged breach of the contract, and asked that a receiver be appointed to take charge of the assets of the said corporation. A copy of the contract for the sale of the holdings of the Ozark Poultry & Egg Company for payment of its debts was attached as an exhibit to the cross-complaint, which also contained a motion to transfer to equity.

On February 20, 1924, the bank replied to the answer of F. M. Patrick, and, in answer to the cross-complaint, denied the allegation made against the bank and its directors, and, by way of cross-complaint, set up the contract made between Patrick, Price and Clark and Roberta Fulbright on August 11, 1923, the same contract set out by said defendants in their cross-complaint, and alleged that Mrs. Fulbright was thereby constituted a trustee of the assets of the Ozark Poultry & Egg Company, and asked that she be held to account for the property of said

corporation disposed of under said contract; and also that there was an agreement therein by which the parties bound themselves to liability for payment of all the debts of said corporation, and prayed judgment against the defendants and each of them by reason of said agreement, and against her, Roberta Fulbright, as administratrix of Jay Fulbright, deceased; alleged that the loan represented by the notes sued upon was an excess loan made by Jay Fulbright in his lifetime, as president and director of the Arkansas National Bank, to the Ozark Poultry & Egg Company, and that she, as administratrix, was liable under §§ 5200 and 5239 of the Revised Statutes of the United States for the amount thereof, and prayed a recovery from her as such administratrix for same.

Roberta Fulbright, after moving the court to dismiss the cross-complaint for misjoinder of parties and the overruling of the demurrer to the cross-complaint, answered, denying all the allegations of both cross-complaints, that of Patrick, Price and Clark and of the Arkansas National Bank, attempting to fix a liability against her individually or in her representative capacity as administratrix of her husband's estate.

The contract for liquidation and sale of the assets of the Ozark Poultry & Egg Company, and the purchase of the stock or interest of Price, Patrick and Clark therein by Roberta Fulbright, administratrix of the estate of Jay Fulbright, was introduced in evidence, and expressly provides for the appointment of liquidation agents, and after inventory made by the parties selected for appraisement of the property, as follows:

"That the party of the first part and the parties of the second part shall each select a good and competent man, and the two selected shall select a third, and a majority of the three shall place what they believe to be a fair value on the building and real estate and holdings of the corporation, including the machinery, refrigeration, holdings, equipment, and all holdings, and the party of the first part shall accept the property so valued at the

price so placed upon it.* * * In case the appraisement of the fixed assets shall be thought to be unreasonable by either party, a second appraisement shall be had by appraisers appointed by the parties as in the first instance, and such second appraisement shall be that to be accepted."

The testimony shows that Roberta Fulbright made a written demand for a second appraisement, in accordance with the terms of said contract; that the other parties objected to the appraisers she suggested; that she finally named another person for appraiser; that they continued to refuse to have a second appraisement, and finally filed a suit or cross-complaint, in which a receiver of the assets was asked for. The concern was then put into bankruptcy, and its remaining assets distributed in bankruptcy.

The testimony of Patrick, Clark and Price indicated that their refusal or failure to appoint an appraiser and have a second appraisement made was on account of their belief that the demand therefor was not made in good faith.

T. L. Hart, cashier of the bank, testified that he had been cashier since 1913, and identified the Patrick note sued on, which was a demand note for $10,000, payable to the order of said bank, with interest from date until paid, with the clause providing that the indorsers waive demand or presentation, etc., signed by F. M. Patrick, indorsed on the back "M. L. Price and R. M. Clark," with three credits, 2-7-23, $200; 5-16-23, $200; 9-11-23, $200. He stated that, on the morning of November 15, 1922, he met Mr. Jay Fulbright in the street, and "he told me he had arranged for Mr. Patrick to sign the note for $10,000, and Mr. Price would be up and fix it up. About something like an hour after that Mr. Price came in with the note already made out and indorsed, and I placed the proceeds of the note to the credit of F. M. Patrick. A little later in the day I went to Mr. Fulbright to find out if the note was signed like he understood it was to be signed, and he told me it was."

The proceeds of the note were placed to the credit of Mr. F. M. Patrick. Later on in the day Mr. Patrick checked the money to the Ozark Poultry & Egg Company. Later witness made a demand on Price and Patrick for payment of the note, writing them a letter. The interest was paid on September 1, 1923. At the time the note was given by Mr. Patrick, the Ozark Poultry & Egg Company was indebted to the Arkansas National Bank in the sum of $12,000, represented by promissory notes. The capital and surplus of the bank at that time amounted to $130,000. Witness had not been consulted about making this loan to Patrick, except as in the conversation with Mr. Fulbright, already stated. On cross-examination witness stated that he placed the proceeds of the $10,000 note to the credit of F. M. Patrick, and it was entered in the account of Patrick on the books of the bank, but afterwards $10,000 was checked out of the bank by Patrick to the Ozark Poultry & Egg Company; that he had no control of Patrick's account in the bank, and had no authority to control the disposition of his account; had no specific knowledge that the loan was made for any other person than Patrick; was under the impression that it was a loan for the Ozark Poultry & Egg Company, as he did not know what Mr. Patrick would be borrowing that much money for.

Witness had no knowledge of what arrangement had been made between Mr. Patrick and the Ozark Poultry & Egg Company, and did not know the company had given to Mr. Patrick a note representing the amount borrowed. His only reason to believe it was a loan for the Ozark Poultry & Egg Company was the fact that Mr. Patrick checked the proceeds out to that company.

Witness did not believe at the time that it was an excess loan. It was reported to the board of directors afterwards, and the board took the regular action as on most loans, approving them as they read them. Mr. Fulbright had told me a number of times he considered Mr. Patrick good for his obligations. Mr. Fulbright was the principal financial power connected with the

Ozark Poultry & Egg Company, and, when loans were made to that company, they were arranged for through him.

This loan was never submitted to the loan committee of the bank, but was submitted to the board of directors after the loan was made. Mr. Fulbright was a director and president of the Arkansas National Bank, and was active in his office as president of the bank. "We paid a check drawn by the Ozark Poultry & Egg Company in favor of the First National Bank of Fort Smith for $10,000, as I remember, on the 16th day of November, 1922." Witness said if the loan had been made direct to the Ozark Poultry & Egg Company at that time it would have been an excess loan; did not recall that any excess loan had ever been made by the bank to the Ozark Poultry & Egg Company prior to that time. Stated that Mrs. Fulbright sat with the board of directors of the bank after his death, and suggested that the outstanding loan due should be looked after. Don't remember just what she said, but understood she wanted the matter looked after, and complied with her request. Think application was made to our attorney, Mr. Davidson, to bring suit upon this note.

Witness is unable to state regarding the listing of this note as a liability of the Ozark Poultry & Egg Company by the members of that company. Does not recall whether any of the checks received in payment of the interest on the note were signed by Price, Jordan, or Mr. Clark as manager. Does recall that Jay Fulbright never signed any of those checks. Witness was engaged during this time actively discharging the duties of cashier of the bank. The bank filed a claim in bankruptcy against the Ozark Poultry & Egg Company for $10,000 and received dividends from the bankruptcy court out of the estate; does not know whether Mr. Patrick filed such claim or not.

Introduced copy of bank record of the account of the Ozark Poultry & Egg Company, dated November 15, 1922, showing deposit on that date in favor of that

company of $10,494.77, and a check paid on November 16, 1922, for $10,000; also the minutes of the meeting of the board of directors on the 15th, showing the names of those present; that it did not show that Jay Fulbright was present at the meeting; otherwise his name would have been included; that the numbers of the notes which were read and approved at that meeting included the note for $10,000 sued on in this action.

Witness also introduced evidence of F. M. Patrick's personal account in the bank, showing a deposit to that account on November 15, 1922, of $10,000.

Patrick testified he had signed the note for $10,000; that it was prepared at the Ozark Poultry & Egg building, and the money was borrowed by him for the Ozark Poultry & Egg Company, which was $10,000 to pay a note at Fort Smith. The notes at the Fort Smith bank were signed by the poultry company, F. M. Patrick and Jay Fulbright as indorsers. "My impression was, in talking to Mr. Fulbright, he signified his dissatisfaction of borrowing so much money at Fort Smith and indorsing these notes, and I understand Mr. Fulbright fixed up this plan for me to sign this $10,000 note to retire one down there; that is the impression I had. There was a note due there, and they needed their money, and Mr. Fulbright would rather have interest in his own bank than to pay it down there, and that was the impression I received, to get the money up here instead of down there."

Witness denied it was agreed upon between him and the other members of the corporation, the Ozark Poultry & Egg Company, that he was to give the note and draw the money individually, instead of having the company do it; did say his understanding was that the company owed the bank its limit and could not borrow any more money in its own name. "That was the way it was represented to me. When he drew the check for the Ozark Poultry & Egg Company for $10,000, he gave it to Mr. Price, manager down at the house."

Price testified he was secretary and manager of the poultry and egg company from 1917 to August 13, 1923; that the note sued on in this case was prepared by his secretary in the office of that company, and signed and indorsed there. At the time the company had $25,000 borrowed money from Fort Smith on the First National Bank at Fort Smith, and it seemed the Arkansas National Bank had considerable money. The rate of interest at Fort Smith was virtually the same as at Fayetteville. "The Fort Smith bank having written a letter and advised that we could reduce our indebtedness $10,000, I mentioned the matter to Mr. Fulbright, and asked him what arrangement we had better make. He suggested that Patrick sign the note, in order to avert the banking laws, and it would be all right for him to sign it, and the Ozark Poultry & Egg Company could take credit for it, as we had the $12,000 borrowed at the Arkansas National Bank." Witness prepared the note at the office, let Mr. Patrick sign it, and took it to the bank for the purpose of getting credit for it; handed the note to Mr. Hart, cashier, as had been done in borrowing money heretofore. "I suggested it would be much better if we would deposit this $10,000 to the credit of Mr. Patrick and let Mr. Patrick give the check to the Ozark Poultry & Egg Company for a like amount, which was done. He mailed a check of the Ozark Poultry & Egg Company to Fort Smith on the same date to take up its $10,000 note held there by the First National Bank. I talked to Mr. Fulbright about reducing our loan in Fort Smith; told him I thought we had better take $10,000 off down there and put it in the Arkansas National Bank, and he said go ahead and have Mr. Patrick make a note for the $10,000;" said that at numerous times various members of the corporation of the Ozark Poultry & Egg Company made notes to the Arkansas National Bank for various sums, but that the company's signature was never for more than $12,000 borrowed money. Mr. Fulbright looked after the financial end of the company to a certain extent. He was down there a great deal, and appeared to be very much interested in that line of business.

Frank A. Handlin testified he was president of the First National Bank of Fort Smith, and that that bank, on about the 15th of November, '22, held five notes of the Ozark Poultry & Egg Company, three for $10,000 each and two for $5,000 each; that all the notes were guaranteed or indorsed by Jay Fulbright, F. M. Patrick and M. L. Price, and one of these $10,000 notes was paid November 15, 1922.

The chancellor, on hearing, held that Roberta Fulbright was not liable individually or as administratrix to the defendants, Patrick, Price and Clark, on their cross-complaint; that they refused to agree to a second appraisement of the assets of the poultry and egg corporation, and, by filing the cross-complaint herein, had breached the said contract for its liquidation, and released her from its performance; that there was no liability against her individually or as administratrix to the Arkansas National Bank on account of the contract of August 11, 1923, between herself and the other defendants of the Ozark Poultry & Egg Company, but held that the loan represented by the note signed by Patrick November 15, 1922, and indorsed by Price and Clark, was made to the Ozark Poultry & Egg Company, was made and knowingly assented to by Jay Fulbright, her intestate, as president and director of the Arkansas National Bank, and was an excess loan, for which he was liable to the bank, and that she, as administratrix, and Patrick, Price and Clark, were each liable to the bank for the amount due thereon, $7,585.46, and decreed accordingly.

Roberta Fulbright, as administratrix, appealed from that part of the decree holding her liable to the bank for said sum. The other defendants appealed from the decree dismissing their cross-complaint and rendering judgment against them upon the notes sued on by the bank.

The decree also recites that:

"It is agreed in open court, by all the parties to this suit, that the oral testimony of the witnesses may be

taken in shorthand by Marcus Fietz and by him transcribed in typewritten form and filed herein, either in term time or vacation, and, when so taken and filed, shall be treated as depositions of the witnesses and become a part of the record in this cause, and the costs of the taking of said testimony in shorthand and the transcribing of same shall be taxed as costs in this suit as other costs are taxed."

The testimony of the witnesses was transcribed with the caption of this recital of the decree, and marked "Filed March 22, 1926. E. P. Watson, clerk." The testimony of all these witnesses and all the testimony so transcribed and filed was brought up to this court by certiorari, with the clerk's certificate that the above and foregoing pages from 2 to 301 in volume 2 contained a true, perfect and complete transcript of all the depositions, exhibits thereto, entries and proceedings of the witnesses mentioned in the writ of certiorari in the cases," giving the style thereof, Arkansas National Bank *v.* F. M. Patrick et al., defendants, "as the same now appears on file in my office," which makes a true and complete transcript of the diminution suggested by said writ, etc.

W. N. Ivie, for Patrick *et al.,* appellants.

John W. Grabiel and *John W. Nance,* for Fulbright

J. V. Walker and *B. R. Davidson,* for appellee.

KIRBY, J., (after stating the facts). It is first urged that there is no oral testimony properly included in the record, that the decree of the chancellor must be presumed to be correct, and the case affirmed accordingly. The decree recites that all the parties agreed in open court that the oral testimony of the witnesses may be taken in shorthand by the stenographer, naming him, and by him transcribed in typewritten form and filed herein, either in term time or vacation, and, when so taken and filed, shall be treated as depositions of the witnesses and become a part of the record in this cause. What purports to be the testimony of the witnesses was presented to the clerk in typewritten form and by him filed and certified to this court as a true, perfect and complete

transcript of all the depositions, exhibits thereto, entries and proceedings of the witnesses mentioned, etc.

Counsel for appellant contend that this transcript of testimony is not sufficiently identified as having been taken by the stenographer in accordance with the agreement, there being no certificate by him thereto, nor properly made a part of the record of the case by bill of exceptions, submitted to them for examination and certified by the trial judge. They do not contend, however, that there was any material testimony that is not included in the corrected record here. The court is of opinion that, under the agreement of the parties that the oral testimony, when transcribed and filed, either in term time or in vacation, shall be treated as depositions of the witnesses and become a part of the record in this cause with the certificates of filing by the clerk, and to the transcript that it contains all the testimony, etc., is sufficient to show the evidence upon which the cause was heard. *Lenon* v. *Brodie,* 81 Ark. 208, 98 S. W. 979; *Sanders* v. *W. B. Worthen,* 122 Ark. 104, 182 S. W. 549; *Massey* v. *Kissire,* 149 Ark. 215, 232 S. W. 24; *McMillan* v. *Brookfield,* 150 Ark. 518, 234 S. W. 621.

Although appellants, Price, Patrick and Clark, denied the execution of the note to the bank, in their answer, the note itself, with their signatures and their admissions in testimony, shows its execution and indorsement by them, and the undisputed testimony shows that the bank loaned the money thereon, and passed it to the credit of the maker, Patrick, who afterwards checked it out to the corporation, which used it in payment for a note they were liable on to another bank. At the very least, they could not be considered other than accommodation parties and liable on the instrument to the holder for value, notwithstanding such holder may have known, when taking it, that they were only accommodation parties. Crawford & Moses' Digest, § 7795; *Hamilton* v. *Brown,* 88 Ark. 97, 113 S. W. 1014; *Fox* v. *State,* 102 Ark. 451, 145 S. W. 228; *First National Bank* v. *Allen,* 141 Ark. 328, 216 S. W. 1039.

It is next contended that the court erred in dismissing their cross-complaint against Roberta Fulbright on the contract for the sale of their stock in, and liquidation of the debts of, the Ozark Poultry & Egg Company. The court found, however, that these parties had, in violation of the terms of the said contract, refused and failed to select an appraiser and to make a second appraisement of the fixed assets of said corporation, upon the demand of Roberta Fulbright, in accordance with the express agreement therein that such second appraisement should be made if either party thought the first appraisement unreasonable, and by filing of the cross-complaint herein, which amounted to a substantial breach of the contract and released her from its performance. This finding of the facts is supported by the testimony, and no error was thereby committed, nor in declaring such finding a breach of the contract that released Roberta Fulbright from liability to them for any failure to perform it. They claimed that she was liable to them for payment of the value of their stock in said corporation, to be ascertained by the appraisement and sale of its assets and property, in accordance with the terms of the agreement therefor.

It is undisputed, however, that one of them, Price, shortly before the making of said contract, had offered to buy the one-half of the stock of the Ozark Poultry & Egg Company owned by her intestate, her husband, at the time telling her that he found that the company had come to the end of their row. They were heavily indebted, owed $50,000 to the banks, and the liquid assets amounted to about $39,000; "that the company was worth $18,000 less than nothing," but that he would see that she would not lose anything, and would give her $6,000 par value for the stock.

The liquidation of the corporation proceeded under the agreement until the appellants filed their cross-complaint against her, asking for receiver of the assets, and the corporation was then put into bankruptcy, and its administration there failed to show the payment of its

debts and that the stock of appellant was of any value whatever.

The decree as to these appellants is correct, and is affirmed.

The court erroneously held the estate of Jay Fulbright, a director and president of the bank at the time the loan was made, responsible for the payment of the balance due thereon, adjudging it an excess loan knowingly made by him as a director of the bank.

The bank first brought suit against Patrick, Price and Clark on the note executed by Patrick and indorsed by the other, and finally, in the denial of the allegations of the answer and cross-complaint of Patrick, alleged that the loan represented by the note sued on was an excess loan to the Ozark Poultry & Egg Company, made by Jay Fulbright, the director and president of the bank, knowingly and in violation of the National Banking law, and that Roberta Fulbright, as his administratrix, was liable to the bank to the payment of the balance due thereon, under §§ 5200 and 5239 of said statute. On this point it made the following finding of fact:

"That on said date aforesaid (November 15, 1922), the deceased, Jay Fulbright, while acting both as president and director of the plaintiff, Arkansas National Bank, and as president and director of the said Ozark Poultry & Egg Company, negotiated, granted and made to the defendant, F. M. Patrick, a loan of $10,000, which was evidenced by a promissory note executed by said defendant, Patrick, and indorsed by the defendants, M. L. Price and R. M. Clark; that said loan was made to the defendant, Patrick, for the benefit of the Ozark Poultry & Egg Company."

The Ozark Poultry & Egg Company, hereafter called the corporation, was indebted, at the time of this loan, to the bank in such a sum as that the amount of the loan, $10,000, would have been in excess of the amount the bank, with its capital and surplus, could lend to any one person, firm or corporation. The testimony shows that Fulbright was the president of the corporation, which had

been doing an extensive business, as well as director and president of the bank. The directors of the corporation, before the making of this loan, had on numerous times borrowed money from the bank on paper executed by them.

This loan was applied for by Patrick, the maker, presenting the note, which had already been signed and indorsed at the office of the corporation, to the cashier of the bank, who advanced the money thereon, placing it to the credit of the maker of the note, who, later that day, checked it out to the corporation, which used it in payment of one of its notes due to a bank in Fort Smith. The corporation charged itself with the money as having been received from and due to Patrick, the maker of the note.

Unquestionably these individuals, the maker and indorsers of the note, had the right to borrow money from the bank, and it was not unusual for them to do so, and lend it to the corporation, of which they were directors and stockholders. They were separate and distinct persons from the corporation, and not personally liable to the payment of its debts. The money borrowed by the corporation from the bank constituted no liability against them, personally or individually. They were not an association, or a company or firm, nor with the corporation any person within the meaning of said § 5200 of the statute, providing that total liability of any borrower shall at no time exceed one-tenth part in amount of the capital stock. This corporation was not thought to be insolvent at the time this money was borrowed from the bank by Patrick and his indorsers, and by them loaned to it. The cashier, after making the loan, later asked Fulbright, the president of the bank and also of the corporation, first, after telling him that the loan had been made on the note signed by Patrick and indorsed by the other two, if it was signed as it should have been, and he replied that it was.

It is true some of the witnesses liable to the payment of the note stated it was agreed to be made and the loan procured for the corporation in that way to avoid the

appearance of its being a loan to the corporation, which would have been an excess loan made to one borrower in violation of the statute. The witnesses, however, were liable to the payment of the note in any event, and seeking to escape such liability by transferring it to the estate of Fulbright, who could not testify about the transaction.

The chancellor found, too, that Jay Fulbright, while acting both as president and director of the plaintiff bank and of the corporation, "negotiated, granted and made to defendant, F. M. Patrick, a loan for $10,000, which was evidenced by a promissory note executed by said defendant, Patrick, and indorsed by the defendants, L. M. Price and R. M. Clark;" that said loan was made to the defendant, Patrick, "for the benefit of the corporation."

Even if it could be said that the $10,000 loan to Patrick was a loan indirectly to the corporation, of which Fulbright was president, and for the making of which the directors of the bank would be liable for the resulting damages under the law prohibiting an excess loan to one borrower, corporation, association, individual, partnership and members thereof, then it is more nearly true, and the proof would have warranted the finding, that Fulbright only procured the making of the loan, which was granted by the cashier of the bank, and later approved by its board of directors, at a meeting from which he was absent, and in the making of which loan he did not knowingly participate in his capacity as director or officer of the bank. This transaction is unlike that in the case of the *Corsicana National Bank* v. *Johnson,* 251 U. S. 68, where the testimony showed there was an excess loan to two persons, individuals, in making which the bank director knowingly participated, rather than two loans, neither of them excessive, made to borrowers severally. It was shown that one of the parties indorsed the note of the other, the maker of which in turn indorsed his note for a like sum, which would not have been an excess amount. These individuals had been partners and jointly interested in many ventures, and were still partners in some, and the transaction was treated as

one in the making of the loan by the bank, the money being forwarded by check or draft payable to the order of the two individuals jointly, as though they were a firm or partnership.

Here, as already said, while it is true the maker and indorsers of this note were directors of the corporation to which they loaned the money borrowed by them, they were entirely separate and distinct persons from said corporation, and without personal liability to the payment of its debts or performance of its obligations.

It follows that the court erred in holding Roberta Fulbright, as administratrix of the estate of her deceased husband, liable to the payment of the balance due on said Patrick note. The cause is therefore remanded to the chancery court, with directions to dismiss the action as against the said administratrix.

FURST & THOMAS v. HARTZELL.

Opinion delivered February 21, 1927.

1. SALES—CONSTRUCTION OF CONTRACT.—It is the province of the court to determine whether a contract is one of purchase and sale or one of agency if the contract is unambiguous.
2. SALES—CONSTRUCTION OF CONTRACT.—Where a contract for the disposal of plaintiff's goods to consumers named defendant as "salesman" and provided for free advice and suggestions to him as to the best method of selling the goods, for payment by him according to cash sales, and for return of unsold goods on termination of the contract, *held* that, whether it constituted a contract of agency or of purchase and sale is for the jury.

Appeal from Arkansas Circuit Court, Northern District; *George W. Clark,* Judge; affirmed.

A. G. Meehan, for appellant.

W. A. Leach, for appellee.

MEHAFFY, J. The appellant, plaintiffs below, filed in the Arkansas Circuit Court the following complaint: That on or about the 8th day of July, 1921, the plaintiffs and the defendant, William E. Chadick, entered

into a contract by the terms of which the plaintiffs agreed to sell and deliver, subject to the conditions contained in said contract, to the defendant, William E. Chadick, plaintiffs' product in reasonable quantities as ordered by the defendant. The relationship of vendor and vendee, according to the terms of this contract, were to continue for so long as the contract remained in force.

By the terms of said contract the said William E. Chadick agreed to pay Furst & Thomas for all goods sold to him by them the usual wholesale price thereof, and further agreed to pay all unpaid balances due from him to them at the time of the execution of said contract, the terms and conditions of said payments being more definitely set out in the duplicate copy of said contract, which is hereto attached and made a part hereof. The said contract above referred to was subject to acceptance by the plaintiffs, Furst & Thomas, and the same was duly accepted by them on the 2d day of August, 1921.

Shortly after the execution of the said contract the plaintiffs began shipping to the defendant, William E. Chadick, under instructions and orders from the said William E. Chadick, and in accordance with the contract above referred to, merchandise and products of the kind contemplated at the time of the execution of said contract. That the said William E. Chadick continued to purchase merchandise and products from the plaintiffs from that time until the 24th day of December, 1923. On or about the time the purchases aforesaid began to be made by the defendant, William E. Chadick, he, the said defendant, began to make remittances to the said Furst & Thomas, and continued to do so up until the 3rd day of January, 1924, but that no further payments have been made upon said account since that date. The unpaid balance of indebtedness for goods, wares, merchandise, as above set out, due from the defendant, William E. Chadick, to the plaintiff is the sum of $1,376.76.

As a part of the said contract the defendants, A. A. Hartzell, Charles F. Kuehen and J. A. Owen, executed

a joint and several guaranty in favor of Furst & Thomas for the purpose of guaranteeing the faithful performance of the contract above referred to by the codefendant, William E. Chadick, and to guarantee payment by him of the purchase price of all goods furnished to him on credit, as provided in said contract. The said guaranty also extended to any balance on his account for goods previously purchased by him and remaining unpaid at the date of the acceptance of the contract herein referred to.

As a further condition of said guaranty, the three defendants, A. A. Hartzell, Charles F. Kuehen and J. A. Owen, agreed that, three months from and after the termination of the agreement above referred to and the nonpayment of his account by William E. Chadick, the guaranty of said account by said three defendants shall become absolute as to the amount due from him, and the said three defendants agreed to pay any indebtedness of the said William E. Chadick due the plaintiffs, Furst & Thomas, without any proceedings having to be taken against the said William E. Chadick. That a period of time in excess of three months has expired since the termination of said contract. A copy of the contract aforesaid and the bond aforesaid is hereto attached, marked Exhibit A and made a part hereof.

A certified statement of account is hereto attached and marked Exhibit B. That an itemized statement of account is hereto attached and marked Exhibit C.

Attached to complaint as Exhibit A was the following contract:

"This contract, made and entered into at Freeport, Illinois, this 6th day of July, 1921, by and between Frank E. Furst and Fred G. Thomas, copartners, doing business under the name of Furst & Thomas, of Freeport, Illinois, and Wm. E. Chadick of Stuttgart, Arkansas, hereinafter called the salesman, witnesseth:

"That, upon acceptance of this contract, Furst & Thomas agree to thereafter, unless prevented by strikes, fires, accidents, or other causes beyond their control, sell

and deliver to the said salesman, on board cars at Freeport, Illinois, or, at their option, at their nearest branch warehouse, at their current wholesale prices, their products in reasonable quantities as ordered by him, so long as this contract is in force and his account is in satisfactory condition. Furst & Thomas also agree to give the salesman free advice and suggestions through bulletins, booklets and letters as to the best methods of selling to consumers the goods purchased by him under this contract, but it is expressly agreed that nothing contained in such advice and suggestions shall be binding upon the salesman nor shall be construed as in any way altering or modifying the terms of this contract.

"The salesman agrees to pay Furst & Thomas the regular wholesale price for all goods sold to him by them, including any balance on his account for goods previously purchased by him and remaining unpaid at date of acceptance of this contract, in the following manner, to-wit: On the installment plan, by paying to said Furst & Thomas in cash, each week, a sum equal to not less than one-half his total cash sales and collections from such goods during said week; provided, that the salesman may be required, at the option of Furst & Thomas, to pay not less than the wholesale price of certain products designated by them and sold by him for cash or collected for during said week; provided that, by paying his account in full on or before the tenth day of each month, said salesman shall receive a discount of 3 per cent., if he remits cash in full with each order, he shall receive a discount of 5 per cent. from their current wholesale prices.

"As a matter of good faith and to show what the receipts of his business are from week to week, he agrees to send to Furst & Thomas each week a correct and fully itemized record of his business on forms provided for that purpose by them. Either party shall have the right to terminate this contract by giving written notice to the other party; provided that, if the sale or purchase of goods under this contract be permanently discontinued for any reason, it is thereby terminated, and, upon

its termination from any cause by either party, the salesman agrees to settle within three months the balance due said Furst & Thomas on account; provided that the salesman shall have the privilege of returning promptly, after termination of contract, to Furst & Thomas, at Freeport, Illinois, by prepaid freight, his stock of unsold goods, and for all goods so returned by the salesman in original, unopened bottles and packages, Furst & Thomas agree to allow credit at the price originally charged after deducting the cost of checking, handling and putting such goods back into stock, and if, on final accounting, any balance is due the salesman, to pay the same promptly.

"This contract is subject to acceptance by Furst & Thomas at their home office in Freeport, Illinois, and, when so accepted, shall immediately be in force and effect.

"Accepted at Freeport, Illinois. 8-2-1921. Furst & Thomas.

"Salesman sign here in ink. William Chadick."

The defendant, Wm. E. Chadick, filed separate answer, which was as follows:

"Defendant admits that he signed the contract mentioned and described in plaintiff's complaint and admits that the copy of said contract annexed to plaintiff's complaint as Exhibit A thereto is a correct copy thereof. Defendant denies that any relation existing between this defendant and the plaintiffs, by reason of said contract, was that of vendor and vendee. Defendant denies that he was to pay for all goods delivered to him by the plaintiffs, but states that he was to pay for only such goods as were delivered to him and by him sold and delivered to the purchasers. Defendant denies that any of the goods delivered to him were purchased by him, but states that all goods so delivered to him were consigned to him to be sold, and that all goods so delivered to him, remaining unsold at the termination of the contract, were to be by him returned to the plaintiffs. That all goods delivered to defendant by the plaintiffs

were manufactured by and were the property of Furst-McNess Company; that Furst & Thomas, in delivering said goods to the defendant, were acting merely as agents for and on behalf of said Furst-McNess Company, and that all deliveries so made by Furst & Thomas to this defendant were in truth and in fact made by said Furst-McNess Company. That Furst-McNess Company is a corporation, organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in Freeport, Illinois. That said Furst-McNess Company has failed to file with the Secretary of State for the State of Arkansas a copy of its charter, and has failed to file a statement of its assets and liabilities, and has failed to designate its general office in the State of Arkansas, as is required by § 1826 of C. & M. Digest. That said Furst-McNess Company has failed to file the resolution of its board of directors and has failed to designate an agent for service in this State, as is required by § 1827 of C. & M. Digest. That said Furst-McNess Company has wholly failed to comply with the laws of the State of Arkansas permitting foreign corporations to do business in Arkansas, and was not and is not authorized to do business in Arkansas.

"That Frank E. Furst, one of the plaintiffs herein, was, at all times herein mentioned, and is now, the president of Furst-McNess Company and a large stockholder therein; that Fred G. Thomas, one of the plaintiffs herein, was, at all times herein mentioned and now is, vice president of Furst-McNess Company and a large stockholder therein. That the firm of Furst & Thomas was organized at the same time Furst-McNess Company was founded, and was organized for the sole purpose of distributing the products manufactured by Furst-McNess Company. That Furst & Thomas are the agents of Furst-McNess Company, and, in making the contract with this defendant and in delivering the goods to this defendant, acted for and on behalf of said Furst-McNess Company, and the contract when made was, in truth and in fact, a contract between this defendant and said Furst-McNess

Company, and that this defendant, in the handling and selling of the products delivered by Furst & Thomas, was acting as the agent of said Furst-McNess Company. That all sales of the goods so delivered to him as aforesaid were had and made by this defendant in the State of Arkansas, as the agent of Furst-McNess Company in the State of Arkansas, in violation of the statute in such cases made and provided.

"Defendant denies that he is indebted to plaintiffs in the sum of $1,376.76, or in any other sum and amount, and, having fully answered, he asks that the complaint as to him be dismissed and that he have judgment for his costs."

The other defendants also filed separate answers, but it is not necessary to set them out. The appellant does not abstract any of the evidence, but sets out the instructions of the court, both those given and refused, and also motion for a new trial and judgment. Appellants do not abstract the testimony, for the reason that it does not ask any reversal of the judgment by any reference to the testimony, but relies solely on the law, and states that, whether or not the contract sued upon is subject to the terms of what we know as the "Wingo act" (Acts 1907, p. 744) relating to nonresident corporations, is determinative of the question to be raised here.

Appellants admit that, if the contract set forth above is a contract of agency by Furst & Thomas or the company manufacturing the products referred to in the contract, then their contention must fail. But they say, on the other hand, if it is a contract of purchase and sale, then it refers to interstate commerce, and appellant would be entitled to recover. That is, they could if it is a contract of purchase and sale, and not ambiguous, then it was the duty of the trial court to instruct for the appellant, without submitting any questions of fact to the jury. It therefore becomes unnecessary to determine or decide any questions except whether the contract sued on is a contract of purchase and sale or a contract of agency, or whether it is so ambiguous as to permit evidence to

determine the effect of the contract, whether it is one of purchase and sale or one of agency.

The first part of the contract, when considered alone, would be construed as a contract of purchase and sale. The question, then, is whether the other parts of the contract render it ambiguous. This court has several times decided the question involving contracts somewhat similar to the one here involved, and it may be conceded that, if the contract is unambiguous, it is the province of the court to construe it and declare its purport.

In the case to which attention is called by appellant, in 115 Ark. 166, 171 S. W. 136, the contract there dealt with provided for the appointment of Clark as a traveling salesman for its products in the territory described, and no other, and agreed to furnish its products at place of shipment to said traveling salesman at such times and in such reasonable quantities as he might order, to be charged to him, in accordance with the company's price list current, etc. The medical company promised to take back all goods left in possession of the traveling salesman at the time he quit work. These are substantially the same provisions as in the contract involved here. In the case mentioned they also had an obligation of sureties, as they have in this case. The court, among other things, stated in the case referred to:

"In construing a contract we may consider the construction which the parties themselves have placed upon it and the action they have taken in executing its provisions. These rules of construction, however, are not available where the terms of the contract are unambiguous. Where the terms of the contract are unambiguous, it is the province of the court to construe the contract and to declare its purport; and appellee insists that that duty here devolved upon the trial court, and that that court correctly construed the contract as one of sale, and not as a mere appointment of an agent. * * * It is clear that, if the contract between the parties constitutes a sale of the commodities there mentioned, there can be no doubt that the court correctly directed a verdict in favor of

appellee. But the evidence upon that question is not so undisputed that it may be said as a matter of law that the contract constituted a sale of goods, and not an agency." *Clark* v. *J. R. Watkins Medical Co.,* 115 Ark. 166, 171 S. W. 136.

The court reversed and remanded the above case, with directions to submit the questions of agency to the jury, with directions to render a verdict for the appellee if they find the relationship between litigants was that of vendor and vendee, rather than that of principal and agent. The court in the above case reviewed the authorities and held that the contract in that case was such as to be a question of fact for the jury as to whether the litigants were vendor and vendee, or whether the contract created an agency.

The contract of J. R. Watkins Medical Company was again before this court, and it was there held that the evidence was legally sufficient to support the finding that the business out of which this litigation arose was appellant's and that appellee was but his agent. *J. R. Watkins Co.* v. *Williams,* 124 Ark. 539, 187 S. W. 653.

In the case of *W. T. Rawleigh Medical Company* v. *Holcomb,* 126 Ark. 597, 191 S. W. 215, the court called attention to the fact that, while there were points of similarity between that case and the J. R. Watkins Medical Company case, it did not find the uncertainty in the relationship of the parties which was developed in the proof in the other case. The agreement in the case of the *Rawleigh Medical Company* v. *Holcomb* is somewhat different from the contract in the present suit. The agreement mentioned the medical company as party of the first part, and Holcomb as party of the second part, and not as salesman, and there was nothing in that contract to indicate that he was a mere salesman, and instead of letting him return the goods, in that case, the company agreed to repurchase, at wholesale prices, the goods that the second party had on hand, if they were in as good salable condition as when originally sold to him, provided that the second party, on repurchase, pay the

company's actual expenses of receiving, inspecting and overlooking all such goods. It is also provided in that contract that that instrument constituted the sole and entire agreement. *W. T. Rawleigh Co.* v. *Holcomb,* 126 Ark. 597, 191 S. W. 215.

The contract in the case now before the court expressly states that it is a contract between Furst & Thomas and Wm. E. Chadick, called the salesman. Then they agreed to give the salesman free advice and suggestions through bulletins, booklets and letters as to the best method of selling to consumers the goods purchased by him under this contract. It states that the salesman agreed to pay, etc.

Another thing about this contract is that he does not agree to pay Furst & Thomas, except according to cash sales and collections. It appears from the contract that he receives and sells them, and, after the goods have been sold, he is then to make payment, and, upon the termination of the contract, the salesman is given the privilege of returning promptly his stock of unsold goods.

We think therefore it was clearly a question of fact for the jury to determine whether the contract was one of agency or one of purchase and sale. There seems to be a very clear distinction between this contract and the contracts the court has held were free from ambiguity. It is such a contract and of such doubtful meaning that the court cannot say as a matter of law that it is not a contract of agency. We think the question is thoroughly settled by the former decisions of this court, and the circuit court did not err in submitting the question to the jury, and, this being the only contention of the appellant here, the judgment is affirmed.

TEXAS COMPANY v. SNOW.

Opinion delivered February 21, 1927.

1. EVIDENCE—VARYING WRITING BY PAROL.—The general rule is that parol testimony is inadmissible to vary or contradict the terms of a written agreement or contract.
2. EVIDENCE—PAROL EVIDENCE TO VARY DEED.—While parol evidence is admissible for the purpose of showing that the true consideration is different from that expressed in a deed, it is not admissible to show that a deed warranting against all claims was not intended to warrant against a specific claim.
3. COVENANTS—KNOWLEDGE OF INCUMBRANCE.—Knowledge or notice, however full, of an incumbrance or of a paramount title does not impair the right of recovery upon covenants of warranty, as they are taken for protection and indemnity against known and unknown incumbrances or defects of title.
4. ESTOPPEL—CONDUCT.—Evidence *held* to sustain a finding that plaintiff was estopped by its conduct from recovering for breach of a covenant of warranty.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor; affirmed.

Mahony, Yocum & Saye, for appellant.

T. J. Gaughan, J. T. Sifford, J. E. Gaughan and *Elbert Godwin,* for appellee.

MEHAFFY, J. The Texas Company brought suit in the Ouachita Circuit Court against D. V. Snow and others, to recover for a breach of a covenant of warranty in a warranty deed conveying 80 acres of land. The plaintiff alleged that, in February, 1923, it purchased from the defendants the north one-half of the northwest quarter of section 30, township 15 south, range 16 west, for the price of $10,000, which it paid the defendants. It is alleged that the defendants executed and delivered a warranty deed whereby they warranted the title to said property, and agreed to defend title against claims of all persons. Plaintiff alleged that, at the time of the delivery of the deed, the defendants were not the owners of the land, but that it was owned by others, who had since obtained judgment and decree for the recovery of said land. Plaintiff prayed judgment for the $10,000,

with interest. It afterwards filed an amendment to its complaint, claiming the sum of $2,250, expended as attorney's fees, and $250 as costs.

Defendants filed answer and cross-complaints and motion to transfer to equity. The cause was transferred to equity. The defendants, in their answer, admitted executing and delivering the deed described in plaintiff's complaint, and admitted the judgment obtained for the recovery of the land after the execution of the deed, but they denied that plaintiff was entitled to recover the $10,000. They alleged that, prior to the negotiations referred to by the plaintiffs and defendant, suit had been filed in the Ouachita Chancery Court by Adam and Mary Ann Reaves, claiming that they were the owners of the land, and that the plaintiff in this suit was well aware, and had full knowledge of the claim of said Adam Reaves and wife, and agreed to purchase unconditionally and without a covenant of warranty, and subject to the pending litigation; that the plaintiff made an agreement to purchase the lease from the defendant unconditionally and without a covenant of warranty, subject to said pending litigation and subject to an exception or reservation of one-eighth of all oil, gas and other minerals in, under and upon said land, and, in addition, agreed to take charge of said litigation, as agent for said defendants and for itself, for the sum and price of $10,000; that these defendants agreed to accept that sum, and executed a deed of conveyance unconditionally, and without a covenant of warranty, excepting and reserving one-eighth of oil, gas and minerals, and to turn over to plaintiff, as their agent, the control and management of said litigation. They alleged that the plaintiff took actual possession of the land on oral agreement, on or about the 15th day of December, 1922, erected tanks, structures, etc., on said land, and employed counsel to represent it and these defendants in said pending litigations, and that all this occurred more than a month before the deed was executed. They alleged that, in the sale of the lands, the same attorney represented both the defendant and the

plaintiff, Gordon, in passing upon the sufficiency of the title, and that said attorney made a requirement that, in addition to the conveyance to be executed by Gordon, the executor, the same should be executed by all the heirs and legal representatives of the said George R. Ritchie; that the deed of conveyance was prepared by an attorney, and, by mutual mistake of all parties, a warranty deed in form was prepared and executed by the defendant, and that the covenant of warranty in the deed was without consideration, and void. They further stated that, as a part of the consideration, the Texas Company agreed to take charge, as agent of defendants and for itself, of the control and management of the litigation, and that defendants, in keeping with this agreement, turned over the control and management to plaintiff as their agent, and that plaintiff employed attorneys and immediately took charge and control of said litigation. Defendants further stated that, after the plaintiff took charge, Adam Reaves and his wife made an offer to release and relinquish all their rights, title, claim or interest to the plaintiff for $4,000; that plaintiff did not inform these defendants of the offer, and that said litigation could have been compromised and settled by the defendants had it not been for the grossly negligent conduct of plaintiff, and that, by reason of the fiduciary relations existing between the defendants and plaintiff, plaintiff was under legal obligations to report said offer to them, and that plaintiff was grossly negligent in refusing and failing to do so; that, if plaintiff had informed defendants, they would have accepted compromise of $4,000 and thereby saved the one-half royalty on gas, oil and minerals, and that this was worth $30,000, and asked judgment for $30,000 against the plaintiff.

Plaintiff filed an answer to cross-complaint, denying the allegations of said cross-complaint. The appellees contend that there was a mutual mistake by reason of which a warranty deed was given, warranting against all claims, when all parties understood, at the time the agreement was made, that Adam Reaves and his wife were

claiming that a deed they had previously executed was, in fact, a mortgage, and had already filed suit to redeem. About this fact there does not seem to be any conflict in the testimony. The deed was executed about the 3d day of February, 1923, and on the 1st day of December, 1922, Adam Reaves and his wife had filed suit in the Ouachita Chancery Court, alleging that they were the owners of the land in controversy in this suit, and that the deed executed by them was, in fact, a mortgage, and praying for a decree authorizing them to redeem. The fact that the Reaves suit was filed, seeking to redeem this land, before negotiations began, or during the negotiations, between appellant and appellees, with reference to the sale of this land, and that all parties knew about it, seems to be undisputed. The negotiations between appellant and appellees began some time in December, after the Reaves suit was filed, and the Reaves suit was discussed, and it appears that Gordon stated in his testimony that Mr. Redditt, who represented the Texas Company, knew that the Reaves suit was filed, and that it was pending at the time the trade was closed. Gordon told him at the time that he did not suppose they could deliver the deed, because this suit had been filed, and stated in his testimony that Mr. Redditt asked him about the nature of the suit, and he outlined it to him, and that later Redditt came back, and they had several conversations, and, about the fourth talk that they had about the first of December, Mr. Redditt came with his final statement of what the Texas Company would do. He stated that they would buy the 80 acres with the suit pending, subject to the suit, and they would take care of the lawsuit themselves.

Mr. Redditt himself testified that he knew the Reaves case was pending before the deal was finally consummated, but he did not think that Reaves had a chance to win. He stated that he learned of the suit some time in December; that he already knew about it when he talked to Gordon. He also stated that Gordon told him that they were not going to spend any money trying a lawsuit, and that Redditt told him that they would fight the lawsuit. It

also appears from the testimony that a proposition to settle the Reaves matter was made to the Texas Company, and that it could have settled it for $4,000. It made a counter-proposition of $1,000, but these propositions were never communicated to the appellees, although the Texas Company claimed to be attending to the Reaves matter as agent for the appellees.

It would serve no useful purpose to set out the testimony in full or at length, for the undisputed testimony establishes the fact that the Texas Company had knowledge of the claim of Reaves, and that the suit was pending before the deal was closed. The representative of the Texas Company admits stating that they would attend to the lawsuit, or fight the lawsuit, but the testimony is conflicting as to whether they purchased the land subject to the lawsuit, the appellee contending that it was so understood, and Mr. Redditt denying that the Texas Company purchased it with that understanding. It is well settled by decisions of this court, as a general rule, that parol testimony is not admissible to vary or contradict the terms of a written contract or agreement, and this court has said, with reference to the admissibility of parol testimony contradicting a deed:

"'Whenever in a deed the consideration, or an admission of its receipt, is stated merely as a fact, that part of the deed is received as a receipt would be, and the statement is subject to be varied, modified and explained; but, if the stated consideration is in the nature of a contract, that is, if by it a right is vested, created or extinguished, the terms of the contract thereby evidenced may not be varied by parol proof, but the writing is its sole exponent.'"

"We find the rule and its exception very concisely and properly stated in the case of *Hendrick* v. *Crowley, supra,* as follows: 'There is no doubt but that parol evidence is admissible for the purpose of contradicting or showing that the true consideration is other and different from that expressed in the written instrument. But this is not the rule, but an exception to the rule, that the legal effect

of a written instrument cannot be varied or defeated in whole or in part by parol evidence. The exception can never be allowed to override the rule, for that would be to dispense with the rule entirely and preserve the exception. The exception always loses its governing force when it comes in conflict with the rule which it qualifies, and must yield to its higher claim. Hence the consideration cannot be contradicted or shown to be different from that expressed when thereby the legal operation of the instrument to pass the entire interest according to the purpose therein designated would be defeated.' " *Wallace* v. *Meeks,* 99 Ark. 350, 138 S. W. 638.

The above is a statement of the rule that is found in many decisions of this court, so that it would appear that parol evidence is not admissible to show that a warranty deed warranting against all claims was not intended to warrant against a specific claim; but the court in the case last mentioned also stated:

"No effort was made to prove a mutual mistake in conveying the timber tracts separately as would justify the court in decreeing reformation. Nor is there any proof of fraud in procuring separate deeds, instead of a single deed expressing the entire consideration. The proof merely shows that this was done for convenience, and not through any mistake. The proof does not bring the case within the principle announced by this court in *Lawrence County Bank* v. *Arndt,* 69 Ark. 410, 65 S. W. 1052, where relief was given in equity against a mistake of law on account of reliance by the parties on one side on the representation and superior knowledge of the other party to the contract."

In addition to the contention of appellees that the warranty deed was given by mistake, they also contend that appellant is estopped by its declaration and conduct. This court has defined estoppel as follows:

"Equitable estoppel (estoppel *in pais*) is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed,

either of property, of contract, or of remedy, as against another person, who has, in good faith, relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon." *Thompson* v. *Wilhite,* 131 Ark. 77, 198 S. W. 271.

As we have said, the testimony conclusively was that the appellant knew of the Reaves claim and suit before it closed the deal with appellees. It not only knew about the suit, but, according to the undisputed testimony, agreed to attend to the suit itself, and the appellees told Mr. Redditt that they would not fight the lawsuit. The Texas Company knew that it could settle the Reaves claim for $4,000, but did not communicate this proposition to the appellees. Then again, the appellant purchased the Reaves interest without mentioning it to any of the appellees.

The chancellor may have found that the conduct of the appellant estopped it from claiming any right because of the Reaves claim. It is true, as contended by appellant, that knowledge, or notice, however full, of an incumbrance, or of a paramount title, does not impair the right of recovery upon covenants of warranty. The covenants are taken for the protection and indemnity against known and unknown incumbrances or defects of title. The appellees, however, go further in this case, and not only contend that the appellant knew of the defect or incumbrance, but show such conduct on the part of the appellant as appears inconsistent with their claim for damages for breach of warranty because of the Reaves claim.

The testimony is conflicting, and we cannot say that the finding of the chancellor was against the preponderance of evidence, and the decree is therefore affirmed.

SNEED v. SNEED.

Opinion delivered February 28, 1927.

1. ABATEMENT AND REVIVAL—DEATH OF PARTY.—On the death of a party pending an appeal, where no general administrator has been appointed, it is proper to revive the case in the name of a special administrator.
2. DIVORCE—CONVEYANCE IN FRAUD OF ALIMONY RIGHTS.—A wife securing a judgment for alimony in a divorce suit becomes a creditor, and a conveyance made in fraud of her rights as such may be set aside or the property subjected to the lien of her judgment, provided the rights of purchasers without notice and for valid consideration have not intervened.
3. DIVORCE—CONVEYANCE IN FRAUD OF ALIMONY RIGHTS.—An assignment by a divorced husband of a $1,000 legacy to his second wife when he owed his former wife for 10 years' back alimony *held* fraudulent as to his first wife, though the second wife paid $1,000 for the legacy.
4. GARNISHMENT—REMEDY TO IMPOUND FUND.—Equitable garnishment is the proper remedy for a divorced wife, to whom the husband owes alimony, to impound a fund constituting a legacy due the husband.

Appeal from Garland Chancery Court; *W. R. Duffie*, Chancellor; affirmed.

STATEMENT OF FACTS.

Elizabeth Sneed brought this suit in equity to obtain judgment against her former husband, Dr. A. L. Sneed, for $4,800 for unpaid alimony, and asked that the same be declared a lien upon the funds in the bands of Al A. Reynolds as executor of the estate of Maeda C. Reynolds, deceased.

The defendant, Reynolds, answered that he had in his possession as executor of the estate of Maeda C. Reynolds, deceased, the sum of $1,000, which she had bequeathed to Dr. A. L. Sneed. He stated that an equitable garnishment had been served upon him, and asked that the court should direct him to pay said sum of money to the person entitled to receive it. Julia L. Snead, the present wife of Dr. A. L. Sneed, was allowed to intervene and claim the legacy of $1,000, which she claimed had been assigned to her by her husband for a valuable consideration.

According to the evidence for the plaintiff, Elizabeth Sneed, the chancery court of Garland County, Arkansas, in September, 1912, had awarded her the custody of the two minor children of herself and Dr. A. L. Sneed, and had also adjudged that he should pay her alimony in the sum of $40 per month. Dr. Sneed paid this sum regularly until October, 1914, when he became a nonresident of the State of Arkansas. After the plaintiff and Dr. Sneed had been divorced, he married Julia L. Sneed, and she is his present wife. At the time the present suit was filed, Dr. Sneed owed the plaintiff the sum of $4,800 in alimony. After he quit paying alimony, in 1914, the attorney for the plaintiff made every effort to collect the monthly sum awarded her, but was unable to do so. Dr. Sneed was insolvent. Even his office fixtures, instruments and books were in his second wife's name, and could not be reached under execution. Maeda C. Reynolds died on April 10, 1923, and left a legacy of $1,000 to Dr. A. L. Sneed. Al A. Reynolds became the executor of her estate, and a writ of equitable garnishment was served upon him while the legacy was still in his hands as executor.

Virginia Sneed, daughter of Elizabeth Sneed and Dr. A. L. Sneed, was a witness for the plaintiff. According to her testimony, Julia L. Sneed knew that an order had been made by the chancery court for her father to pay $40 a month to her mother as alimony. Julia L. Sneed objected to the order on the ground that, if paid, it would deprive her of that amount of the earnings of her husband.

According to the testimony of Julia L. Sneed, she paid $1,000 in cash to her husband for the assignment of the $1,000 legacy to her. In purchasing the legacy and taking the assignment thereof, it was not her intention to defeat the claim of the plaintiff for alimony.

The chancellor found the issues in favor of the plaintiff, and a decree was entered of record in accordance with his findings. To reverse that decree Julia L. Sneed has duly prosecuted an appeal to this court.

James E. Hogue, for appellant.

Lee Miles, for appellee.

HART, C. J., (after stating the facts). After the transcript was lodged in this court, Julia L. Sneed died intestate, and a motion was made by counsel for appellees to dismiss the appeal and to prevent a revival of case in the name of a special administrator appointed for that purpose. The ground of the motion was that Julia L. Sneed was a nonresident of the State, and that her heirs did not desire to prosecute the appeal. Her attorney objected to the dismissal of the case on the ground that he had, under contract with Julia L. Sneed, a one-half interest in the $1,000 legacy which had been transferred to Julia L. Sneed by Dr. A. L. Sneed, in the event of the reversal of the decree and a finding by the court that she was entitled to the legacy. Under this state of facts, it was proper to make an order to revive the case in the name of a special administrator appointed for that purpose, and it was ordered that the case be revived in the name of H. J. Burney as such special administrator. In such case, where there is no general administrator, it is proper that revivor shall be in the name of a special administrator appointed by the court in which the action is pending. *Anglin* v. *Cravens,* 76 Ark. 122, 88 S. W. 833.

This brings us to discussion of the case on its merits. The law is that a wife who secures a judgment for alimony in a suit against her husband for a divorce is a creditor, and a conveyance made in fraud of her rights as such may be set aside or the property subjected to the lien of the judgment, provided that the rights of purchasers without notice and for a valid consideration have not intervened. *Masterson* v. *Ogden,* 78 Wash. 644, 139 Pac. 654, Ann. Cas. 1914D, 885; *Barber* v. *Barber,* 21 How. (U. S.) 582; *Fahey* v. *Fahey,* 43 Col. 354, 96 Pac. 251, 127 Am. St. Rep. 118, 18 L. R. A. (N. S.) 1147; and *Austin* v. *Austin,* 143 Ark. 222, 220 S. W. 46.

In the case at bar the facts are that Elizabeth Sneed and Dr. A. L. Sneed were divorced in September, 1912, and she was awarded alimony in the sum of $40 per month

and given the custody of their two minor children. Dr. Sneed paid the alimony until October, 1914. At that time he left the State, and has not paid any alimony since. Unpaid alimony in the sum of $4,800 had accumulated at the time he became entitled to the $1,000 legacy. According to the testimony of Julia L. Sneed, who was at that time his wife, he assigned this legacy of $1,000 to her and she paid him $1,000. It is true that she testified that this was not done for the purpose of defeating claim of Elizabeth Sneed for alimony. The circumstances surrounding the transaction are against her claim. She knew that Dr. Sneed owed his former wife alimony in the sum of $4,800, and knew that he was insolvent, and had even placed his office fixtures and books in her name. At least, she is presumed to have known this, for the daughter of Dr. Sneed testified to these facts, and she did not attempt to deny them. She contented herself with stating that the assignment was not made to her for the purpose of defeating the plaintiff's claim for alimony. The undisputed testimony shows that the attorney for the plaintiff, for several years, had been making every effort to collect the alimony and had been unable to do so because he could not find any property in the name of Dr. A. L. Sneed. If the assignment of the legacy was not made for the purpose of defeating the plaintiff in the collection of her claim for alimony, it had just as well not have been made. It is a significant fact that Julia L. Sneed claims to have paid her husband $1,000 for the $1,000 legacy left him. No attempt is made to explain what was done with the $1,000 or for what purpose the assignment was made. Under these circumstances we are of the opinion that the assignment was fraudulent and void as to the plaintiff as a creditor of Dr. A. L. Sneed.

An equitable garnishment was the proper remedy to impound the fund, pending a decision of the question to whom it belonged. *Riggin* v. *Hilliard,* 56 Ark. 476, 20 S. W. 42, 35 Am. St. 113.

It follows that the decree must be affirmed.

FRAZIER v. NICKS.

Opinion delivered February 28, 1927.

1. LANDLORD AND TENANT—RIGHT TO STIPULATED RENT.—A landlord is not required to accept less rent than that stipulated because of unforeseen and unpropitious crop conditions which rendered the lease for the year unproductive and unprofitable to the tenant.
2. LANDLORD AND TENANT—LEASE CONVERTIBLE INTO SALE.—A contract of lease may provide that it may be converted into a sale at termination of the lease if the lessee complies with the contract provisions as to payments.

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

Mehaffy & Mehaffy, for appellant.

A. L. Rotenberry and *June P. Wooten,* for appellee.

WOOD, J. This is an action by Nicks against Hatter and Frazier on a note in the sum of $9,450, executed by Hatter on March 1, 1923, to J. H. Frazier, Sr., and indorsed by J. H. Frazier. It is alleged that the note was given as collateral security to secure a note of $6,000 due on January 1, 1924; that demand was made for payment and refused, and the note was duly protested. The answer denied the material allegations of the complaint. The defendant alleged that Isabel Frazier entered into a contract with Nicks on the first of February, 1923, to purchase certain lands in Jefferson County, Arkansas, and that the contract was evidenced by an instrument which was attached to the complaint; that the plaintiff violated the contract by renting the property to other persons. It was alleged that they had paid the plaintiff more than the rental value of the place for the year they occupied the same, and that nothing was due by them on the instrument upon which the action was founded. The contract of February 1, 1923, is as follows:

"For and in consideration of the sum of six thousand dollars, due and payable on the first day of January, 1924, evidenced by the promissory note of Isabel H. Frazier of this date for the said sum due and payable, with interest from date, at the rate of eight per cent. per annum,

and for the consideration of the debts, covenants and agreements hereinafter contained, D. W. Nicks hereby lets, leases and demises for and during the period commencing January 1 and ending December 31, 1923, unto the said Isabel H. Frazier, lands in Jefferson County, Arkansas, described as follows: (Here follows description of lands).

"It is expressly understood and agreed that Isabel H. Frazier will commit no waste upon the said premises, and that she will, at the expiration of this lease, deliver possession of said premises to the said D. W. Nicks in as good condition as the same were in when received by her, ordinary wear and tear incident to her use excepted, without legal notice to quit and vacate, as provided by law, which is hereby waived.

"All improvements placed upon the said lands shall be at the expense of Isabel H. Frazier, and no liens shall be fixed thereon without the consent of D. W. Nicks first given in writing. All improvements placed upon said lands shall immediately become a part of the realty, and shall not be removed by the said Isabel H. Frazier; and all repairs made upon the premises shall be at the expense of Isabel H. Frazier.

"And for the consideration aforesaid, and the assumption and payment by Isabel H. Frazier of the indebtedness of D. W. Nicks, amounting to $32,320, with interest at the rates recited in the note, which is secured by deeds of trust and vendor's liens covering said lands, the payment by Isabel H. Frazier of all taxes and legal assessments which are or may become due, and the payment of all insurance premiums which are or may become due, the said D. W. Nicks and Mary R. Nicks agree to execute a warranty deed conveying said lands to Isabel H. Frazier.

"It is understood that Isabel H. Frazier is to make all such payments as they become due, whether before or after December 31, 1923. It is also understood that the indebtedness of D. W. Nicks mentioned herein as amount-

ing to $32,320, includes all his indebtedness secured by liens of any kind on said lands.

"It is distinctly understood and agreed that the relation of landlord and tenant shall not be disturbed by any of the covenants or agreements herein contained, and that the same shall not in any way change, modify and nullify the relationship of landlord and tenant existing between the parties hereto at the time of the execution of this agreement.

"Witness our hands and seals, this first day of February, 1923.

(Signed) "Isabel H. Frazier,
"D. W. Nicks,
"Mary R. Nicks."

Contemporaneous with the above contract, I. H. Frazier and Isabel H. Frazier executed an instrument in which they promised to pay Nicks, on January 1, 1924, $6,000, and pledged him as collateral security therefor the note of $9,450 above mentioned, and granted to Nicks the right to sell the same upon the failure of Frazier and wife to pay the note for $6,000 due January 1, 1924.

The collateral note on which the note was founded has written on its face the following recital: "This note is put up as security for $6,000."

We deem it unnecessary to set out the testimony in detail. Suffice it to say the testimony of Nicks tends to prove that the contract was executed by Isabel H. Frazier and her husband, I. H. Frazier, and that I. H. Frazier, the son of J. R. Frazier, stated to witness that he was willing to put up the note in suit as security on a rental proposition with the privilege of buying the place. I. H. Frazier asked witness how it would suit to make this rental with the privilege of buying, and witness told him that it would suit all right. I. H. Frazier was to pay the taxes and insurance and meet all payments as they fell due, and the contract was made to that effect. The testimony of witness was further to the effect that Isabel Frazier and I. H. Frazier went into possession of the property, that they held it for the year 1923, were not able

to make the first payment when it came due, and abandoned the proposition and surrendered possession to witness. The note in suit was given as security for the rent. That was thoroughly understood by all the parties. The rental value of the place for the year it was occupied by I. H. Frazier and his wife was $3,200. The witness could not have rented the place for $6,000, but could have rented it for about $3,500. The year that Frazier and wife worked it was a very bad year. After that year the witness rented the property for $3,200 and reserved the storehouse. If the contract had been for rental value alone it would have been about $3,500. I. H. Frazier paid the sum of $919.64 to witness for taxes and insurance for the year he occupied the place. Frazier also paid witness some accounts which witness had advanced for supplies to labor and for working and making the crop the year that Frazier occupied the place, which amounted to about $1,100. Frazier went ahead and used this labor, and would have had to make these payments in order to keep the labor, and he got the benefit of it. The payment was for money and provisions which witness had advanced to his laborers on the place and which the Fraziers would have had to pay in order to keep them.

There was testimony tending to corroborate the testimony of Nicks in regard to the Fraziers not being able to make the payments and finance the place, and that they had to give it up on that account, and, after the place was surrendered by them, Nicks rented the place the next year, 1924, to one Graham. There was testimony tending to show that the note in controversy was duly protested for nonpayment.

John R. Frazier and Earl Frazier and Mrs. I. H. Frazier testified on behalf of the appellants, and their testimony tended to prove that the note in controversy was given as a collateral note for the purchase of the place; that the note would not have been put up as collateral as a guaranty of rent on the plantation; that the rent of the plantation in ordinary years would be between

$2,800 and $3,200, but that for the year 1923 it was not worth anything like that. The testimony of I. H. Frazier in effect contradicted the testimony of Nicks tending to prove that the Fraziers surrendered the place and abandoned their contract to purchase the same. On the contrary, the Fraziers' testimony tended to show that he had made arrangements to finance the crop for the year 1924, and so informed Nicks in December, 1923, but Nicks had rented the place to one Graham, and witness therefore had to move. Witness conceded that he and his wife could not make the payments due for the year 1923.

The above are substantially the facts upon which the court rendered a decree in favor of the appellee against the appellants in the sum of $2,000, from which decree is this appeal.

The decree of the court on the issues of fact involved was not clearly against the preponderance of the evidence. The testimony tended to show that the rent of the place during ordinary years was between $2,800 and $3,200; that appellee could have rented the place for the year 1923 for at least $3,200. This amount was conceded by the Fraziers to be the fair rental value for ordinary years. That was the correct standard. The appellee, as the landlord, was not required to accept a rental less than that because of unforeseen and unpropitious crop conditions which rendered the year 1923 unproductive and unprofitable to the tenants on the place.

The court, by its decree, reduced the rental to the sum of $2,000. This was a less sum than the court might have justly found by fair preponderance of the evidence. While there is a decided conflict in the oral testimony as to whether the note in controversy was given as collateral to secure the amount due under the contract of February 1, 1923, as above set forth, we are convinced that it was given as a collateral to secure any amount that might be due January 1, 1924, under that contract. The written contract speaks for itself. It is a contract of lease which, at the termination thereof, if the lessee complied with the provisions of the contract with refer-

ence to the payments, was to be converted into one for the purchase of the property and the lessor was to make the lessee a warranty deed conveying the same.

In *Ish* v. *Morgan,* 48 Ark. 413-415, 3 S. W. 440, we said: "The agreement between the parties about the possession must determine the relation between them, and, though it consists of two separate and distinct stipulations, they are to be read together as one contract, and that contract is competent evidence to establish or rebut the relationship of landlord and tenant. If the contract shows that the defendant was in under an agreement to purchase, the idea of a tenancy was rebutted. * * * But if, on the other hand, the meaning of it is that he is to pay rent, or a compensation for the use of the land, then he was a tenant."

In *Thomas* v. *Johnson,* 78 Ark. 574, 95 S. W. 468, we said: "The parties to an agreement for the sale of land may also contract with the right, at the election of either party in the future, upon the performance or nonperformance of certain conditions, to treat the transaction either as a purchase and sale contract or a lease." See also *Block* v. *Smith,* 61 Ark. 266, 32 S. W. 1070; *Levy* v. *McDonnell,* 92 Ark. 324, 122 S. W. 1002, 135 Am. St. 183. We have recognized this doctrine in several cases in regard to executory contracts for the sale of land. We see no reason why the doctrine should not operate conversely where the parties have, by their contract, agreed that the relation should be that of landlord and tenant, with a provision that, at the end of tenancy, all the provisions of the contract having been performed, the contract shall then become one of sale and purchase, requiring the lessor to make an absolute deed to the property. Such, we believe, was the effect of the contract under review. The judgment is therefore correct, and it is affirmed.

MEHAFFY, J., disqualified.

GREENE COUNTY v. PARAGOULD.

Opinion delivered February 28, 1927.

1. BRIDGES—AUTHORITY OF COUNTY TO BUILD.—A county may expend its road funds in constructing a bridge over a ditch constituting the boundary of a city, though half of the bridge will be inside of the city limits.
2. BRIDGES—AUTHORITY OF CITY TO BUILD.—A city had power to bind itself to pay half of the cost of a bridge which constituted its boundary line notwithstanding that half of the bridge would be without the city limits.

Appeal from Greene Circuit Court, First Division; *G. E. Keck,* Judge; reversed.

John D. Hoskins, for appellant.

Jeff Bratton, for appellee.

SMITH, J. This cause was tried in the court below upon an agreed statement of facts, in which it was recited that the ditch constructed by the Eight-Mile Drainage District is the east boundary line of the city of Paragould at the point where the drainage ditch intersects Junction Street in that city, and the extension of this street from that point is a county road of the first class. In the year 1923 it became necessary to construct a new bridge over said ditch at the point where Junction Street intersects it, and a controversy arose between the city of Paragould and the county of Greene as to whether the city was liable for any part of the cost of building and constructing said bridge, inasmuch as only one-half thereof would be within the corporate limits.

With the consent of the city council, the mayor of the city entered into an agreement with the county judge, which is as follows: "Whereas, it has become necessary to rebuild what is known as Junction Street bridge, same being a first-class bridge across Eight-Mile Ditch, located at the terminus of Junction Street across said Eight-Mile Ditch, said ditch being the corporation line along the eastern limit of the city of Paragould, and the matter of the cost of construction of such bridge being in dispute, and the city contending that it is not liable

for any part of the costs of construction of said bridge, the county contending that the city is liable for one-half of the cost of constructing said bridge, but the construction of said bridge being a matter of urgent public necessity, it is therefore hereby agreed by and between the county and the city that the county and the city will jointly, each sharing one-half of the cost thereof, immediately construct said bridge, with the express and distinct understanding that the city will claim reimbursement for all moneys expended by it in the construction of said bridge, and that the city, in paying one-half of the cost of constructing said bridge, does not in any way waive or thereby estop the city from claiming, and, if legally entitled thereto, from being reimbursed for all moneys thereby expended.

"It is understood that the city will duly file its claim with the county court of Greene County, Arkansas, for allowance and reimbursement of all moneys expended by it in constructing said bridge."

The bridge was built, and, pursuant to this agreement, the city paid $871.37, which was one-half the cost of construction, whereupon the city filed a claim with the county court for reimbursement. The claim was disallowed, and an appeal was prosecuted to the circuit court, where judgment was rendered in favor of the city and the claim ordered allowed by the county court, and this appeal is from that judgment.

It is conceded that, had the county elected so to do, it might have paid the entire cost of the construction of the bridge. *Greenberg Iron Co.* v. *Dixon,* 127 Ark. 470. But the county did not elect so to do. Obviously it was the purpose of the county judge to require the city to pay one-half the cost of the bridge if the city had the power so to do, and we think the city had that power.

Section 7563, C. & M. Digest, reads as follows: "Each city of the first and second class and incorporated towns in this State shall have the power to build, construct and keep in repair any bridge within the corporate

limits thereof at the exclusive expense of any such municipal corporation."

It is true, only one-half of this bridge lies within the corporate limits of the city, but it is true also that the city paid only one-half of the total cost, which amounts to the city paying for the portion of the bridge within the corporate limits.

Presumptively an agreement had been reached as to the character of the bridge and the plans therefor and the cost thereof; at least no question is raised to the contrary, and, upon the execution of these plans, a completed structure—a bridge—afforded means of ingress and egress into and out of the city, one-half of which was in the city.

In insisting that the city bear one-half of the cost of the bridge, the county judge was not imposing on the city an obligation which was *ultra vires*. Section 7563, C. & M. Digest, *supra*.

The bridge in question supplies the missing link which connects Junction Street in the city of Paragould with the road which was involved in the case of *Mack* v. *Paragould & Hopkins Bridge Road Imp. Dist.*, 168 Ark. 867. In that case there was involved the question of building a bridge across the St. Francis River, and the plans for the proposed improvement called for the construction of a bridge to the center of the river—the boundary of the district—where connection was made with a similar improvement, thus making a completed bridge across the river. We there said: "It does not appear from the record before us that the proposed improvement is open to the objections which proved fatal to the proposed improvement in the cases of *Mullins* v. *Little Rock*, 113 Ark. 590, and *Mullins* v. *Commissioners Bridge Imp. Dist. No. 2*, 114 Ark. 324. Each of those cases involved the construction of a bridge across the Arkansas River at the city of Little Rock. In the first of those cases the proposed improvement was defeated because, as was held by this court, there was no provision in the law for a local improvement district to aid a

county in the construction of a bridge connecting two cities, as was proposed in that case. In the second of those appeals, which involved the same improvement, it was held that there could not be two separate sets of commissioners to build a single improvement."

We are of the opinion that there is nothing in either of the Mullins cases militating against the right of the city to pay the cost of the bridge in the city limits because a part of the bridge was without the city limits. The contract between the city and the county contemplated a single structure, which has been built, and we perceive no reason why the city might not bind itself to pay one-half of the cost thereof, inasmuch as half the bridge was within the city limits.

The city should not therefore have recovered the sum which it had agreed to pay and has paid, as it had the power so to agree, and the judgment of the court below will therefore be reversed and the cause of action dismissed.

HERWEIGH v. HALL.

Opinion delivered February 28, 1927.

1. PAYMENT—APPLICATION OF PAYMENTS.—The general rule relating to the application of payments is that the debtor at the time of making payment has the primary right to direct the application; if he fails to make the application, the creditor may make it; should he fail to make it, the law applies the payment to the oldest items of the account that are payable at the date of the payment.
2. PAYMENT—APPLICATION OF PAYMENTS.—The general rule as to the application of payments does not apply where a third party has a paramount interest entitling him to direct the application of payments.
3. PAYMENTS—APPLICATION.—Where a landlord, who became co-maker with his tenant of notes executed to the payee for rent and supplies, he may direct that the proceeds of the tenant's cotton sold to the payee by the tenant be applied to the oldest items in the account secured by such notes, whether due or not.

Appeal from Greene Circuit Court, First Division; *G. E. Keck,* Judge; reversed.

John D. Hoskins, for appellant.

Jeff Bratton, for appellee.

HUMPHREYS, J. This suit was instituted before a justice of the peace in Greene County by appellee against appellant and Abe Moore to recover an alleged balance of $168.60, with 10 per cent. interest per annum from July 16, 1925, until paid, on two notes of $100 each, executed by Abe Moore and his landlord, the appellant herein, to secure supplies to be furnished by appellee to Abe Moore during the crop season of 1920.

Appellant interposed the defense that the payments made by the sale of the cotton raised by Moore on his farm should have been credited on the notes instead of upon the unsecured account for supplies purchased by Moore from appellee in excess of the notes.

Appellee herein obtained judgment for the amount claimed in the magistrate's court against appellant and his tenant, Moore, from which an appeal was prosecuted to the First Division of the Circuit Court of Greene County, where the case was tried *de novo,* with the same result, from which is this appeal.

The undisputed testimony reflects that Abe Moore, a tenant on the farm of L. Herweigh, made arrangements with Ira Hall, a merchant at Delaplaine, to furnish him with supplies during the crop season to the amount of $200, by agreeing to give him two notes in the sum of $100 each, bearing interest at the rate of 10 per cent. per annum from date until paid; that, after purchasing the bill in the sum of $....., which was charged in Hall's books on open account against Abe Moore, he executed his promissory note to Hall for $100, dated April 12, 1920, due eight months after date, and another note for the same amount dated June 8, 1920, due six months after date, both of which were signed by L. B. Herweigh; that Moore bought supplies from time to time, which were charged on the account on the dates same were purchased, until the account amounted to $200, at which time Hall

extended additional credit to Moore without security, and continued to charge such supplies as he purchased, on the open account; that, in October, 1920, Moore sold Hall the cotton which he had raised on the farm, the price therefor being credited, as delivered, on the open account; that the account appearing in Hall's ledger, so far as it deals with the credits, is as follows:

Date Oct. 9, 1920.

Mr. Abe Moore	
Amount forwarded	$282.80
Credit cash	70.00
	$212.80

Date Oct. 15, 1920.

Mr. Abe Moore	
Amount forwarded	$221.10
By Cash	79.36
	$141.74

Date Oct. 22, 1920.

Mr. Abe Moore	
Amount forwarded	$154.05
Cash	70.00
	$ 84.05

Date Mch. 21, 1921.

Mr. Abe Moore	
Amount forwarded	$167.43
Cash	8.00
Paid	.75
	$176.18

One bale cotton to apply on account.

The above statement does not show a $23 payment which was credited on the first note as of date April 10, 1921. It does show a $70 payment that was also credited on the first note of date October 27, 1920. The testimony reflects, without dispute, that the total amount of the account was $420.96, with total payments of $242.36,

leaving a balance due of $168.60, the amount for which suit was brought. The notes had been assigned to the bank, and were not in possession of Hall when the payments were made by Moore.

The testimony is conflicting relative to directions concerning the application of the payments.

Hall testified that, when Moore brought the first bale of cotton, he told him to credit it on the account; that, on the same day, Herweigh came to him and asked how Moore had directed that the proceeds of the cotton be applied, and, upon being informed that Moore had told him to apply it on the account, he said to credit it on the notes; that, when Moore came back, he informed him that Herweigh said to credit the proceeds of the cotton on the notes, and Moore replied that he wanted it credited on the account.

W. W. Clayton, Hall's clerk, testified that Moore directed the other cotton he brought in to be credited on the account.

Abe Moore testified that he told Hall to credit the proceeds of the cotton on the notes.

"The rule relating to application of payments is that the debtor, at the time of making payment, has the primary right to direct the application; if he fails to make such application, the creditor has the right to make it; should he fail to make it, then the law makes it by applying the payment to the oldest items of the account that are payable at the date of payment." *Briggs* v. *Steele,* 91 Ark. 458, 121 S. W. 754; *Cross* v. *Johnson,* 30 Ark. 396; *Johnson* v. *Anderson,* 30 Ark. 755; *Price* v. *Dowdy,* 34 Ark. 285; *Hughes* v. *Johnson,* 38 Ark. 294; *Kline* v. *Ragland,* 47 Ark. 111, 14 S. W. 474; *Lazarus* v. *Friedheim,* 51 Ark. 371, 11 S. W. 518; *Dunnington* v. *Kirk,* 57 Ark. 598, 22 S. W. 430; *Fort* v. *Black,* 50 Ark. 256, 7 S. W. 121; *Goldsmith* v. *Levine,* 70 Ark. 516, 69 S. W. 308.

In cases of debts due and debts not due, or items due and not due, in the same account, the law applies payments to the due debts or items before applying same to the undue debts or items, where no directions are given

by the debtor. In case items in an account are covered by a note securing them, they become due at the maturity of the note, and not before. The law therefore, without directions from a debtor, would apply payments to the oldest items due, and not the oldest items charged. 30 Cyc. 1243; *Frazier* v. *Lanahan,* 71 Md. 131, 17 A. 940; *Wolford* v. *Andrews,* 29 Minn. 250, 29 N. W. 367; *McMillan* v. *Grayson,* 83 Mo. App. 425; *Briggs* v. *Steele, supra.*

None of the rules announced in the cases referred to have any application to the instant case. The rules announced in those cases relate strictly to rights to make application of payments between the debtor and the creditor. The rules do not govern or control the rights of intervening parties. In the instant case the appellant had a landlord's lien on all of the cotton produced on his farm by Moore for the rents and supplies which he had secured by signing the notes. By virtue of this paramount lien and right, it was his privilege to direct where the proceeds of the cotton should be applied. The undisputed testimony shows that he directed that it be applied to items in the account secured by the notes. Hall, the merchant, should have followed his directions and applied the payment to the oldest items charged on the account, irrespective of whether due or not.

On account of the error indicated the judment is reversed, and the cause is dismissed.

Mr. Justice KIRBY dissenting.

ST. MATTHEWS CHURCH *v.* WHITE.

Opinion delivered February 28, 1927.

1. MECHANICS' LIENS—LIEN AGAINST CHURCH.—Under Crawford & Moses' Dig., §§ 6915-6917, giving a lien for laborers and materialmen for work done and materials furnished against churches and charitable institutions where no bond is furnished by the contractor, a mechanic desiring to file a lien against a church, after giving ten days' notice, must either bring suit within ninety days

after the work was done or must within the same period file his account with the circuit clerk.

2. MECHANICS' LIEN—PARTIES.—In a suit by a mechanic to enforce his lien for labor, done on a building, the contractor for whom he worked is a necessary party.

3. MECHANICS' LIEN—ENFORCEMENT—LIMITATION.—A suit to enforce a mechanics' lien which was filed with the circuit clerk must be brought within fifteen months after the work was done.

Appeal from Johnson Circuit Court; *J. T. Bullock,* Judge; reversed.

STATEMENT OF FACTS.

Appellee brought suit against the appellant church and its trustees to fix and enforce a lien against the church building in Coal Hill for labor performed by him for Charles Ziegler, contractor, in reconditioning and repairing same. He filed an itemized verified account against the church only with the circuit clerk of Johnson County, on March 28, 1925, on which he stated, "that between the 27th day of November, 1924, and January, 1925, he was employed as a laborer and did labor between said dates on St. Mathews Church, at Coal Hill, Arkansas," describing the lot on which church was located, for which he claimed there was due him for labor $218.14, and for which he claimed a lien on the lot on which the church was situated. No notice was given to the trustees of the filing of this account, nor any statement contained in it showing for whom the work was done. He filed suit, on which summons was issued against appellants, the church and its trustees, on April 15, 1925.

Appellants filed a special demurrer on May 6, 1925, reserving the right to stand on their motion to quash the service of the summons without entering their appearance except for the purpose of the demurrer, alleging that plaintiff failed to show in his complaint that he had filed a proper account with the circuit clerk, claiming and fixing the lien upon the property, within ninety days from the date the labor was performed; also to show for whom the service was rendered and by whom he was employed, and that ten days' notice had been given before

the filing of the lien, or that he made a contract with either of the appellants.

The demurrer was overruled, but, on May 7, amendment to the complaint was filed, stating that appellee was employed by Charles Ziegler to do the work on the St. Mathews Church, as plasterer, but he had not sufficient information to state whether Ziegler was the original contractor or was acting as agent or superintendent for the trustees of said church; stated further that, if Ziegler was an original contractor, trustees had not required him to enter into bond, as required by law, conditioned to pay all indebtedness incurred for labor or material furnished in the construction of said church.

On May 7 defendants first filed a general demurrer to the amended complaint, alleging also that it had failed to make the contractor a party defendant, and, upon it being overruled, on the same day filed a motion asking the court to require the plaintiff to make the contractor a party defendant, and demurred to the complaint because he had not been made a party. All of which were overruled.

On December 3, 1925, the defendants filed a motion to dismiss the case, alleging that more than fifteen months had already elapsed since the work was done, and that the original contractor had never been made a party to the suit, as the law required. Upon the hearing the testimony showed that Charles Ziegler had been employed as a contractor to recondition and repair the church, furnishing all labor and material necessary therefor, at the price of $821, and that none of the trustees had employed the appellee to do any work upon the church or been notified, at the time he filed his account with the clerk of the circuit court, that he had done such work, for which he claimed a lien on the building. He testified as to the amount and value of the work done, admitted that he had at first claimed only $144.25, and the court instructed the jury to return a verdict for the plaintiff for $158.14, and rendered judgment therefor,

declaring it a lien against the church, from which judgment this appeal is prosecuted.

White & White, for appellant.

Jesse Reynolds, for appellee.

KIRBY, J., (after stating the facts). It is conceded that no notice was given of the filing of the account and claim for a lien, as required by § 6917, Crawford & Moses' Digest, and also that Charles Ziegler, the original contractor, was not made a party to the suit, but insisted that there was no necessity for complying with any of the provisions of the mechanics' and laborers' lien law, since the building against which the lien was sought to be enforced was a church, except §§ 6915 and 6916, giving a lien for laborers and materialmen against churches and charitable institutions when no bond is required filed by the contractor for payment of labor done and materials furnished.

This contention is without merit. The said sections of the statute (act of June 2, 1911) were evidently made to provide protection for laborers and materialmen for work done and materials furnished upon buildings and improvements of religious and charitable organizations and institutions, which the court had held were not subject to the provisions of said mechanics' and laborers' lien law.

In *Pfeiffer Stone Co.* v. *Brogdon,* 125 Ark. 426, 188 S. W. 1187, the case in which it was sought to enforce a lien against a church where no notice of the filing of the account with the circuit clerk had been given, the court held that the filing of the suit to enforce the lien within the ninety days' time given for fixing it dispensed with the giving of any such notice as had been held in the enforcement of such liens under the general law. This suit not having been commenced within ninety days after the work was done for which a lien is claimed, would not operate to relieve a lien claimant against the necessity for filing his account with the circuit clerk within the ninety days after the work was performed, and after giving the ten days' notice required by law.

It was not the intention of the statute to give a lien for work done for contractors on such buildings and improvements in case no bond was required filed for the payment of such claims that could be enforced at any time thereafter, but, obviously and necessarily, the new act was intended to become a part of such general law, and, certainly, to the extent of perfecting and enforcing the lien in accordance with the provisions thereof. The contractor was a necessary and indispensable party, as held in *Simpson* v. *J. W. Black Lumber Co.*, 114 Ark. 464, 172 S. W. 883.

Even if it could be considered that there was doubt about the bringing of the suit within ninety days of the date the last labor was performed, which dispensed with necessity for giving the notice and filing the account with the circuit clerk, the law requires that an action to enforce such lien shall be commenced within fifteen months, and the contractor is a necessary and indispensable party to such suit. His not having been made a party within said time, and the fact that the suit was sooner brought against the owner, could not relieve against the limitation.

The judgment is accordingly reversed, and the cause dismissed.

BROWN SHOE COMPANY *v.* STONE.

Opinion delivered February 28, 1927.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—RELEASE.—In an action by a creditor to recover a balance of the account after the debtor had made an assignment for the benefit of creditors, a verdict for defendant *held* sustained by evidence that plaintiff had accepted a *pro rata* dividend in full settlement.
2. CUSTOMS AND USAGES—WHEN BINDING.—A local custom by which creditors, after assignment of a debtor for their benefit, took a *pro rata* share of the assets in satisfaction of their claims, of which custom plaintiff had knowledge, *held* sufficiently proved.
3. APPEAL AND ERROR—INVITED ERROR.—Appellant cannot complain of the introduction of testimony as to a custom brought out by appellee, when appellant brought out testimony as to such custom more fully than appellee did.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—RELEASE.—Where a creditor, knowing that an assignment will not be carried through unless it agrees to it, and with that knowledge accepts a check sent in full payment, it will be bound by its own act, and cannot thereafter maintain a suit for any balance against the assignor.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; affirmed.

Clinton R. Barry, for appellant.

Warner, Hardin & Warner, for appellee.

MEHAFFY, J. R. E. Williams and J. H. Stone were in business in Fort Smith, Arkansas, and on the eighth day of March, 1924, made a deed of assigment to H. C. Bass, reciting that the parties of the first part were indebted in divers sums of money, which they were unable to pay in full to their different creditors, a list of which was given; and the deed further stated that they decided to make a fair distribution of their property and assets among all their creditors, in proportion to their respective claims. The said deed recited that it was in trust for the benefit of creditors of the estate of the parties of the first part. Among the creditors in the list attached was the Brown Shoe Company in St. Louis, to whom, according to the list, Williams & Stone were indebted in the sum of $1,004.87.

H. C. Bass took charge of the assets of Williams & Stone, and wrote the creditors, on the 24th day of March, 1924, the following letter, which was mailed to the Brown Shoe Company, as well as to the other creditors:

"March 13, 1924.

"To the Creditors of
Williams & Stone,
Fort Smith, Arkansas.

"Gentlemen: Subsequent to a meeting of creditors, held in this city last Friday, March 7, Williams & Stone, located at 420 Towson Avenue, Fort Smith, Arkansas, have made an assignment to the writer for the benefit of all creditors, share and share alike, subject, of course, to the approval of said creditors.

"The following firms were represented at the creditors' meeting: Beal-Burrow Dry Goods Company, Berry Dry Goods Company, J. Foster & Company, Arkansas Valley Bank. It developed that the liabilities of Williams & Stone were considerably in excess of the cash value of their assets and that their volume of business was not sufficient to cover overhead expenses, therefore it was the unanimous opinion of the creditors present that it would be to the best interest of all parties concerned to liquidate this business, and the writer was asked to act as trustee to avoid bankruptcy proceedings.

"The books of this concern showed their liabilities and creditors to be as follows:

Beal-Burrow D. G. Co.	Little Rock, Ark.	$2,733.34
Brown Shoe Co.	St. Louis, Mo.	1,004.87
Berry D. G. Co.	Ft. Smith, Ark.	652.42
J. Foster & Co.	Ft. Smith, Ark.	1,941.23
Arkansas Valley Bank	Ft. Smith, Ark.	2,000.00
Ft. Smith Garment Co.	Ft. Smith, Ark.	125.50
Wolverine Shoe Co.	Rockford, Mich.	306.50
The Davis Hat Co.	Dallas, Texas	121.30
Safe Cabinet Co.	Marietta, Ohio	22.10
Sunbraid Hat Co.	St. Louis, Mo.	23.30
One month's rent		50.00
"Total		$8,980.86

"Inventory shows the following assets:

Cash	$ 46.80
Dry goods and notions	3,190.69
Shoes	2,759.10
Groceries	480.53
Fixtures	902.11
"Total	$7,379.23

"Acting on the assumption that all creditors not represented at the meeting will concur in the assignment, it will be the purpose of the trustee to sell the stock of merchandise and fixtures at public auction at 10 A. M. Monday, March 24, at the Williams & Stone store.

"It will be noticed that this concern has no notes and accounts receivable, having done a strictly cash business, and the condition of their affairs is due to the fact that very little capital was put into this business; to be exact, only $1,170; however, at the time the indebtedness was incurred it was the belief and opinion of Williams & Stone that they would be able to secure sufficient outside capital to conduct their business, but their plans did not carry through, and, since their volume of business has not taken care of their overhead, the small initial investment has been consumed.

"Hoping that you will concur in the assignment and forward verified statement of your account by return mail, I am,

"Yours very truly,
"H. C. Bass, Trustee."

After the Brown Shoe Company received the letter they sent to Bass, the trustee, their account, amounting to $1,004.87. Thereafter, on the 24th day of April, 1924, H. C. Bass wrote to the Brown Shoe Company, inclosing a check to them for $482.34, in which he stated that this amount represented the first and final dividend of 48 per cent. of their account against Williams & Stone. This statement was then followed in the letter by a complete statement of the receipts and disbursements. On the 13th day of September, 1924, the Brown Shoe Company filed suit against Williams & Stone for $522.49. No service was had on Williams and the suit proceeded against Stone. Defendant Stone filed an answer denying the indebtedness, and denying that the account matured prior to April 8, 1924, denying their statement of account was correct, and denying that Williams admitted it to be true; and, for further answer, Stone alleged that a meeting of all the creditors of the concern was called and held, and that at said meeting the partners proposed to deliver over all the assets in liquidation and settlement of the outstanding debts, including the plaintiff's. They alleged that the proposition was accepted by the creditors and the agreement fully consummated, and all other assets

of the business were turned over to the trustee, who was selected by the creditors, and that the creditors accepted the amount in full, final, and complete settlement of all the obligations, including the debt of plaintiff. They alleged that plaintiff was a party to the agreement entered into, acquiesced in and accepted the agreement and settlement thereunder, and that their creditors were paid, each, including the plaintiff, its pro rata part.

The letter from the trustee to the appellant stated that Williams & Stone had made an assignment to the writer for the benefit of all the creditors, share and share alike, subject, of course, to the approval of all creditors. The appellant then had notice that there was an assignment for the benefit of all creditors, but it was subject to the approval of all creditors. Then the letter, inclosing the appellant a check for $482.34, stated that it represented the first and final dividend. The letter of March 13, 1924, above referred to, also stated that the liabilities of Williams & Stone were considerably in excess of their cash assets, and that it was the opinion of the creditors that it would be to the interest of all parties concerned to liquidate their business, and the writer was asked to act as trustee to avoid bankruptcy proceedings. This letter also contained the following statement: "Acting on the assumption that all creditors not represented at the meeting will concur in the assignment, it will be the purpose of the trustee to sell the stock of merchandise and fixtures at public auction at 10 A. M. Monday, March 24, at the Williams & Stone store." The letter closed with the statement: "Hoping that you will concur in the assignment and forward verified statement of your account by return mail, I am," etc.

The appellant therefore knew that an assignment for the benefit of all creditors was made, was subject to the approval of all creditors, and knew when the stock was to be sold, and knew that, if it approved it, it was requested to send its verified statement of account by return mail.

The trustee who wrote those letters testified that he had received the account of the Brown Shoe Company through the mail. This witness further testified that the creditors represented felt that it was the best thing that could be done for the creditors to save expense and to save bankruptcy cost. Witness also testified that, when he wrote the letter to the Brown Shoe Company, appellant, he received a verified statement of account; in other words, it filed its claim with him.

The testimony shows that, when creditors took charge of a debtor's property, it was the custom in that territory that the pro-rata share of the property received by each creditor should be in satisfaction of the creditor's claim, and that this was the understanding in this case. The testimony also shows that the appellant, Brown Shoe Company, had been doing business in that trade territory for many years. It was advised by the trustee that an assignment had been made for the benefit of all the creditors, but that it was on condition that it met the approval of all the creditors, and it was expressly stated to the appellant in the letter that the creditors had done this to avoid bankruptcy, that is, this is the substance of what was stated in the letter, and, after being told that the debtors had assigned all their property for the benefit of all the creditors, but it was on condition of the approval of all the creditors, they sent their verified account as requested, and participated in the proceeds of the sale.

The proof is sufficient to show not only the custom, but that the appellant knew of the custom, having been in that territory for many years. Appellant argues but two questions. It first contends that the court erred in admitting certain testimony, and it is argued that the testimony with reference to the agreement of the creditors, and the testimony as to the custom, was improper. The appellant, however, brought out the testimony about the custom much more fully than the appellee, and also showed that the Brown Shoe Company had been doing business in that territory for many years,

In the view that we take of this case we do not think that the testimony was prejudicial. The appellant contends that the court erred in refusing to direct the jury to find for the plaintiff. It may be conceded that, if a debtor makes an assignment for the benefit of his creditors, with a provision in the deed that creditors must agree to accept their *pro rata* share in full settlement of their claim, the deed of assignment is void, and, if this condition was not in the deed, but was made at the time and carried into effect, it would be void. The Circuit Court of Appeals of the 8th Circuit announced the rule to be as follows: "And a deliberate agreement, in or out of the deed, made at the time and carried into effect, to violate the statute, is a fraud upon the statute, and a fraud upon the legal rights of creditors, which the law will redress by removing the fraudulent barrier to the assertion of their legal rights against their debtors." *Simmons Hardware Co.* v. *Rhodes,* 7 Fed. Rep. (2d) 352.

Another case decided by this court and relied on by appellant stated:

"A deed of assignment, by an insolvent debtor, which provides that the preferred creditors are not to enjoy its benefits unless they accept of its provisions in full satisfaction of their debts, and that, if any of them refuse to accept, they shall be excluded, and the *pro rata* share to which they would have been entitled, had they accepted, shall be paid to another specified creditor, and which makes no provision as to the disposition of any surplus that may remain in the event all the preferred creditors shall refuse to accept, after paying the debt of the residuary creditor, is fraudulent and void on its face." *Collier* v. *Davis,* 47 Ark. 367, 1 S. W. 684, 58 Am. Rep. 758.

The court puts this on the ground that the debtor has no right to do this because it hinders and delays the creditors in their remedies and endangers the ultimate collection of their debts. It is said that it puts the proposition beyond the reach of judgments and executions into the hands of an assignee chosen, not by themselves,

but by the debtor. This court said, in one of the cases relied on by appellant, after announcing the rule above set forth: "This," say the authors of Ruling Case Law, "is on the ground that an insolvent debtor has no right to dictate terms which shall make him independent of his legal obligations, and that it is contrary to justice and against public policy to allow debtors to coerce their creditors into releasing their debts." *Nelson* v. *Harper*, 122 Ark. 39, 182 S. W. 519.

The rule is well established in this State that a debtor cannot make an assignment with the condition that all persons who accept their *pro rata* part shall thereby extinguish their debt, but we have here a very different case from any of those relied on by appellant. The debtor in this case did not seek to coerce any of his creditors. It was the creditors themselves who met and agreed to take charge of all of the debtor's assets; the debtor had no voice in it, as it appears from the evidence; he simply executed the deed to the trustee selected by the creditors, with the provision agreed to by the creditors. They entered into this agreement, they say, to avoid bankruptcy, and, in notifying the creditors, the trustee expressly stated that there had been a meeting of creditors held, and, subsequent to that meeting, the deed of assignment had been made to the trustee for the benefit of all the creditors, share and share alike, and subject, of course, to their approval. He also stated in the letter that he was asked to act as trustee to avoid bankruptcy proceedings. He was representing the creditors, and not the debtor. This letter was received by the appellant, and, in response to that letter, it sent its verified account. Since the appellant knew that a deed of assignment was made for the benefit of all the creditors, knew that it was done at a meeting of the creditors for the purpose of avoiding bankruptcy, and knew that it was not to be carried out unless all the creditors agreed, it agreed to the arrangement by sending its verified account as requested, with the knowledge of all these facts.

It is well established in this State that, where a creditor accepts a check which states on its face that it is in full payment, the creditor is bound thereby, and cannot thereafter sue for any balance. And if a creditor, knowing the facts, knowing that the assignment will not be carried through unless it agrees to it, knows that the check is sent in full satisfaction of its account, and receives and cashes the check with the knowledge of all the facts that were in the possession of appellant in this case, it is bound by its own act, and cannot thereafter maintain suit for any balance. At any rate, the court could not say as a matter of law that it was not bound, and this is the only contention in this case.

It has been said by this court, speaking of deeds of assignment: "Such deeds of assignment have been upheld by the decisions of this court holding that the debtor, in making assignment of his property for the benefit of creditors, may exact releases from creditors as a condition of preference under the deed, where he dedicates all of his property, not exempt by law, to the payment of all his creditors, not necessarily to the payment of all in equal proportions." *King* v. *Hargadine-M'Kittrick Dry Goods Co.,* 60 Ark. 1, 28 S. W. 514.

Again this court has said: "An insolvent debtor can reserve no use or benefit to himself out of the property assigned. He may stipulate for a release, but he must dedicate all of his property, not exempt by law, to the payment of all his creditors; not necessarily to the payment of all in equal proportions, for he may prefer such as will execute releases. But the deed must provide for the distribution of any surplus that may remain in the hands of the trustee, after the payment of the preference creditors, amongst the other creditors, whether they assent or not." *McReynolds* v. *Dedman,* 47 Ark. 13, 1 S. W. 552.

No objection is urged to any instructions given by the court and no objections to the court's refusing to give instructions, except the one instruction for a directed verdict. The evidence is sufficient to support the verdict, and the judgment is therefore affirmed.

BOTTRELL v. FARMERS' BANK & TRUST COMPANY.

Opinion delivered February 28, 1927.

1. LANDLORD AND TENANT—LIMITATION AS TO LIEN.—A cause of action of a landlord having a lien on his tenant's crop against a bank for receiving the proceeds of sale of the crop with notice of the lien is barred by the six months' statute of limitations; the remedy being in equity to impress a lien upon the proceeds of the crop in the bank's hands.
2. EQUITY—FOLLOWING STATUTE OF LIMITATIONS.—Equity follows the law as to the statute of limitations.
3. CONTRACT—CONSIDERATION.—In a suit by a landlord to enforce his lien against one converting the crop on which the lien existed, a promise of the conversioner to pay the rent to the landlord was without consideration where the landlord never promised to forbear or do anything in consideration for the bank's agreement.
4. LIMITATIONS OF ACTIONS—SUSPENSION.—Though a bank which converted the proceeds of a crop subject to a landlord's lien agreed to pay the rent to the landlord, such promise, being without consideration, did not suspend the statute of limitations applicable to landlords' liens.

Appeal from Mississippi Chancery Court, Chickasawba District; *J. M. Futrell,* Chancellor; affirmed.

Harrison, Smith & Taylor, for appellant.

Trieber & Lasley, for appellee.

MEHAFFY, J. This suit was begun by appellant, plaintiff below, alleging that one S. R. Sweeney was a tenant on the land belonging to him, and raised a crop for the season of 1920, under a contract by which Sweeney was to pay the plaintiff $9,487 for the rent.

Plaintiff alleged that the tenant, Sweeney, harvested the crop and paid $13,000 of the proceeds thereof to the defendant, Farmers' Bank & Trust Company, for the satisfaction of a certain mortgage executed by Sweeney to the bank. It is also alleged that the defendant received said money, knowing that Sweeney was the tenant of said plaintiff and that said sum was derived from the sale of crops on the land and was subject to plaintiff's lien for rent. Plaintiff also alleged that he made a demand on the defendant for the amount due on the rent, and was told that the financial condition of the bank was such that

it could not sustain a draft for said sum, but that it was instituting action against Wilson-Ward Company at Memphis for the proceeds of cotton shipped to Wilson-Ward Company by Sweeney, and that defendant would pay the rent if it was successful. It alleged that it relied on defendant's promise to pay, and, for that reason, did not enforce or attempt to enforce his lien for rent; also alleged that defendant had recovered the money from Wilson-Ward Company.

The defendant answered, admitting that plaintiff was the owner of the land and that it was rented to Sweeney, but denied that it was rented for the sum of $9,487; denied that Sweeney had sold the crop and paid $13,000 of the proceeds to the defendant to be applied to the paying of the mortgage, without having paid said rent; denied that it received the money with knowledge that said money was proceeds of the crop raised and grown, and subject to plaintiff's lien for rent; denied that any demand was made upon defendant; denied plaintiff was told that defendant's financial condition was such that it could not sustain a draft at the time, but that it was instituting action against Wilson-Ward Company; denied that it told said plaintiff that it would pay rent if it was successful; denied that any promise was made and that plaintiff relied on the promise for rent; and further stated that, if plaintiff ever had a claim, it was barred by the statute of limitations at the time of filing of this suit.

The undisputed facts in the case are that the plaintiff was the owner of the land, and that Sweeney was his tenant and raised a crop on which the plaintiff had a lien for the rent, amounting to $9,487, and that Sweeney was indebted to the bank, said indebtedness being secured by a mortgage on some personal property and the crop. Sweeney sold the crop and, without paying the rent, except a small portion of it, paid the proceeds from the sale of the crop to the bank on his indebtedness to it.

Plaintiff's proof tends to show that the bank promised to pay him the rent if they collected from Wilson-Ward Company, but the defendant denies this. The proof does not show, however, that the defendant asked or that the plaintiff promised not to institute suit to enforce the lien. Suit was not begun within six months after the rent was due. It would be useless to set out the testimony, because the undisputed proof is such that, if the suit is not barred by the statute of limitations, plaintiff is entitled to recover. If his cause of action is barred, he is not entitled to recover. This is the only real controversy in the case.

The appellant contends that the action of the bank destroyed the landlord's lien, and that its action amounted to a conversion, thereby giving rise to an action in tort, which may be brought any time within three years.

The defendant contends that the statute of limitations is six months. Plaintiff calls attention first to the case of *Van Etten* v. *Goldman Cotton Co.*, 158 Ark. 432, 250 S. W. 338. In that case it was held that "the act of purchasing the cotton destroys the landlord's lien, and one cannot do this and escape liability for so doing except when he has acted in good faith in making the purchase, and good faith requires a reasonable investigation of any information of which the purchaser has possession calculated to warn him that he is being offered cotton upon which there exists a landlord's lien."

In the above case the landlord sought to make the purchaser of cotton pay, because it was alleged that the purchaser had converted the cotton. The court, however, held that the purchaser bought the cotton without knowledge of the lien, and was therefore an innocent purchaser. But in this case it is not claimed that defendant was an innocent purchaser, but the claim is that the suit was not begun in time. We therefore think the above case has no application to the facts in this case.

Appellants next call attention to and rely on the case of *Walker* v. *Rose*, 153 Ark. 599, 241 S. W. 19. We do

not think that case has any application. In the first place, there is no controversy about the statute of limitations, but it is a question of an innocent purchaser and of conversion. The proof showed in that case that the cashier of the bank stated that it was his fault that Walker shipped the cotton, that he instructed him to ship it, and knew that he shipped it, and received the drafts, and the court said:

"When the bank, through its cashier, advised Walker to ship cotton to a cotton factor out of the State, the cashier knowing at the time that the appellee had a lien on such cotton for rent and supplies, and when the cashier received from Walker a draft on the factor for the proceeds of such cotton and used such drafts in paying Walker's indebtedness, the bank by these acts converted to its own use the proceeds of the cotton, with full knowledge of the fact that the appellee had a lien upon such cotton, or its proceeds, for rents and supplies. The decree of the court holding the bank liable to appellee for such proceeds, under the circumstances, was correct, as disclosed by the above proof. Having knowledge of the appellee's lien, it must be held that the conduct of the bank was tantamount to a destruction by it of such lien."

It will be observed that the only question in that case was the question of an innocent purchaser, and the court held that, when the bank advised the tenant to ship the cotton out of the State, and, acting on that advice, the tenant did ship it, and turned the proceeds over to the bank, this was tantamount to a destruction of the lien by the bank, but there was no question in the case of *Walker* v. *Rose* as to the statute of limitations.

The next case relied on by appellant, *Foster* v. *Bradley,* 143 Ark. 319, 220 S. W. 811, has no application to this case, and does not discuss the question of time in which suit must be brought. And, as we have already said, there is no question here about the landlord having a lien superior to that of the bank, and no question, as we understand the proof, about the knowledge of the bank that Sweeney was a tenant and that the appellant there-

fore had a lien for rent. But the only question is whether or not he can enforce his lien against the bank after six months, or whether he can maintain a suit to compel the bank to pay because it received the proceeds, if a suit was not begun within six months. We think it may be said that the case of *First National Bank* v. *Farmers' & Merchants' Bank,* 159 Ark. 389, 252 S. W. 34, has no application to the facts in this case, and it is useless to discuss the law with reference to landlord's lien and conversion, except so far as it may be necessary to determine when the suit in this case should have been brought, because we think the undisputed proof shows that the plaintiff had a valid lien and a right to enforce it, not only against the tenant, but against the bank. This court has said: "The lien of the landlord continues but for six months after the rent becomes due. And when there has been a conversion of the crop, or a portion of it, by one with knowledge of the lien, and it attaches in equity to the proceeds in his hands, its continuance is only for the same period, for equity follows the law. * * * The suit not having been commenced within six months after the rent became due, and the lien having expired, no equity or cause of action was shown in the complaint." *King & Clopton* v. *Blount,* 37 Ark. 115.

"If J. L. Cocke & Company could be made responsible at all to the appellees for the rents of 1891, it would be upon the theory that they had received cotton from the place upon which there was a landlord's lien for rents, with notice of such lien. But this would not be tenable, for two reasons: First, because the proof is hardly sufficient to charge them with notice of appellee's lien; and second, if it were sufficient, the lien of a landlord for rent expires in six months after the rent becomes due and payable." *Cocke* v. *Clausen,* 67 Ark. 455, 55 S. W. 846.

It should be kept in mind in this case that the landlord was not the absolute owner of the property which he claims that the bank converted, but only has a lien for the rent, and this court has said:

"Where the plaintiff has a lien on the property taken and sold by the conversioner, as in the case at bar, his remedy is in equity, not for the value of the property taken, for he is not in that case the owner thereof, but to fix his lien upon the proceeds of the property in the hands of the conversioner, it being an equitable doctrine that a lien may be fixed upon the proceeds of the property where the lien on the property has been destroyed by the wrongdoer." *Judge* v. *Curtis,* 72 Ark. 132, 78 S. W. 746.

It would seem that the above case of *Judge* v. *Curtis* settles this case, because it is expressly held that, although the purchaser is guilty of conversion, the remedy of the landlord is an action in equity to fix his lien on the proceeds, and, as he only has a lien by virtue of the statute, the action must be begun within six months, as provided by the statute.

Appellant calls attention to the case of the *Bank of Gillette* v. *Botts,* 157 Ark. 478, 248 S. W. 573; but in that case it will be observed that the suit was begun by the landlord against the tenant and some laborers who were claiming laborers' liens on the rice crops. The purpose of this suit, which was brought within six months, was to establish a lien for rent and supplies. After the suit was begun to enforce the lien, a receiver was appointed by the chancery court. The bank in that case took charge of the property and sold it, after the suit was begun to enforce the lien, and the court simply held that in that case the six-months statute had no application. It had no application because the suit to enforce the landlord's lien for rent and supplies was properly begun within six months, and the bank, after the expiration of six months, took possession of the property and sold it while the suit for rent was pending. We do not think that that case has any application, and, so far as we know, this court has uniformly held, not only that the action by the landlord against the tenant to enforce a lien must be begun within six months, but, when the property on which there is a lien is sold by the tenant, a suit to enforce a lien on the proceeds must be begun within six months. This

court also held, in the case of *Anderson* v. *Bowles,* 44 Ark. 108, that a suit against the purchaser must be in equity, and must be brought within six months of the maturity of the rent.

The other contention of the appellant is that the bank promised to pay. On this question there is no proof tending to show that any agreement was reached or that any facts existed that would work an estoppel. As stated by the chancellor in his opinion, the promise of the bank to pay the rents when collections should be made from the Wilson-Ward Company constitutes no estoppel. There is no testimony, even by the appellant, that he promised to forbear, or promised to do anything as a consideration for the agreement he claims the bank made. Testimony is conflicting as to the promise to pay, but, even if the officer had made the promise, as we view the testimony, there is no consideration, and it did not suspend the operation of the statute.

This suit not having been begun within six months, plaintiff's cause of action was barred, and the decree of the chancellor is affirmed.

APPENDIX

IN MEMORIAM.

JAMES WILLIAM MEHAFFY.

On April 11, 1927, in open court, Mr. J. F. Loughborough presented the following resolutions of the Little Rock Bar Association.

On Saturday, November 21, 1926, just before noon, James William Mehaffy was driving his car into the suburbs of McGehee, Arkansas, and in crossing a railroad track at that point he lost control of the car and it crashed into a post on the side of the road, with the shocking and lamentable result that he was fatally injured.

He had little, if any, consciousness after the accident, and life was extinct in but a few minutes after he reached the office of Dr. Smith in McGehee, to which he was taken at once.

With this suddenness the ever mysterious hand of Death was laid upon this worthy man at the time he was in the prime of life and health, had reached the heights of his ambition at the Bar, and was entering upon a judicial career to which he had consecrated his most sincere devotion. Although but thirty-nine years of age, he had attained a position of prominence that many men strive for in vain through a long lifetime.

The son of Thomas M. Mehaffy and Annie Poe Mehaffy, James William Mehaffy was born in Saline County, Arkansas, December 26, 1886. He attended the public schools at Benton and later at Little Rock. He also attended the Fordyce Training School and the Henderson-Brown College, receiving an A.B. degree from the latter institution, and during the last year of his life he was elected a member of the Board of Trustees of that college. He also graduated from the University of Arkansas and received his A.B. degree there, and then finished the law course in the same university, receiving his LL.B. degree from our law school in the month of June, 1910. In his school and college work he stood high in all of his classes, and won and held the attachment of teachers and scholars alike. He was admitted to the practice by the Arkansas Supreme Court in the same month that he graduated from law school. Pursuing his education further, he spent four months abroad. On his return he began the practice of law in Little Rock and was associated with his father in the practice continuously until the time of his death.

He served the city of Little Rock as City Attorney from the years 1913 to 1918, having been elected for each of the two terms, and during this period he represented the city in several extra-important cases.

On September 6, 1910, he was married to Ara Evelyn Mitchell, and his wife, his son, J. W. Mehaffy, Jr., and his daughter, Sybil, survive him.

Mr. Mehaffy early joined the Masonic Fraternity, in which he took much interest, and in which his faithful and efficient services were rewarded by the Honorary Thirty-third Degree of that order. That degree, conferred upon him in 1923, was with the added distinction that he was then the youngest Mason of that rank in the State. His funeral services were conducted under the auspices of that order with the impressive Rose Croix ceremony of the Scottish Rite, and he was buried in Oakland Cemetery in Little Rock.

He was a communicant of the Winfield Memorial Methodist Church of Little Rock, a member of its board of stewards, and a teacher in the Bible class of its Sunday School. A devout Christian, his knowledge of the Bible was profound, and he was often called upon to address Bible classes in various places in the State.

Mr. Mehaffy was much interested in bar associations, was a member of the American Bar Association, the Arkansas Bar Association, and the Little Rock Bar Association, and was a constant attendant upon their meetings and active in their work.

Of his lodge and club affiliations, it may be mentioned that besides his membership in the Masons, he was a member of the Lodge of Eagles, of the B.P.O. Elks of Little Rock, and of the Lions Club and Country Club of that city.

In addition to the members of his immediate family who survive him, Mr. Mehaffy is survived by his father, Judge Thomas M. Mehaffy, three brothers, C. P. Mehaffy of Fort Worth, Texas, and Charles and Pat Mehaffy of Little Rock, and three sisters, Mrs. W. R. Jones, Miss Lucille Mehaffy, and Miss Mary Mehaffy, of Little Rock.

Strong of body, handsome in appearance, with a good voice, pleasing manner, and rather a gift of oratory, he impressed his personality favorably upon all who met him, while his high integrity, freedom from deceit, loyalty and generosity in his friendships, brought him friends whose attachments were lasting and unwavering.

He had a high appreciation of the dignity of his profession, and was ever willing to contribute all that was within his power for the advancement of its standards.

The regard in which he was held throughout the State was most signally demonstrated in the primary election last year in which he was a candidate for the Democratic nomination as an Associate Justice of the Supreme Court. There were eight candidates in the field, some of them very prominent and widely known for distinguished service on the bench, but, notwithstanding he was the youngest of the candidates, he led the ticket. His speeches during

this campaign were dignified, forceful and pleasing, and brought him new friends and supporters from all his audiences, and his large majorities in this race were not from a particular section or sections, but from all parts of the State. His relations with the other candidates were fair and chivalrous, and earned and won for him their lasting regard.

He was deeply moved by the vote of confidence the people of Arkansas had given him and expected to dedicate himself most heartily to the important service to the State for which this office afforded so great an opportunity.

Studious in his habits, he was one of the best read men in the State, and his knowledge of the literature of the language was remarkably extensive and discriminating for one of his years. Immediately after his nomination he began a painstaking review of the Arkansas decisions and of various textbooks, and would have taken his seat upon the Bench profoundly impressed that the least any man could do in this important office was to give to it the best of his talents and industry. His friends expected of him increasingly distinguished services in the office to which he so seriously aspired and to which the people so signally selected him as their choice.

His relationships with his wife and children and with his mother during her lifetime, with his distinguished father, and with each of his brothers and sisters, were affectionate in a most unusual degree, and his shocking and untimely death has brought a weight of sorrow to each of them that we all respectfully bow before and hope that the passing years may tend to alleviate.

The committee of the Little Rock Bar Association appointed for that purpose presents to the court the following resolutions:

Be it resolved, that in the death of James William Mehaffy the State of Arkansas has lost one of its most patriotic citizens; that the State Bar and the Little Rock Bar have lost a member who was ever active, interested and obliging in advancing the interests of the profession; that his wife and children have lost a loving husband and father, and that his father, brothers and sisters have lost a dutiful and affectionate son and brother, and that our heartfelt sympathy is extended to each of them in their great bereavement.

Be it further resolved, that this report and resolution be entered upon the permanent records of this court, and that the Clerk hereof transmit to the wife and to the father of the deceased a certified copy thereof.

Respectfully submitted,

J. F. LOUGHBOROUGH.
GEO. B. PUGH,
J. S. UTLEY.

II.

TABLE OF OPINIONS NOT REPORTED.

Barksdale *v.* Johnson; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; reversed January 10, 1927; per McCulloch, C. J.

Barnett *v.* Bank of Malvern; appeal from Hot Springs Chancery Court; W. R. Duffie, Chancellor; affirmed February 7, 1927; per Smith, J.

Blazier *v.* Anderson; appeal from Pulaski Chancery Circuit Court, Third Division; Marvin Harris, Judge; affirmed January 24, 1927; per Kirby, J.

Brown *v.* Dean; appeal from Randolph Circuit Court; John C. Ashley, Judge; affirmed February 7, 1927; per Hart, J.

Clark *v.* Thompson; appeal from Clark Circuit Court; James H. McCollum, Judge; affirmed January 17, 1927; per Humphreys, J.

Cornelius *v.* State; appeal from Lafayette Circuit Court; James H. McCollum, Judge; reversed January 10, 1927; per Kirby, J.

Cutts *v.* State; appeal from Lincoln Circuit Court; T. G. Parham, Judge; affirmed December 13, 1926; per McCulloch, C. J.

Forrest *v.* State; appeal from Jackson Circuit Court; Dene H. Coleman, Judge; affirmed January 31, 1927; per Hart, J.

Gladys Bell Oil Co. *v.* Magee; appeal from Union Circuit Court, Second Division; W. A. Speer, Judge; reversed February 21, 1927; per McHaney, J.

Godfrey *v.* State; appeal from Lafayette Circuit Court; James H. McCollum, Judge; affirmed November 29, 1926; per McCulloch, C. J.

Hamilton *v.* El Dorado Pipe & Supply Company; appeal from Union Chancery Court, Second Division; George M. LeCroy, Chancellor; reversed January 24, 1927; per Kirby, J.

Hyaldahl *v.* Alphin; appeal from Union Circuit Court, Second Division; W. A. Speer, Judge; reversed January 24, 1927; per Humphreys, J.

Lindsey *v.* State; appeal from Saline Circuit Court; Thomas E. Toler, Judge; affirmed December 20, 1926; per Smith, J.

Mayo *v.* State; appeal from Benton Circuit Court; W. A. Dickson, Judge; affirmed January 10, 1927; per Mehaffy, J.

Merchants' Bank of Kansas City *v.* Searcy Wholesale Grocery Co.; appeal from White Circuit Court; E. D. Robertson, Judge; reversed January 10, 1927; per Wood, J.

Mitchell *v.* Riley; appeal from Ashley Chancery Court; E. G. Hammock, Chancellor; modified January 24, 1927, per Kirby, J.

Montgomery *v.* State; appeal from Clark Circuit Court; James H. McCollum, Judge; affirmed December 6, 1926; per Humphreys, J.

Moore & Brown *v.* Rea; appeal from Columbia Circuit Court; L. S. Britt, Judge; affirmed December 13, 1926; per Wood, J.

Nichol *v.* Schnyder; appeal from Jefferson Chancery Court; H. R. Lucas, Chancellor; appeal dismissed January 31, 1927; per Smith, J.

Philpot *v.* Shelby; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; reversed December 13, 1926; per McCulloch, C. J.

Price *v.* May; appeal from Clark Chancery Court; C. E. Johnson, Chancellor; reversed November 29, 1926; per Wood, J.

Sanders *v.* Hall; appeal from Cross Circuit Court; W. W. Bandy, Judge; affirmed December 20, 1926; per Humphreys, J.

Sangston *v.* State; appeal from Prairie Circuit Court, Southern District; George W. Clark, Judge; affirmed January 10, 1927; per Humphreys, J.

Spriggs *v.* American Insurance Union; appeal from Crawford Circuit Court; James Cochran, Judge; affirmed February 7, 1927; per Kirby, J.

Stockton *v.* Rainwater; appeal from Franklin Circuit Court, Ozark District; J. V. Bourland, Chancellor; affirmed January 10, 1927; per Kirby, J.

Taylor *v.* Gray; appeal from Union Circuit Court, Second Division; W. A. Speer, Judge; affirmed January 24, 1927; per Hart, J.

Thiel *v.* Gutzeit; appeal from Greene Chancery Court; C. M. Buck, special Chancellor; affirmed February 7, 1927; per Mehaffy J.

Williams *v.* Pocahontas; appeal from Randolph Circuit Court; John C. Ashley, Judge; affirmed December 6, 1926; per Smith, J.

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